Annex 55

31 JANUARY 2024

JUDGMENT

APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM AND OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(UKRAINE *v.* RUSSIAN FEDERATION)

_____

APPLICATION DE LA CONVENTION INTERNATIONALE POUR LA RÉPRESSION DU FINANCEMENT DU TERRORISME ET DE LA CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

(UKRAINE c. FÉDÉRATION DE RUSSIE)

31 JANVIER 2024

ARRÊT

TABLE OF CONTENTS

INTERNATIONAL COURT OF JUSTICE

YEAR 2024

2024
31 January
General List
No. 166

31 January 2024

APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM AND OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(UKRAINE *v.* RUSSIAN FEDERATION)

General background — Proceedings instituted by Ukraine in January 2017 following events which occurred from early 2014 in eastern Ukraine and in Crimean peninsula — Subject-matter of dispute — Dispute brought under International Convention for the Suppression of the Financing of Terrorism (ICSFT) and International Convention on the Elimination of All Forms of Racial Discrimination (CERD) — Jurisdiction of the Court limited to alleged violations of those two Conventions.

* *

International Convention for the Suppression of the Financing of Terrorism.

Preliminary issue — "Clean hands" doctrine — Doctrine cannot be applied in inter-State dispute where the Court's jurisdiction is established and application is admissible — Invocation of "clean hands" doctrine as defence on merits rejected.

*

Interpretation of term "funds" as defined in Article 1, paragraph 1, of ICSFT in accordance with Articles 31 to 33 of 1969 Vienna Convention — In defining "funds", text of Article 1, paragraph 1, makes broad reference to "assets of every kind" — Context indicates that term "funds" is confined to resources possessing financial and monetary character and does not extend to means used to commit acts of terrorism — According to object and purpose, ICSFT specifically concerns the financing aspect of terrorism — Interpretation confirmed by travaux préparatoires *— The Court's conclusion that term "funds" refers to resources provided or collected for their monetary value and does not include means used to commit acts of terrorism, including weapons or training camps — Consequently, alleged supply of weapons to armed groups operating in Ukraine and alleged organization of training for their members fall outside material scope of ICSFT.*

Offence of terrorism financing under Article 2, paragraph 1, of ICSFT — Scope ratione personae *— Financing of terrorism by a State outside scope of ICSFT — States are required to act to suppress and prevent commission of offence of terrorism financing by all persons, including by State officials — Scope* ratione materiae *— Distinction between offence of terrorism financing in* chapeau *of Article 2, paragraph 1, of ICSFT and categories of underlying offences in Article 2, paragraph 1* (a) *and* (b) *(Predicate acts) — Term "offences set out in Article 2" in ICSFT only refers to terrorism financing in the* chapeau *— Mental elements of offence of terrorism financing — Funds to be provided or collected either with the "intention" or in the "knowledge" that they will be used to carry out predicate acts — Not necessary that funds actually used to carry out predicate acts — Reliance by Ukraine upon mental element of "knowledge" — Ordinary meaning of term "knowledge" — Funder must have been aware that funds were to be used to carry out a predicate act — "Knowledge" to be determined on basis of objective factual circumstances — Whether groups notorious for committing predicate acts or were characterized as "terrorist" by United Nations organ — Characterization by a single State of organization or group as "terrorist" insufficient.*

Proof of predicate acts — Offence of terrorism financing distinct from commission of predicate acts — Not necessary to determine whether incidents alleged by Ukraine constitute predicate acts — Insufficient evidence to characterize armed groups implicated by Ukraine in commission of alleged predicate acts as groups notorious for committing such acts.

Questions of proof — Claims do not require application of heightened standard of proof — The Court will determine whether evidence is convincing — Evidential threshold differs depending on nature of obligation imposed by particular provision of ICSFT invoked.

*

Alleged violations of obligations under ICSFT.

Obligation of States parties under Article 8 of ICSFT — Applicant's claim primarily concerns alleged obligation to freeze funds — Evidentiary threshold — Obligation to freeze funds comes into operation if State party has reasonable grounds to suspect that funds were used or allocated for purpose of terrorism financing — Notes Verbales and requests for legal assistance do not contain sufficiently specific and detailed evidence to give Russian Federation reasonable grounds to suspect that funds were allocated for carrying out predicate acts — Not established that Russian Federation violated its obligations under Article 8, paragraph 1, of ICSFT.

Obligations of State parties under Article 9, paragraph 1, of ICSFT — Relatively low evidentiary threshold for obligation to arise — Article 9 does not however require initiation of investigation into unsubstantiated allegations of terrorism financing — Information provided by Ukraine to Russian Federation met evidentiary threshold — Respondent required to undertake investigation — Failure of Russian Federation to fulfil its obligation — Violation by Russian Federation of its obligations under Article 9, paragraph 1, of ICSFT.

Obligations of States parties under Article 10, paragraph 1, of ICSFT — Applicant's allegation relates to obligation to prosecute — Obligation to prosecute is ordinarily implemented after conduct of an investigation — Article 10 does not impose absolute obligation — Competent authorities to determine whether prosecution warranted based on available evidence and applicable legal rules — Reasonable grounds must exist to suspect that an offence of terrorism financing has been committed — Information provided by Ukraine to Russian Federation did not meet that threshold — Respondent not under obligation to submit any specific cases to competent authorities for purpose of prosecution — Not established that Russian Federation violated its obligations under Article 10, paragraph 1, of ICSFT.

Obligation of States parties under Article 12 of ICSFT — Of 12 requests for legal assistance by Ukraine, only three concerned allegations regarding provision of funds to persons or organizations engaged in commission of predicate acts — Requests did not describe in any detail the commission of alleged predicate acts by recipients of funds — No indication that alleged funders knew that funds provided would be used for commission of predicate acts — Requests did not give rise to obligation for Russian Federation to provide legal assistance for terrorism financing investigations — Not established that Russian Federation violated its obligations under Article 12, paragraph 1, of ICSFT.

Obligation of States parties under Article 18, paragraph 1, of ICSFT — Not necessary to find that offence of terrorism financing has been committed for a State party to have breached its obligations under Article 18, paragraph 1 — Ordinary meaning of term "all practicable measures" encompasses all reasonable and feasible measures — Such measures may include legislative and regulatory measures — Ukraine did not point to specific measures that Russian Federation failed to take to prevent terrorism financing offences — Russian Federation not under obligation to restrict all funding for the "Donetsk People's Republic" (DPR) and the "Luhansk People's Republic" (LPR) — Russian Federation not under obligation to designate a group as a terrorist entity under

its domestic law — Russian Federation had no reasonable grounds to suspect the funds in question were to be used for purpose of terrorism financing — Not established that Russian Federation violated its obligations under Article 18, paragraph 1, of ICSFT.

*

Remedies in respect of claims under ICSFT.

Declaration by the Court that Russian Federation violated its obligations under Article 9, paragraph 1, of ICSFT and continues to be required to undertake investigations into sufficiently substantiated allegations of acts of terrorism financing in eastern Ukraine — Not necessary or appropriate to grant any of the other forms of relief requested.

* *

International Convention on the Elimination of All Forms of Racial Discrimination (CERD).

Preliminary issues — Doctrine of "clean hands" not applicable — Reference to "campaign of racial discrimination" in 2019 Judgment on preliminary objections — Pattern of racial discrimination needs to be established — Burden of proof varies depending on type of facts to be established — Standard of proof varies depending on gravity of allegation — Convincing evidence necessary in present case — Probative value of evidence — Meaning of "racial discrimination" under Article 1, paragraph 1, of CERD — Neutral measure may be discriminatory if it produces disparate adverse effect on rights of a person or a group protected under CERD — Crimean Tatars and ethnic Ukrainians in Crimea are ethnic groups protected under CERD.

*

Alleged violations by Respondent of Articles 2 and 4 to 7 of CERD.

Incidents of physical violence directed at Crimean Tatars and ethnic Ukrainians in Crimea — Individuals targeted for their political and ideological positions — Any disparate adverse effect on rights of Crimean Tatars and ethnic Ukrainians may be the result of political opposition and not related to prohibited grounds — Physical violence in Crimea not only suffered by Crimean Tatars and ethnic Ukrainians — Alleged violation of duty to investigate allegations of racial discrimination not substantiated — Violations by Russian Federation of its obligations under CERD on account of incidents of physical violence not established.

Law enforcement measures, including searches, detentions and prosecutions directed at persons of Crimean Tatar origin — Disparate adverse effect of measures on rights of persons of Crimean Tatar origin — Measures not based on prohibited grounds — Allegations of failure by Russian Federation to adopt measures for prevention, eradication and punishment of hate speech not established — The Court not convinced that Russian Federation engaged in discriminatory law enforcement measures against Crimean Tatars based on ethnic origin.

Measures taken against the Mejlis *— Measures were taken in response to political opposition — Not established that measures were based on ethnic origin of targeted persons.*

Ban on the Mejlis *— Role of the* Mejlis *in representing Crimean Tatar community — The* Mejlis *is executive body of the Qurultay — Qurultay not banned — Ban on the* Mejlis *produced disparate adverse effect on rights of persons of Crimean Tatar origin — Ban on the* Mejlis *appears due to political activities of some of its leaders rather than based on ethnic origin — Not established that Russian Federation violated its obligations under CERD by imposing ban on the* Mejlis.

Measures relating to citizenship — Russian Federation applies citizenship régime in Crimea to all persons over whom it exercises jurisdiction — Not established that Respondent violated its obligations under CERD as a result of citizenship régime in Crimea.

Restrictions relating to gatherings of cultural importance to Crimean Tatars and ethnic Ukrainians — Measures produced disparate adverse effect on rights of Crimean Tatars and ethnic Ukrainians — Restrictions not based on prohibited grounds — Not established that Russian Federation violated its obligations under CERD by imposing restrictions on certain gatherings of ethnic cultural importance.

Measures restricting Crimean Tatar and Ukrainian media outlets — Measures not based on ethnic origin of persons affiliated with those media outlets — Not established that Respondent violated its obligations under CERD by restricting Crimean Tatar and ethnic Ukrainian media.

Measures relating to cultural heritage of Crimean Tatar and ethnic Ukrainian communities — Not established that any differentiation of treatment of persons affiliated with ethnic Ukrainian cultural institutions in Crimea based on ethnic origin — Not established that Russian Federation violated its obligations under CERD by taking measures relating to cultural heritage of Crimean Tatar and ethnic Ukrainian communities.

Measures relating to education in Crimea — Restrictive measures taken by a State with respect to education in a minority language may fall within scope of CERD — Decline noted in number of students receiving education in Ukrainian language between 2014 and 2016 — Disparate adverse effect on rights of ethnic Ukrainian families — Russian Federation not in compliance with its duty to protect rights of ethnic Ukrainians to have access to education in Ukrainian language —

The Court unable to conclude on basis of evidence that quality of education in Crimean Tatar language has significantly deteriorated since 2014 — The Court's finding that there is pattern of racial discrimination with regard to school education in Ukrainian language, but that no such pattern is established with regard to school education in Crimean Tatar language.

Russian Federation has violated Article 2 (1) (a) *and Article 5* (e) *(v) of CERD with regard to implementation of school education in Ukrainian language.*

*

Remedies in respect of claims under CERD.

Declaration by the Court that Russian Federation has acted in violation of Article 2 (1) (a) *of CERD and Article 5* (e) *(v) of CERD — Not necessary or appropriate to order any other remedy requested.*

* *

Alleged violation of obligations under Order on provisional measures of 19 April 2017.

Finding that Russian Federation, by maintaining ban on the Mejlis*, has violated first provisional measure — Finding is independent of conclusion that ban on the* Mejlis *not in violation of Russian Federation's obligations under CERD — Finding that Russian Federation has not violated second provisional measure requiring Respondent to ensure availability of education in Ukrainian language — Finding that Russian Federation, by recognizing the DPR and the LPR as independent States and by launching "special military operation" against Ukraine, has violated its obligation regarding non-aggravation of dispute.*

*

Remedies in respect of violations of provisional measures.

Declaration by the Court that Russian Federation acted in breach of provisional measures indicated in Order of 19 April 2017 provides adequate satisfaction to Ukraine — Not necessary or appropriate to order any other remedy requested.

JUDGMENT

Present: *President* DONOGHUE; *Judges* TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, SALAM, IWASAWA, NOLTE, CHARLESWORTH, BRANT; *Judges* ad hoc POCAR, TUZMUKHAMEDOV; *Registrar* GAUTIER.

In the case concerning the application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination,

between

Ukraine,

represented by

HE Mr Anton Korynevych, Ambassador-at-Large, Ministry of Foreign Affairs of Ukraine,

as Agent;

Ms Oksana Zolotaryova, Director General for International Law, Ministry of Foreign Affairs of Ukraine,

as Co-Agent;

Ms Marney L. Cheek, Covington & Burling LLP, member of the Bars of the Supreme Court of the United States of America and the District of Columbia,

Mr Jonathan Gimblett, Covington & Burling LLP, member of the Bars of the District of Columbia and the State of Virginia, solicitor of the Senior Courts of England and Wales,

Mr Harold Hongju Koh, Sterling Professor of International Law, Yale Law School, member of the Bars of the State of New York and the District of Columbia,

Mr Jean-Marc Thouvenin, Professor at the University of Paris Nanterre, Secretary-General of the Hague Academy of International Law, associate member of the Institut de droit international, member of the Paris Bar, Sygna Partners,

Ms Clovis Trevino, Covington & Burling LLP, member of the Bars of the District of Columbia and the State of New York,

Mr David M. Zionts, Covington & Burling LLP, member of the Bars of the Supreme Court of the United States of America and the District of Columbia,

as Counsel and Advocates;

Mr Andrii Pasichnyk, Deputy Director, Department of International Law, Ministry of Foreign Affairs of Ukraine,

Ms Anastasiia Mochulska, Department of International Law, Ministry of Foreign Affairs of Ukraine,

Ms Mariia Bezdieniezhna, Counsellor, Embassy of Ukraine in the Kingdom of the Netherlands,

Mr Volodymyr Shkilevych, Covington & Burling LLP, member of the Bar of the State of New York,

Ms Amanda Tuninetti, Covington & Burling LLP, member of the Bars of the State of New York and the District of Columbia,

Ms Ariel Rosenbaum, Covington & Burling LLP, member of the Bars of the State of New York and the District of Columbia,

Mr Paul Strauch, Covington & Burling LLP, member of the Bars of the District of Columbia and the State of California,

Mr Minwoo Kim, Covington & Burling LLP, member of the Bars of the State of New York and the District of Columbia,

Ms Jill Warnock, Covington & Burling LLP, member of the Bar of the District of Columbia,

as Counsel;

Mr Refat Chubarov, Chairman of the *Mejlis* of the Crimean Tatar People,

Mr Pavlo Kushch, Metropolitan of Simferopol and Crimea Klyment, Head of the Crimean Eparchy of the Orthodox Church of Ukraine,

Major General Victor Trepak, Defence Intelligence, Ministry of Defence of Ukraine,

Mr Dmytro Zyuzia, Security Service of Ukraine,

Mr Mykola Govorukha, Deputy Head of Unit, Office of the Prosecutor General of Ukraine,

Ms Olha Kuryshko, Mission of the President of Ukraine in the Autonomous Republic of Crimea,

Mr Anatolii Skoryk, Associate Professor, Kharkiv Air Force University,

Ms Iulia Tyshchenko, Head of the Democratic Processes Support Program, Ukrainian Center for Independent Political Research,

Lieutenant General (Retired) Christopher Brown, former Head of the Artillery Branch of the British Army,

as Members of the Delegation;

Mr Fedir Venislavskyy, Defence Intelligence, Ministry of Defence of Ukraine,

Ms Ambria Davis-Alexander, Covington & Burling LLP,

Mr Liam Tormey, Covington & Burling LLP,

Ms Églantine Jamet, Sygna Partners,

as Assistants,

and

the Russian Federation,

represented by

HE Mr Gennady Kuzmin, Ambassador-at-Large, Ministry of Foreign Affairs of the Russian Federation,

HE Mr Alexander Shulgin, Ambassador of the Russian Federation to the Kingdom of the Netherlands,

HE Ms Maria Zabolotskaya, Deputy Permanent Representative of the Russian Federation to the United Nations,

as Agents;

Mr Hadi Azari, Professor of Public International Law at the Kharazmi University of Tehran, Legal Adviser to the Centre for International Legal Affairs of Iran,

Mr Michael Swainston, KC, member of the Bar of England and Wales, Brick Court Chambers,

Mr Jean-Charles Tchikaya, member of the Paris and Bordeaux Bars,

Mr Kirill Udovichenko, Partner, Monastyrsky, Zyuba, Stepanov & Partners,

Mr Sienho Yee, Changjiang Xuezhe Professor of International Law and Director of the Chinese Institute of International Law, China Foreign Affairs University, Beijing; member of the Bars of the United States Supreme Court and the State of New York; member of the Institut de droit international,

as Counsel and Advocates;

Mr Dmitry Andreev, Counsel, Monastyrsky, Zyuba, Stepanov & Partners,

Mr Konstantin Kosorukov, Head of Division, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Mr Andrew Thomas, member of the Bar of England and Wales, Brick Court Chambers,

as Counsel;

Mr Aider Abliatipov, Adviser to the President of the State Council of the Republic of Crimea,

Mr Mikhail Abramov, Senior Associate, Monastyrsky, Zyuba, Stepanov & Partners,

Mr Yury Andryushkin, First Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Mr Mikhail Averianov, First Secretary, Permanent Mission of the Russian Federation to the Organisation for Security and Co-operation in Europe,

Mr Ruslan Bairov, Deputy Mufti of the Republic of Crimea,

Ms Olga Chekrizova, First Secretary, Department for Multilateral Human Rights Cooperation, Ministry of Foreign Affairs of the Russian Federation,

Mr Vladislav Donakanian, Attaché, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Kseniia Galkina, Second Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Victoria Goncharova, First Secretary, Permanent Representation of the Russian Federation to the Organisation for the Prohibition of Chemical Weapons,

Ms Anastasia Khamenkova, Expert, Office of the Prosecutor General of the Russian Federation,

Mr Stanislav Kovpak, Principal Counsellor, Department for Multilateral Human Rights Cooperation, Ministry of Foreign Affairs of the Russian Federation,

Ms Marina Kulidobrova, Associate, Monastyrsky, Zyuba, Stepanov & Partners,

Mr Artem Lupandin, Associate, Monastyrsky, Zyuba, Stepanov & Partners,

Ms Tatiana Manezhina, Minister of Culture of the Republic of Crimea,

Ms Daria Mosina, Second Secretary, Permanent Mission of the Russian Federation to the Organisation for Security and Co-operation in Europe,

Mr Igor Nazaikin, Expert, Federal Financial Monitoring Service of the Russian Federation,

Ms Emile Shirin, Assistant at the Department of Russian, Slavic and General Linguistics at the V. I. Vernadsky Crimean Federal University,

Mr Ibraim Shirin, member of the Public Chamber of the Republic of Crimea,

Ms Elena Stepanova, Expert, Prosecutor General's Office of the Russian Federation,

Mr Aider Tippa, Chairman of the State Committee on Inter-Ethnic Relations of the Republic of Crimea,

Mr Aleksei Trofimenkov, Counsellor, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Kata Varga, Associate, Monastyrsky, Zyuba, Stepanov & Partners,

Ms Victoria Zabyyvorota, First Secretary, Second CIS Department, Ministry of Foreign Affairs of the Russian Federation,

Mr Mikhail Zaitsev, Third Secretary, Legal Department, Ministry of Foreign Affairs of the Russian Federation,

Ms Olga Zinchenko, Second Secretary, Department for Multilateral Human Rights Cooperation, Ministry of Foreign Affairs of the Russian Federation,

Mr Nikolay Zinovyev, Senior Associate, Monastyrsky, Zyuba, Stepanov & Partners,

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 16 January 2017, the Government of Ukraine filed in the Registry of the Court an Application instituting proceedings against the Russian Federation with regard to alleged violations by the latter of its obligations under the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 (hereinafter the "ICSFT") and the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter "CERD").

2. In its Application, Ukraine sought to found the jurisdiction of the Court on Article 24, paragraph 1, of the ICSFT and on Article 22 of CERD, in conjunction with Article 36, paragraph 1, of the Statute of the Court.

3. On 16 January 2017, Ukraine also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

4. The Registrar immediately communicated the Application to the Government of the Russian Federation in accordance with Article 40, paragraph 2, of the Statute of the Court, and the Request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing of the Application and the Request for the indication of provisional measures by Ukraine.

5. In addition, by a letter dated 17 January 2017, the Registrar informed all Member States of the United Nations of the filing of the above-mentioned Application and Request for the indication of provisional measures.

6. Pursuant to Article 40, paragraph 3, of the Statute, the Registrar notified the Member States of the United Nations, through the Secretary-General, of the filing of the Application, by transmission of the printed bilingual text.

7. By letters dated 20 January 2017, the Registrar notified both Parties that the Member of the Court of Russian nationality, referring to Article 24, paragraph 1, of the Statute, had informed the President of the Court of his intention not to participate in the decision of the case. Pursuant to Article 31 of the Statute and Article 37, paragraph 1, of the Rules of Court, the Russian Federation chose Mr Leonid Skotnikov to sit as judge *ad hoc* in the case. Following the resignation of Judge *ad hoc* Skotnikov on 27 February 2023, the Russian Federation chose Mr Bakhtiyar Tuzmukhamedov to sit as judge *ad hoc*.

8. Since the Court included upon the Bench no judge of Ukrainian nationality, Ukraine proceeded to exercise the right conferred upon it by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case; it chose Mr Fausto Pocar.

9. By an Order of 19 April 2017, the Court, having heard the Parties, indicated the following provisional measures:

> "(1) With regard to the situation in Crimea, the Russian Federation must, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,
>
> *(a)* Refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*;
>
> *(b)* Ensure the availability of education in the Ukrainian language;
>
> (2) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve." (*I.C.J. Reports 2017*, pp. 140-141, para. 106.)

10. In a letter dated 19 April 2018, Ukraine drew the Court's attention to the Russian Federation's alleged non-compliance with point (1) *(a)* of operative paragraph 106 of the Court's Order on the Request for the indication of provisional measures (hereinafter the "Order indicating provisional measures" or "Order of 19 April 2017"). Following this communication, at the Court's request, the Russian Federation provided information on measures that had been taken by it to implement point (1) *(a)* of operative paragraph 106 of the Court's Order of 19 April 2017, and Ukraine furnished comments on that information. At the Court's further request, additional information and comments were provided by the Parties. By letters dated 29 March 2019, the Parties were informed that the Court had considered and taken due note of the various communications submitted by them. It was further indicated in this respect that the issues raised in these communications may need to be addressed by the Court at a later juncture. It was also conveyed to the Parties that, in such an eventuality, they would be at liberty to raise any issues of concern relating to the provisional measures indicated by the Court.

11. Pursuant to the instructions of the Court under Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to States parties to the ICSFT and to States parties to CERD the notifications provided for in Article 63, paragraph 1, of the Statute. In addition, with regard to both of these instruments, in accordance with Article 69, paragraph 3, of the Rules of Court, the Registrar addressed to the United Nations, through its Secretary-General, the notifications provided for in Article 34, paragraph 3, of the Statute.

12. By an Order dated 12 May 2017, the President of the Court fixed 12 June 2018 and 12 July 2019 as the respective time-limits for the filing of a Memorial by Ukraine and a Counter-Memorial by the Russian Federation. The Memorial of Ukraine was filed within the time-limit thus fixed.

13. On 12 September 2018, within the time-limit prescribed by Article 79, paragraph 1, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, the Russian Federation raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Consequently, by an Order of 17 September 2018, the President of the Court noted that, by virtue of Article 79, paragraph 5, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, the proceedings on the merits were suspended, and, taking account of Practice Direction V, fixed 14 January 2019 as the time-limit within which Ukraine could present a written statement of its observations and submissions on the preliminary objections raised by the Russian Federation. Ukraine filed such a statement within the time-limit so prescribed and the case thus became ready for hearing in respect of the preliminary objections.

14. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of the State of Qatar asked to be furnished with copies of the Memorial of Ukraine and the preliminary objections of the Russian Federation filed in the case, as well as any documents annexed thereto. Having ascertained the views of the Parties in accordance with the same provision, the Court decided, taking into account the objection raised by one Party, that it would not be appropriate to grant that request. The Registrar duly communicated that decision to the Government of the State of Qatar and to the Parties.

15. Public hearings on the preliminary objections raised by the Russian Federation were held on 3, 4, 6 and 7 June 2019. In its Judgment of 8 November 2019, the Court found that it had jurisdiction on the basis of Article 24, paragraph 1, of the ICSFT to entertain the claims made by Ukraine under this Convention. In the same Judgment, the Court found that it had jurisdiction on the basis of Article 22 of CERD to entertain the claims made by Ukraine under this Convention and that the Application in relation to those claims was admissible.

16. By an Order of 8 November 2019, the Court fixed 8 December 2020 as the new time-limit for the filing of the Counter-Memorial of the Russian Federation. By Orders dated 13 July 2020 and 20 January 2021, respectively, the Court, at the request of the Respondent, extended that time-limit first until 8 April 2021 and then until 8 July 2021. By an Order dated 28 June 2021, the President of the Court, at the request of the Respondent, further extended that time-limit to 9 August 2021. The Counter-Memorial was filed within the time-limit thus extended.

17. By an Order dated 8 October 2021, the Court authorized the submission of a Reply by Ukraine and a Rejoinder by the Russian Federation, and fixed 8 April 2022 and 8 December 2022 as the respective time-limits for the filing of those pleadings. By an Order dated 8 April 2022, at the request of the Applicant, the Court extended to 29 April 2022 and 19 January 2023 the respective time-limits for the filing of these pleadings. The Reply was filed within the time-limit thus extended.

18. By Orders dated 15 December 2022 and 3 February 2023, respectively, the Court, at the request of the Respondent, extended the time-limit for the filing of the Rejoinder by the Russian Federation first until 24 February 2023 and then until 10 March 2023. The Rejoinder was filed within the time-limit thus extended.

19. By a letter dated 21 March 2023, the Registrar, acting pursuant to Article 69, paragraph 3, of the Rules of Court, transmitted to the Secretary-General of the United Nations copies of the written proceedings filed in the merits stage of the case, and asked whether the Organization intended to present observations in writing under that provision. By a letter dated 23 March 2023, the Assistant Secretary-General in charge of the Office of Legal Affairs of the United Nations stated that the Organization did not intend to submit any observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court.

20. By a letter dated 30 May 2023, the Agent of the Russian Federation, referring to Article 56 of the Rules of Court and Practice Direction IX, submitted a document entitled "Expert report of Alexey Borisovich Artyushenko, Olga Anatolyevna Zolotareva, Viktor Viktorovich Merkuryev", together with annexed exhibits. By a letter dated 2 June 2023, the Agent of Ukraine informed the Court that his Government objected to the production of the said document by the Russian Federation. The Court, having considered the views of the Parties, decided to authorize the production by the Russian Federation of the Expert Report and annexed exhibits pursuant to Article 56, paragraph 2, of the Rules of Court, it being understood that Ukraine would have the opportunity to comment thereon during the hearings. The Court further decided that, should Ukraine wish to comment in writing and submit documents in support of its comments pursuant to Article 56, paragraph 3, of the Rules of Court, it might do so by 26 June 2023. The decision of the Court with respect to the Russian Federation's request was duly communicated to the Parties by letters from the Registrar dated 5 June 2023. Ukraine provided written comments on the Expert Report on 26 June 2023.

21. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the written pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings, with the exception of the names and personal data of certain witnesses referred to in the Counter-Memorial and Rejoinder of the Russian Federation, as well as in documents annexed thereto.

22. Public hearings were held on 6, 8, 12 and 14 June 2023, at which the Court heard the oral arguments and replies of:

For Ukraine:	HE Mr Anton Korynevych, Mr Harold Hongju Koh, Mr Jean-Marc Thouvenin, Mr David M. Zionts, Ms Marney L. Cheek, Ms Clovis Trevino, Mr Jonathan Gimblett, Ms Oksana Zolotaryova.
For the Russian Federation:	HE Mr Alexander Shulgin, HE Mr Gennady Kuzmin, Mr Michael Swainston, Mr Hadi Azari,

Mr Sienho Yee,
Mr Kirill Udovichenko,
HE Ms Maria Zabolotskaya,
Mr Jean-Charles Tchikaya,
Mr Konstantin Kosorukov.

23. At the hearings, a Member of the Court put a question to the Parties, to which replies were given orally, in accordance with Article 61, paragraph 4, of the Rules of Court.

24. Before the opening of its second round of oral pleadings on 14 June 2023, the Russian Federation, in accordance with usual practice, transmitted to the Registry the texts of its oral pleadings for that day, as well as a folder of documents for the convenience of the judges. Among these texts was a speech (with accompanying slides available in the judges' folder), in which counsel for the Russian Federation raised a certain matter that, according to the Respondent, might have implications for the administration of justice. The Court considered that, in the interests of the good administration of justice, the Russian Federation should not address that matter during the second round of oral argument, but should instead raise its concerns in writing. Ukraine would then be given an opportunity to comment thereon also in writing. The President made a statement to this effect at the opening of the public sitting on 14 June 2023. The Russian Federation, however, did not subsequently communicate in writing its concerns and therefore no further action by the other Party or by the Court ensued.

*

25. In the Application, the following claims were made by Ukraine:

With regard to the ICSFT:

> "134. Ukraine respectfully requests the Court to adjudge and declare that the Russian Federation, through its State organs, State agents, and other persons and entities exercising governmental authority, and through other agents acting on its instructions or under its direction and control, has violated its obligations under the Terrorism Financing Convention by:
>
> *(a)* supplying funds, including in-kind contributions of weapons and training, to illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals, in violation of Article 18;
>
> *(b)* failing to take appropriate measures to detect, freeze, and seize funds used to assist illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals, in violation of Articles 8 and 18;
>
> *(c)* failing to investigate, prosecute, or extradite perpetrators of the financing of terrorism found within its territory, in violation of Articles 9, 10, 11, and 18;

(d) failing to provide Ukraine with the greatest measure of assistance in connection with criminal investigations of the financing of terrorism, in violation of Articles 12 and 18; and

(e) failing to take all practicable measures to prevent and counter acts of financing of terrorism committed by Russian public and private actors, in violation of Article 18.

135. Ukraine respectfully requests the Court to adjudge and declare that the Russian Federation bears international responsibility, by virtue of its sponsorship of terrorism and failure to prevent the financing of terrorism under the Convention, for the acts of terrorism committed by its proxies in Ukraine, including:

(a) the shoot-down of Malaysia Airlines Flight MH17;

(b) the shelling of civilians, including in Volnovakha, Mariupol, and Kramatorsk; and

(c) the bombing of civilians, including in Kharkiv.

136. Ukraine respectfully requests the Court to order the Russian Federation to comply with its obligations under the Terrorism Financing Convention, including that the Russian Federation:

(a) immediately and unconditionally cease and desist from all support, including the provision of money, weapons, and training, to illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals;

(b) immediately make all efforts to ensure that all weaponry provided to such armed groups is withdrawn from Ukraine;

(c) immediately exercise appropriate control over its border to prevent further acts of financing of terrorism, including the supply of weapons, from the territory of the Russian Federation to the territory of Ukraine;

(d) immediately stop the movement of money, weapons, and all other assets from the territory of the Russian Federation and occupied Crimea to illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals, including by freezing all bank accounts used to support such groups;

(e) immediately prevent all Russian officials from financing terrorism in Ukraine, including Sergei Shoigu, Minister of Defence of the Russian Federation; Vladimir Zhirinovsky, Vice-Chairman of the State Duma; Sergei Mironov, member of the State Duma; and Gennadiy Zyuganov, member of the State Duma, and initiate prosecution against these and other actors responsible for financing terrorism;

(f) immediately provide full co-operation to Ukraine in all pending and future requests for assistance in the investigation and interdiction of the financing of terrorism relating to illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals;

(g) make full reparation for the shoot-down of Malaysia Airlines Flight MH17;

(h) make full reparation for the shelling of civilians in Volnovakha;

(i) make full reparation for the shelling of civilians in Mariupol;

(j) make full reparation for the shelling of civilians in Kramatorsk;

(k) make full reparation for the bombing of civilians in Kharkiv; and

(l) make full reparation for all other acts of terrorism the Russian Federation has caused, facilitated, or supported through its financing of terrorism, and failure to prevent and investigate the financing of terrorism."

With regard to CERD:

"137. Ukraine respectfully requests the Court to adjudge and declare that the Russian Federation, through its State organs, State agents, and other persons and entities exercising governmental authority, including the *de facto* authorities administering the illegal Russian occupation of Crimea, and through other agents acting on its instructions or under its direction and control, has violated its obligations under the CERD by:

(a) systematically discriminating against and mistreating the Crimean Tatar and ethnic Ukrainian communities in Crimea, in furtherance of a State policy of cultural erasure of disfavoured groups perceived to be opponents of the occupation régime;

(b) holding an illegal referendum in an atmosphere of violence and intimidation against non-Russian ethnic groups, without any effort to seek a consensual and inclusive solution protecting those groups, and as an initial step toward depriving these communities of the protection of Ukrainian law and subjecting them to a régime of Russian dominance;

(c) suppressing the political and cultural expression of Crimean Tatar identity, including through the persecution of Crimean Tatar leaders and the ban on the *Mejlis* of the Crimean Tatar People;

(d) preventing Crimean Tatars from gathering to celebrate and commemorate important cultural events;

(e) perpetrating and tolerating a campaign of disappearances and murders of Crimean Tatars;

(f) harassing the Crimean Tatar community with an arbitrary régime of searches and detention;

(g) silencing Crimean Tatar media;

(h) suppressing Crimean Tatar language education and the community's educational institutions;

(i) suppressing Ukrainian language education relied on by ethnic Ukrainians;

(j) preventing ethnic Ukrainians from gathering to celebrate and commemorate important cultural events; and

(k) silencing ethnic Ukrainian media.

138. Ukraine respectfully requests the Court to order the Russian Federation to comply with its obligations under the CERD, including:

(a) immediately cease and desist from the policy of cultural erasure and take all necessary and appropriate measures to guarantee the full and equal protection of the law to all groups in Russian-occupied Crimea, including Crimean Tatars and ethnic Ukrainians;

(b) immediately restore the rights of the *Mejlis* of the Crimean Tatar People and of Crimean Tatar leaders in Russian-occupied Crimea;

(c) immediately restore the rights of the Crimean Tatar People in Russian-occupied Crimea to engage in cultural gatherings, including the annual commemoration of the *Sürgün*;

(d) immediately take all necessary and appropriate measures to end the disappearance and murder of Crimean Tatars in Russian-occupied Crimea, and to fully and adequately investigate the disappearances of Reshat Ametov, Timur Shaimardanov, Ervin Ibragimov, and all other victims;

(e) immediately take all necessary and appropriate measures to end unjustified and disproportionate searches and detentions of Crimean Tatars in Russian-occupied Crimea;

(f) immediately restore licenses and take all other necessary and appropriate measures to permit Crimean Tatar media outlets to resume operations in Russian-occupied Crimea;

(g) immediately cease interference with Crimean Tatar education and take all necessary and appropriate measures to restore education in the Crimean Tatar language in Russian-occupied Crimea;

(h) immediately cease interference with ethnic Ukrainian education and take all necessary and appropriate measures to restore education in the Ukrainian language in Russian-occupied Crimea;

(i) immediately restore the rights of ethnic Ukrainians to engage in cultural gatherings in Russian-occupied Crimea;

(j) immediately take all necessary and appropriate measures to permit the free operation of ethnic Ukrainian media in Russian-occupied Crimea; and

(k) make full reparation for all victims of the Russian Federation's policy and pattern of cultural erasure through discrimination in Russian-occupied Crimea."

26. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Ukraine,

in the Memorial:

"653. For the reasons set out in this Memorial, Ukraine respectfully requests the Court to adjudge and declare that:

ICSFT

(a) The Russian Federation is responsible for violations of Article 18 of the ICSFT by failing to cooperate in the prevention of the terrorism financing offenses set forth in Article 2 by taking all practicable measures to prevent and counter preparations in its territory for the commission of those offenses within or outside its territory. Specifically, the Russian Federation has violated Article 18 by failing to take the practicable measures of: (i) preventing Russian state officials and agents from financing terrorism in Ukraine; (ii) discouraging public and private actors and other non-governmental third parties from financing terrorism in Ukraine; (iii) policing its border with Ukraine to stop the financing of terrorism; and (iv) monitoring and suspending banking activity and other fundraising activities undertaken by private and public actors on its territory to finance . . . terrorism in Ukraine.

(b) The Russian Federation is responsible for violations of Article 8 of the ICSFT by failing to identify and detect funds used or allocated for the purposes of financing terrorism in Ukraine, and by failing to freeze or seize funds used or allocated for the purpose of financing terrorism in Ukraine.

(c) The Russian Federation has violated Articles 9 and 10 of the ICSFT by failing to investigate the facts concerning persons who have committed or are alleged to have committed terrorism financing in Ukraine, and to extradite or prosecute alleged offenders.

(d) The Russian Federation has violated Article 12 of the ICSFT by failing to provide Ukraine the greatest measure of assistance in connection with criminal investigations in respect of terrorism financing offenses.

(e) As a consequence of the Russian Federation's violations of the ICSFT, its proxies in Ukraine have been provided with funds that enabled them to commit numerous acts of terrorism, including the downing of Flight MH17, the shelling of Volnovakha, Mariupol, Kramatorsk, and Avdiivka, the bombings of the Kharkiv unity march and Stena Rock Club, the attempted assassination of a Ukrainian member of Parliament, and others.

CERD

(f) The Russian Federation has violated CERD Article 2 by engaging in numerous and pervasive acts of racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea and by engaging in a policy and practice of racial discrimination against those communities.

(g) The Russian Federation has further violated CERD Article 2 by sponsoring, defending or supporting racial discrimination by other persons or organizations against the Crimean Tatar and Ukrainian communities in Crimea.

(h) The Russian Federation has violated CERD Article 4 by promoting and inciting racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

(i) The Russian Federation has violated CERD Article 5 by failing to guarantee the right of members of the Crimean Tatar and Ukrainian communities to equality before the law, notably in their enjoyment of (i) the right to equal treatment before the tribunals and all other organs administering justice; (ii) the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution; (iii) political rights; (iv) other civil rights; and (v) economic, social and cultural rights.

(j) The Russian Federation has violated CERD Article 6 by failing to assure the Crimean Tatar and Ukrainian communities in Crimea effective protection and remedies against acts of racial discrimination.

(k) The Russian Federation has violated CERD Article 7 by failing to adopt immediate and effective measures in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

654. The aforementioned acts constitute violations of the ICSFT and CERD, and are therefore internationally wrongful acts for which the Russian Federation bears international responsibility. The Russian Federation is therefore required to:

ICSFT

(a) Cease immediately each of the above violations of ICSFT Articles 8, 9, 10, 12, and 18 and provide Ukraine with appropriate guarantees and public assurances that it will refrain from such actions in the future.

(b) Take all practicable measures to prevent the commission of terrorism financing offences, including (i) ensuring that Russian state officials or any other person under its jurisdiction do not provide weapons or other funds to groups engaged in terrorism in Ukraine, including without limitation the DPR, LPR, Kharkiv Partisans, and other illegal armed groups; (ii) cease encouraging public and private actors and other non-governmental third parties to finance terrorism in Ukraine; (iii) police Russia's

border with Ukraine to stop any supply of weapons into Ukraine; and (iv) monitor and prohibit private and public transactions originating in Russian territory, or initiated by Russian nationals, that finance terrorism in Ukraine, including by enforcing banking restrictions to block transactions for the benefit of groups engaged in terrorism in Ukraine, including without limitation the DPR, LPR, the Kharkiv Partisans, and other illegal armed groups.

(c) Freeze or seize assets of persons suspected of supplying funds to groups engaged in terrorism in Ukraine, including without limitation illegal armed groups associated with the DPR, LPR, and Kharkiv Partisans, and cause the forfeiture of assets of persons found to have supplied funds to such groups.

(d) Provide the greatest measure of assistance to Ukraine in connection with criminal investigations of suspected financers of terrorism.

(e) Pay Ukraine financial compensation, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the ICSFT, including the harm suffered by its nationals injured by acts of terrorism that occurred as a consequence of the Russian Federation's ICSFT violations, with such compensation to be quantified in a separate phase of these proceedings.

(f) Pay moral damages to Ukraine in an amount deemed appropriate by the Court, reflecting the seriousness of the Russian Federation's violations of the ICSFT, the quantum of which is to be determined in a separate phase of these proceedings.

CERD

(g) Immediately comply with the provisional measures ordered by the Court on 19 April 2017, in particular by lifting its ban on the activities of the *Mejlis* of the Crimean Tatar People and by ensuring the availability of education in the Ukrainian language.

(h) Cease immediately each of the above violations of CERD Articles 2, 4, 5, 6, and 7, and provide Ukraine with appropriate guarantees and public assurances that it will refrain from such actions in the future.

(i) Guarantee the right of members of the Crimean Tatar and Ukrainian communities to equality before the law, notably in the enjoyment of the human rights and fundamental freedoms protected by the Convention.

(j) Assure to all residents of Crimea within its jurisdiction effective protection and remedies against acts of racial discrimination.

(k) Adopt immediate and effective measures in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

(l) Pay Ukraine financial compensation, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the CERD, including the harm suffered by victims as a result of the Russian Federation's violations of CERD Articles 2, 4, 5, 6 and 7, with such compensation to be quantified in a separate phase of these proceedings."

in the Reply:

"734. For the reasons set out in the Memorial and in this Reply, Ukraine respectfully requests the Court to adjudge and declare that:

ICSFT

(a) The Russian Federation is responsible for violations of Article 18 of the ICSFT by failing to cooperate in the prevention of the terrorism financing offenses set forth in Article 2 by taking all practicable measures to prevent and counter preparations in its territory for the commission of those offenses within or outside its territory. Specifically, the Russian Federation has violated Article 18 by failing to take the practicable measures of: (i) preventing Russian state officials and agents from financing terrorism in Ukraine; (ii) discouraging public and private actors and other non-governmental third parties from financing terrorism in Ukraine; (iii) policing its border with Ukraine to stop the financing of terrorism; and (iv) monitoring and suspending banking activity and other fundraising activities undertaken by private and public actors on its territory to finance . . . terrorism in Ukraine.

(b) The Russian Federation is responsible for violations of Article 8 of the ICSFT by failing to identify and detect funds used or allocated for the purpose of financing terrorism in Ukraine, and by failing to freeze or seize funds used or allocated for the purpose of financing terrorism in Ukraine.

(c) The Russian Federation has violated Articles 9 and 10 of the ICSFT by failing to investigate the facts concerning persons who have committed or are alleged to have committed terrorism financing in Ukraine, and to extradite or prosecute alleged offenders.

(d) The Russian Federation has violated Article 12 of the ICSFT by failing to provide Ukraine the greatest measure of assistance in connection with criminal investigations in respect of terrorism financing offenses.

(e) As a consequence of the Russian Federation's violations of the ICSFT, its proxies in Ukraine have been provided with funds that enabled them to commit numerous acts of terrorism, including the downing of Flight MH17, the shelling of Volnovakha, Mariupol, Kramatorsk, and Avdiivka, the bombings of the Kharkiv unity march and Stena Rock Club, the attempted assassination of a Ukrainian member of Parliament, and others.

CERD

(f) The Russian Federation has violated CERD Article 2 by engaging in numerous and pervasive acts of racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea and by engaging in a policy and practice of racial discrimination against those communities.

(g) The Russian Federation has further violated CERD Article 2 by sponsoring, defending or supporting racial discrimination by other persons or organizations against the Crimean Tatar and Ukrainian communities in Crimea.

(h) The Russian Federation has violated CERD Articles 4 by promoting and inciting racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

(i) The Russian Federation has violated CERD Article 5 by failing to guarantee the right of members of the Crimean Tatar and Ukrainian communities to equality before the law, notably in their enjoyment of (i) the right to equal treatment before the tribunals and all other organs administering justice; (ii) the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution; (iii) political rights; (iv) other civil rights; and (v) economic, social and cultural rights.

(j) The Russian Federation has violated CERD Article 6 by failing to assure the Crimean Tatar and Ukrainian communities in Crimea effective protection and remedies against acts of racial discrimination.

(k) The Russian Federation has violated CERD Article 7 by failing to adopt immediate and effective measures in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

Provisional Measures Order

(l) The Russian Federation has breached the obligations incumbent upon it under the Order indicating provisional measures issued by the Court on 19 April 2017 by maintaining limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*.

(m) The Russian Federation has breached the obligations incumbent upon it under the Order indicating provisional measures issued by the Court on 19 April 2017 by failing to ensure the availability of education in the Ukrainian language.

(n) The Russian Federation has breached the obligations incumbent upon it under the Order indicating provisional measures issued by the Court on 19 April 2017 by aggravating and extending the dispute and making it more difficult to resolve by recognizing the independence and sovereignty of the DPR and LPR and engaging in acts of racial discrimination in the course of its renewed aggression against Ukraine.

735. The aforementioned acts constitute violations of the ICSFT, the CERD, and the Court's Order on provisional measures, and are therefore internationally wrongful acts for which the Russian Federation bears international responsibility. The Russian Federation is therefore required to:

ICSFT

(a) Cease immediately each of the above violations of ICSFT Articles 8, 9, 10, 12, and 18 and provide Ukraine with appropriate guarantees and public assurances that it will refrain from such actions in the future.

(b) Take all practicable measures to prevent the commission of terrorism financing offenses, including (i) ensuring that Russian state officials or any other person under its jurisdiction do not provide weapons or other funds to groups engaged in terrorism in Ukraine, including without limitation the DPR, LPR, Kharkiv Partisans, and other illegal armed groups; (ii) cease encouraging public and private actors and other nongovernmental third parties to finance terrorism in Ukraine; (iii) police Russia's border with Ukraine to stop any supply of weapons into Ukraine; and (iv) monitor and prohibit private and public transactions originating in Russian territory, or initiated by Russian nationals, that finance terrorism in Ukraine, including by enforcing banking restrictions to block transactions for the benefit of groups engaged in terrorism in Ukraine, including without limitation the DPR, LPR, the Kharkiv Partisans, and other illegal armed groups.

(c) Freeze or seize assets of persons suspected of supplying funds to groups engaged in terrorism in Ukraine, including without limitation illegal armed groups associated with the DPR, LPR, and Kharkiv Partisans, and cause the forfeiture of assets of persons found to have supplied funds to such groups.

(d) Provide the greatest measure of assistance to Ukraine in connection with criminal *investigations of suspected financers of terrorism.*

(e) Pay Ukraine financial compensation, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the ICSFT, including the harm suffered by its nationals injured by acts of terrorism that occurred as a consequence of the Russian Federation's ICSFT violations, with such compensation to be quantified in a separate phase of these proceedings.

(f) Pay moral damages to Ukraine in an amount deemed appropriate by the Court, reflecting the seriousness of the Russian Federation's violations of the ICSFT, the quantum of which is to be determined in a separate phase of these proceedings.

CERD

(g) Cease immediately each of the above violations of CERD Articles 2, 4, 5, 6, and 7, and provide Ukraine with appropriate guarantees and public assurances that it will refrain from such actions in the future.

(h) Guarantee the right of members of the Crimean Tatar and Ukrainian communities to equality before the law, notably in the enjoyment of the human rights and fundamental freedoms protected by the Convention.

(i) Assure to all residents of Crimea within its jurisdiction effective protection and remedies against acts of racial discrimination.

(j) Adopt immediate and effective measures in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

(k) Pay Ukraine financial compensation and moral damages, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the CERD, including the harm suffered by victims as a result of the Russian Federation's violations of CERD Articles 2, 4, 5, 6 and 7, with such compensation to be quantified in a separate phase of these proceedings.

Provisional Measures Order

(l) Immediately comply with the provisional measures ordered by the Court on 19 April 2017, in particular by lifting its ban on the activities of the *Mejlis* of the Crimean Tatar People and by ensuring the availability of education in the Ukrainian language.

(m) Immediately comply with the provisional measures ordered by the Court on 19 April 2017, in particular by ceasing its actions that aggravate the dispute and by not taking any further action to aggravate the dispute.

(n) Pay Ukraine financial compensation and moral damages, in its own right and as *parens patriae for its citizens, for the harm Ukraine has suffered as a result of* Russia's violations of the Court's order of 19 April 2017, with such compensation to be quantified in a separate phase of these proceedings."

On behalf of the Government of the Russian Federation,

in the Counter-Memorial:

With respect to the ICSFT:

"For the reasons set out in the present Counter-Memorial, and reserving its right to supplement or amend this Submission, the Russian Federation respectfully requests the Court to dismiss all of the claims made by Ukraine."

With respect to CERD:

"For the reasons set out in the present Counter-Memorial, and reserving its right to supplement or amend this Submission, the Russian Federation respectfully requests the Court to dismiss all of the claims made by Ukraine."

in the Rejoinder:

With respect to the ICSFT:

"In view of the foregoing, the Russian Federation respectfully requests the Court to dismiss all of the claims made by Ukraine under the ICSFT."

With respect to CERD:

"In view of the foregoing, the Russian Federation respectfully requests the Court to dismiss all of the claims made by Ukraine under the CERD."

27. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Ukraine,

at the hearing of 12 June 2023:

"1. On the basis of the facts and legal arguments presented in its written and oral pleadings, Ukraine respectfully requests the Court to adjudge and declare:

ICSFT

(a) The Russian Federation is responsible for violations of Article 18 of the ICSFT by failing to cooperate in the prevention of the terrorism financing offenses set forth in Article 2 by taking all practicable measures to prevent and counter preparations in its territory for the commission of those offenses within or outside its territory. Specifically, the Russian Federation has violated Article 18 by failing to take the practicable measures of: (i) preventing Russian state officials and agents from financing terrorism in Ukraine; (ii) discouraging public and private actors and other non-governmental third parties from financing terrorism in Ukraine; (iii) policing its border with Ukraine to stop the financing of terrorism; and (iv) monitoring and suspending banking activity and other fundraising activities undertaken by private and public actors on its territory to finance terrorism in Ukraine.

(b) The Russian Federation is responsible for violations of Article 8 of the ICSFT by failing to identify and detect funds used or allocated for the purposes of financing terrorism in Ukraine, and by failing to freeze or seize funds used or allocated for the purpose of financing terrorism in Ukraine.

(c) The Russian Federation has violated Articles 9 and 10 of the ICSFT by failing to investigate the facts concerning persons who have committed or are alleged to have committed terrorism financing in Ukraine, and to extradite or prosecute alleged offenders.

(d) The Russian Federation has violated Article 12 of the ICSFT by failing to provide Ukraine the greatest measure of assistance in connection with criminal investigations in respect of terrorism financing offenses.

(e) As a consequence of the Russian Federation's violations of the ICSFT, illegal armed groups in Ukraine have been provided with funds that enabled them to commit numerous acts of terrorism, including the shootdown of Flight MH17, the shelling of Volnovakha, Mariupol, Kramatorsk, and Avdiivka, the bombings of the Kharkiv unity march and Stena Rock Club, the attempted assassination of a Ukrainian member of Parliament, and others.

CERD

(f) The Russian Federation has violated CERD Article 2 by engaging in numerous and pervasive acts of racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea and by engaging in a policy and practice of racial discrimination against those communities.

(g) The Russian Federation has further violated CERD Article 2 by sponsoring, defending or supporting racial discrimination by other persons or organizations against the Crimean Tatar and Ukrainian communities in Crimea.

(h) The Russian Federation has violated CERD Article 4 by promoting and inciting racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

(i) The Russian Federation has violated CERD Article 5 by failing to guarantee the right of members of the Crimean Tatar and Ukrainian communities to equality before the law, notably in their enjoyment of (i) the right to equal treatment before the tribunals and all other organs administering justice; (ii) the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution; (iii) political rights; (iv) other civil rights; and (v) economic, social and cultural rights.

(j) The Russian Federation has violated CERD Article 6 by failing to assure the Crimean Tatar and Ukrainian communities in Crimea effective protection and remedies against acts of racial discrimination.

(k) The Russian Federation has violated CERD Article 7 by failing to adopt immediate and effective measures in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

Provisional Measures Order

(l) The Russian Federation has breached its obligations under the Order indicating provisional measures issued by the Court on 19 April 2017 by maintaining limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*.

(m) The Russian Federation has breached its obligations under the Order indicating provisional measures issued by the Court on 19 April 2017 by failing to ensure the availability of education in the Ukrainian language.

(n) The Russian Federation has breached its obligations under the Order indicating provisional measures issued by the Court on 19 April 2017 by aggravating and extending the dispute and making it more difficult to resolve by recognizing the independence and sovereignty of the so-called DPR and LPR and engaging in acts of racial discrimination in the course of its renewed aggression against Ukraine.

2. The aforementioned acts constitute violations of the ICSFT, the CERD, and the Court's order on provisional measures, and are therefore internationally wrongful acts for which the Russian Federation bears international responsibility. The Russian Federation is therefore required to:

ICSFT

(a) Cease immediately each of the above violations of ICSFT Articles 8, 9, 10, 12, and 18 and provide Ukraine with appropriate guarantees and public assurances that it will refrain from such actions in the future.

(b) Take all practicable measures to prevent the commission of terrorism financing offenses in Ukraine, including in the oblasts purportedly annexed by the Russian Federation on September 30, including in particular (i) ensuring that Russian state officials or any other person under its jurisdiction do not provide weapons or other funds to groups engaged in terrorism in Ukraine; (ii) cease encouraging public and private actors and other nongovernmental third parties to finance terrorism in Ukraine; (iii) police Russia's border with Ukraine to stop any supply of weapons into Ukraine; and (iv) monitor and prohibit private and public transactions originating in Russian territory, or initiated by Russian nationals, that finance terrorism in Ukraine, including by enforcing banking restrictions to block transactions for the benefit of groups engaged in terrorism in Ukraine.

(c) Freeze or seize assets of persons suspected of supplying funds to groups engaged in terrorism in Ukraine, and cause the forfeiture of assets of persons found to have supplied funds to such groups.

(d) Provide the greatest measure of assistance to Ukraine in connection with criminal investigations of suspected financers of terrorism.

(e) Pay Ukraine financial compensation, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the ICSFT, including the harm suffered by its nationals injured by acts of terrorism that occurred as a consequence of the Russian Federation's ICSFT violations, with such compensation to be quantified in a separate phase of these proceedings.

(f) Pay moral damages to Ukraine in an amount deemed appropriate by the Court, reflecting the seriousness of the Russian Federation's violations of the ICSFT, the quantum of which is to be determined in a separate phase of these proceedings.

CERD

(g) Cease immediately each of the above violations of CERD Articles 2, 4, 5, 6, and 7, and provide Ukraine with appropriate guarantees and public assurances that it will refrain from such actions in the future.

(h) Guarantee the right of members of the Crimean Tatar and Ukrainian communities to equality before the law, notably in the enjoyment of the human rights and fundamental freedoms protected by the Convention.

(i) Assure to all residents of occupied Crimea effective protection and remedies against acts of racial discrimination.

(j) Adopt immediate and effective measures in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea.

(k) Pay Ukraine financial compensation and moral damages, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the CERD, including the harm suffered by victims as a result of the Russian Federation's violations of CERD Articles 2, 4, 5, 6 and 7, with such compensation to be quantified in a separate phase of these proceedings.

Provisional Measures Order

(l) Provide full reparation for the harm caused for its actions, including restitution, financial compensation and moral damages, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the Court's Order of 19 April 2017, with such compensation to be quantified in a separate phase of these proceedings.

(m) Regarding restitution: restore the Mejlis' activities in Crimea and its members and all their rights, including their properties, retroactive elimination of all Russian administrative and other measures contrary to the Court's Order and release of members of Mejlis currently in jail."

On behalf of the Government of the Russian Federation,

at the hearing of 14 June 2023:

"For the reasons explained in its written submissions and developed further during the oral hearings, and for any other reasons that the Court may deem appropriate, the Russian Federation respectfully requests the Court

1. to dismiss all of the claims that Ukraine made under the International Convention for the Suppression of the Financing of Terrorism; and

2. to dismiss all of the claims that Ukraine made under the International Convention on the Elimination of All Forms of Racial Discrimination."

*

* *

I. General background

28. The present proceedings were instituted by Ukraine following events which occurred from early 2014 in eastern Ukraine and in the Crimean peninsula. The situation in Ukraine is very different today than it was when Ukraine submitted its Application in January 2017. The Parties are presently engaged in an intense armed conflict that has led to a tremendous loss of life and great human suffering. Nevertheless, with regard to the situation in eastern Ukraine and in the Crimean peninsula, the case before the Court is limited in scope and is brought only under the provisions of the ICSFT and CERD. The Court is not called upon to rule in this case on any other issue in dispute between the Parties.

29. With regard to the ICSFT, the Applicant instituted proceedings relating to the events in eastern Ukraine, alleging that the Russian Federation failed to take measures to prevent and suppress the commission of offences of terrorism financing. In particular, the Applicant refers to acts and armed activities in eastern Ukraine allegedly perpetrated by armed groups linked to two entities that refer to themselves as the "Donetsk People's Republic" (DPR) and the "Luhansk People's Republic" (LPR). Other acts to which the Applicant refers were allegedly perpetrated by armed groups and individuals in other parts of Ukraine. With regard to CERD, the Applicant refers to events which took place in Crimea from early 2014, after the Russian Federation took control over the territory of the Crimean peninsula, alleging that the Russian Federation has engaged in a campaign of racial discrimination depriving Crimean Tatars and ethnic Ukrainians in Crimea of their political, civil, economic, social and cultural rights in violation of its obligations under CERD.

30. The Court recalls that, in its Judgment of 8 November 2019 on preliminary objections (hereinafter the "2019 Judgment"), it considered that the dispute consists of two aspects: the first relates to the ICSFT and the second relates to CERD. The Court therefore defined the subject-matter of the dispute between the Parties in the following terms:

> "[I]n so far as its first aspect is concerned, [the subject-matter of the dispute] is whether the Russian Federation had the obligation, under the ICSFT, to take measures and to co-operate in the prevention and suppression of the alleged financing of terrorism in the context of events in eastern Ukraine and, if so, whether the Russian Federation breached such an obligation. The subject-matter of the dispute, in so far as its second aspect is concerned, is whether the Russian Federation breached its obligations under CERD through discriminatory measures allegedly taken against the Crimean Tatar and Ukrainian communities in Crimea." (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 577, para. 32.)

The Court further stated that, in the present proceedings, Ukraine is not requesting that it rule on issues concerning the Russian Federation's alleged "aggression" or its alleged "unlawful occupation" of Ukrainian territory, nor is the Applicant seeking a pronouncement of the Court on the status of the Crimean peninsula under international law. These matters do not constitute the subject-matter of the dispute before the Court (*ibid.*, para. 29).

31. In the same Judgment, the Court found that it had jurisdiction on the basis of Article 24, paragraph 1, of the ICSFT and Article 22 of CERD to entertain the claims made by Ukraine under

these Conventions. Thus, the jurisdiction of the Court is limited to the alleged violations by the Russian Federation of its obligations under the two instruments invoked by Ukraine and does not concern the conformity of conduct of the Russian Federation with its obligations under other rules of international law.

II. THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

32. The Court recalls that both Ukraine and the Russian Federation are parties to the ICSFT, which entered into force for them on 5 January 2003 and 27 December 2002, respectively. Neither Party entered any reservation to that instrument. As the Court has already stated (paragraph 30), the aspect of the Parties' dispute under the ICSFT concerns alleged violations by the Russian Federation of certain obligations under that Convention.

A. Preliminary issues

33. Before addressing Ukraine's claims under the ICSFT, the Court will first consider certain preliminary issues relevant to the determination of the dispute, namely the Russian Federation's invocation of the "clean hands" doctrine, the interpretation of relevant provisions of the ICSFT and certain questions of proof.

1. Invocation of the "clean hands" doctrine in respect of the ICSFT

34. The Russian Federation requests the Court to dismiss Ukraine's claims under the ICSFT on the grounds that the Applicant comes to the Court with "unclean hands". The Russian Federation argues that Ukraine has itself engaged in serious misconduct or wrongdoing that has a close connection with the relief that it seeks. First, the Russian Federation argues that Ukraine has failed to implement the "Package of Measures for the Implementation of the Minsk Agreements" adopted in Minsk on 12 February 2015. Secondly, the Respondent contends that Ukraine has shelled residential areas and used indiscriminate weapons against civilians in eastern Ukraine. Thirdly, the Russian Federation argues that Ukraine has taken a "hypocritical approach" in its interpretation and application of the ICSFT. In this regard, the Respondent contends that the Applicant has brought charges of terrorism financing against political opponents of the Government of Ukraine, as well as residents of the Donetsk and Luhansk *oblasts* (administrative territorial units) for financial and commercial activities in the DPR and LPR, but failed to bring similar charges against other Ukrainian persons including top Ukrainian officials and politicians, who freely trade with the DPR and LPR in coal, steel and other goods, despite labelling the leadership of the DPR and LPR as "terrorists".

35. For its part, Ukraine asks the Court to disregard the arguments by the Russian Federation on the grounds that the Respondent misapplies the "clean hands" doctrine and has failed to substantiate Ukraine's alleged misconduct with evidence. In Ukraine's view, the Russian Federation falsely equates coal purchases by Ukrainian officials in their own territory with the supply of deadly

weapons by officials of the Russian Federation to terrorist groups that target innocent civilians in Ukraine. The Applicant considers that the Russian Federation's invocation of the "clean hands" doctrine is a "distraction" and not a meaningful "defence" to Ukraine's claims.

* *

36. In its 2019 Judgment, the Court ruled on several preliminary objections to jurisdiction and admissibility raised by the Russian Federation in relation to Ukraine's claims (*I.C.J. Reports 2019 (II)*, p. 558). However, the Russian Federation's objection based on the "clean hands" doctrine was raised for the first time in its Rejoinder filed on 10 March 2023. The Respondent did not specify, either in its Rejoinder or in its oral arguments, whether it invokes the doctrine as an objection to the admissibility of Ukraine's claims or as a defence on the merits. Given that the Respondent raised the objection only at this late stage in the proceedings, the Court views its invocation as a defence on the merits.

37. The Court has hitherto treated the invocation of the "clean hands" doctrine with the utmost caution. It has never upheld the doctrine or recognized it either as a principle of customary international law or as a general principle of law (*Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 44, para. 122; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Judgment of 30 March 2023*, para. 81).

38. Furthermore, the Court has rejected the invocation of the doctrine as an objection to admissibility, stating that it "does not consider that an objection based on the 'clean hands' doctrine may by itself render an application based on a valid title of jurisdiction inadmissible" (*Jadhav (India* v. *Pakistan), Judgment, I.C.J. Reports 2019 (II)*, p. 435, para. 61; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Judgment of 30 March 2023*, para. 81). Similarly, the Court considers that the "clean hands" doctrine cannot be applied in an inter-State dispute where the Court's jurisdiction is established and the application is admissible. Accordingly, the invocation of the "clean hands" doctrine as a defence on the merits by the Russian Federation must be rejected.

2. Interpretation of certain provisions of the ICSFT

39. Before addressing Ukraine's claims under the ICSFT, the Court will consider the interpretation of certain provisions of that Convention that are in dispute between the Parties.

(a) ***Article 1, paragraph 1, of the ICSFT***

40. The Parties disagree regarding the meaning of the term "funds" as defined in Article 1 and used in Article 2, paragraph 1, and other provisions of the ICSFT.

* *

41. Ukraine maintains that whenever States parties wish to accord a special meaning to a term in a treaty, they do so by including a definition in the treaty, as is the case regarding the definition of the term "funds" in Article 1 of the ICSFT. Ukraine, referring to the text of Article 1, paragraph 1, of the ICSFT, argues that the term "funds", according to its ordinary meaning and read in context and in light of the object and purpose of the ICSFT, has a broad meaning and includes "assets of every kind, whether tangible or intangible, movable or immovable". Ukraine further argues that, consistent with that broad definition, the term "funds" is not limited to "financial assets" but covers all forms of property, including weapons and other non-financial assets. In this regard, Ukraine emphasizes that the French and Spanish texts of the phrase "assets of every kind", namely "biens de toute nature" and "los bienes de cualquier tipo", respectively, support the conclusion that "funds" includes weapons and other non-financial assets. Ukraine also cites the *travaux préparatoires* of the ICSFT which, it contends, show that the terms "funds" and "financing" were understood by the drafters to include the provision of in-kind contributions including heavy weaponry.

*

42. The Russian Federation contends that the term "funds" used in Article 2 of the ICSFT is limited to resources intended to finance the commission of acts of terrorism, rather than resources that are themselves used as means of committing those same terrorist acts. According to the Russian Federation, the term "assets" in Article 1, paragraph 1, of the ICSFT must be read in the context of the provision as a whole, in particular in light of the specific categories of assets listed, namely "bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit, as well as documents or instruments evidencing title to or interest in such assets", all of which "assets" have "an inherently monetary value as such, are forms of payment and can be freely and legally purchased, exchanged and sold". In the view of the Russian Federation, the term "funds" as used in Article 2 of the ICSFT must be interpreted in light of the object and purpose of that Convention, which is to suppress a specific form of support of acts of terrorism, namely their financing, rather than broadly prohibiting all forms of in-kind support to alleged terrorist groups.

43. In response to Ukraine's reference to the French and Spanish texts of the phrase "assets of every kind", the Russian Federation refers to the Arabic and Russian texts of the same phrase, in particular the use of the words "أموال" ("amwaal") and "активы" ("aktivy"), respectively, which the Respondent maintains convey a limited meaning of assets of a financial or monetary nature. The Russian Federation also refers to other rules of international law, including the Arms Trade Treaty and resolutions by the United Nations Security Council, all of which, it argues, distinguish "financing" from "the provision of weapons". The Respondent highlights specific references to the term "financial resources" in the drafting history of the ICSFT and argues that the discussion by the drafters of that Convention revolved exclusively around various types of financial resources. Finally, the Russian Federation argues that domestic practice does not support a broad definition of the term "funds", asserting that Ukraine has mischaracterized certain national legislation and that some States have applied a notion of "funds" in their national laws that does not include weapons.

* *

44. In its 2019 Judgment, the Court did not interpret the term "funds", taking the view that it was not necessary to address the issue at that stage of the proceedings since the Russian Federation had not objected to the jurisdiction of the Court in that regard. The Court stated, however, that "the definition of 'funds' could be relevant, as appropriate, at the stage of an examination of the merits" (*I.C.J. Reports 2019 (II)*, p. 586, para. 62).

45. Under Article 2, paragraph 1, of the ICSFT, the provision or collection of funds is a constituent element of the offence of terrorism financing (the *actus reus*). The term "funds" is defined in Article 1, paragraph 1, as meaning:

> "assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit".

46. The Court will interpret the terms "funds" and "assets of every kind" in the ICSFT, in accordance with the rules of interpretation stipulated in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention") to which Ukraine and the Russian Federation are party. According to those provisions, a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in light of that treaty's object and purpose. Furthermore, according to Article 31, paragraph 4, of the Vienna Convention, a special meaning shall be given to a term if it is established that the parties so intended.

47. The Court first turns to the text of Article 1, paragraph 1, of the ICSFT. The definition of "funds" in Article 1, paragraph 1, of the ICSFT begins with a broad reference to "assets of every kind, whether tangible or intangible, movable or immovable, however acquired". That phrase must be interpreted in accordance with the above-mentioned provisions of the Vienna Convention. The rest of that paragraph provides a non-exhaustive list of documents or instruments that may evidence title to or interest in such assets. Those instruments include bank credits, traveller's cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit. Thus, while the phrase "assets of every kind" is an expansive one, the documents or instruments listed in the definition are ordinarily used for the purpose of evidencing title or interest only with regard to certain types of assets, such as currency, bank accounts, shares or bonds.

48. The Court notes that the use of the phrase "but not limited to" in Article 1, paragraph 1, suggests that the term "funds" covers more than traditional financial assets. The term also extends to a broad range of assets that are exchangeable or used for their monetary value. For instance, precious metals or minerals such as gold or diamonds, artwork, energy resources such as oil, and digital assets such as cryptocurrency may fall within the ordinary meaning of the definition of "funds" under the ICSFT where such assets are provided for their monetary value and not as a means of committing acts of terrorism. In addition, the definition in Article 1 specifically refers to "immovable" assets, suggesting that "funds" may include the provision of land or real estate.

49. Secondly, the Court takes into account the context in which the term "funds" is used in the other provisions of the ICSFT, including Articles 8, 12, 13 and 18. Article 8, which concerns measures for the identification, detection and freezing or seizure of funds used or allocated for use in the commission of the offence of terrorism financing, suggests that the term "funds" covers different forms of monetary or financial support. Similarly, under Article 12, paragraph 2, States parties may not refuse a request for legal assistance on the grounds of bank secrecy, again suggesting that the ICSFT is concerned with financial or monetary transactions. Article 13, which provides that, for the purposes of extradition or mutual legal assistance, none of the offences set forth in Article 2 shall be regarded as "a fiscal offence", further suggests that the ICSFT is concerned with financial or monetary transactions. Finally, Article 18, which concerns the institution of practical measures regulating financial transactions, including in relation to physical cross-border transportation of cash and other negotiable instruments, also suggests that the ICSFT is concerned with financial or monetary transactions. In the view of the Court, the context provided by these provisions suggests that the term "funds" as used in Article 1, paragraph 1, of the ICSFT, is confined to resources that possess a financial or monetary character and does not extend to the means used to commit acts of terrorism.

50. Thirdly, the Court also takes into account the object and purpose of the ICSFT in determining the meaning of the term "funds". The preamble of the ICSFT demonstrates that that Convention was intended to address the "financing" of terrorism, rather than terrorism generally. For example, the preamble states that "the *financing* of terrorism is a matter of grave concern to the international community as a whole". It also notes that "the number and seriousness of acts of international terrorism depend on the *financing* that terrorists may obtain" and that "existing multilateral legal instruments do not expressly address such *financing*" (emphases added). In this regard, the Court recalls that in its 2019 Judgment, it explained that "[a]s stated in the preamble, the purpose of the Convention is to adopt 'effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators'" (*I.C.J. Reports 2019 (II)*, p. 585, para. 59). The title of the ICSFT, which refers to "the Suppression of the Financing of Terrorism", also suggests that that Convention specifically concerns the financing aspect of terrorism. Accordingly, the object of the ICSFT is not to suppress and prevent support for terrorism in general, but rather to prevent and suppress a specific form of support, namely its financing.

51. The *travaux préparatoires* confirm the above interpretation of the term "funds". The Parties referred to the text proposed by France in the Sixth Committee of the General Assembly and the subsequent negotiations in the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 and the Working Group on measures to eliminate international terrorism. The record of the negotiations appears to indicate that the concern of the drafters was that international law did not provide means for tracing and effectively punishing those who contribute finances to terrorist organizations, arguing that terrorist acts could be prevented by depriving criminal groups of their financial resources. It was this gap that the ICSFT was intended to fill. Proposals made by delegations regarding the text of what became Article 1 of the ICSFT, including the original proposal by France, expressed a focus on the issue of financial or monetary support.

52. A good-faith interpretation of the ICSFT must take into account the fact that the concern of States parties when drafting that Convention was not the means or military resources that terrorist groups might use to commit acts of terrorism, but rather the acquisition of financial resources that

would enable them, *inter alia*, to acquire such means, including weaponry and training. In this regard, the *travaux préparatoires* reveal that one of the key problems identified by the States negotiating the ICSFT was the use by terrorist groups of real or spurious charitable institutions to collect funds for seemingly legitimate purposes.

53. In light of the foregoing, the Court concludes that the term "funds", as defined in Article 1 of the ICSFT and used in Article 2 of the ICSFT, refers to resources provided or collected for their monetary and financial value and does not include the means used to commit acts of terrorism, including weapons or training camps. Consequently, the alleged supply of weapons to various armed groups operating in Ukraine, and the alleged organization of training for members of those groups, fall outside the material scope of the ICSFT. In the present case, therefore, only monetary or financial resources provided or collected for use in carrying out acts of terrorism may provide the basis for the offence of terrorism financing, assuming that the other elements of the offence referred to in Article 2, paragraph 1, are also present.

(b) ***The offence of "terrorism financing" under Article 2, paragraph 1, of the ICSFT***

54. Next, the Court turns to the interpretation of Article 2, paragraph 1, of the ICSFT, which provides as follows:

> "1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
>
> *(a)* An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
>
> *(b)* Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."

55. The Court will address several issues relevant to determining the scope of the offence defined in Article 2, paragraph 1, of the ICSFT (hereinafter referred to as "terrorism financing").

(i) The scope *ratione personae* of the offence of terrorism financing

56. The Court recalls its previous finding in the 2019 Judgment regarding the scope *ratione personae* of the ICSFT. The Court explained in relation to the phrase "any person" in Article 2, paragraph 1, that

> "this term covers individuals comprehensively. The Convention contains no exclusion of any category of persons. It applies both to persons who are acting in a private capacity and to those who are State agents. As the Court noted . . ., State financing of acts of terrorism is outside the scope of the ICSFT; therefore, the commission by a State official

> of an offence described in Article 2 does not in itself engage the responsibility of the State concerned under the Convention. However, all States parties to the ICSFT are under an obligation to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism committed by whichever person. Should a State breach such an obligation, its responsibility under the Convention would arise." (*I.C.J. Reports 2019 (II)*, p. 585, para. 61.)

Accordingly, while the financing of terrorism by a State, as such, is not covered by the ICSFT, that Convention does require States to act to suppress and prevent the commission of the offence of terrorism financing by all persons, including by State officials.

(ii) The scope *ratione materiae* of the offence of terrorism financing

57. Multiple provisions of the ICSFT refer to the commission of "offences set forth in article 2", including Articles 4, 8, 9, 12 and 18. The Court notes that Article 2 sets out two kinds of offences. First, the offence of terrorism financing, which is addressed in the *chapeau* of Article 2, paragraph 1, and second, the two categories of underlying offences or acts, which are stipulated in Article 2, paragraph 1 *(a)* and *(b)* (hereinafter referred to as "predicate acts").

58. In the view of the Court, the phrase "offences set forth in article 2" should be understood to refer only to the offence of terrorism financing set out in the *chapeau* of Article 2, paragraph 1. The predicate acts described in subparagraphs *(a)* and *(b)* of paragraph 1 are relevant only as constituent elements of the offence of terrorism financing. They are not themselves offences falling within the scope of the ICSFT. If the phrase "offences set forth in article 2" was interpreted to include the predicate acts referred to in subparagraphs *(a)* and *(b)* of paragraph 1, the obligations of States parties under the ICSFT would extend far beyond the prevention and suppression of the financing of terrorism and would apply, *inter alia*, to the suppression and prevention of those predicate acts themselves. Such an interpretation goes beyond the scope *ratione materiae* of the ICSFT.

(iii) The mental elements of the offence of terrorism financing

59. Article 2 of the ICSFT sets out two mental elements of the offence of terrorism financing (the *mens rea*). According to that provision, the commission of the offence of terrorism financing requires that the funds in question be provided or collected either "with the intention that they should be used or in the knowledge that they are to be used" in order to carry out the predicate acts defined in Article 2, paragraph 1 *(a)* or *(b)*. As the use of "or" indicates, these are alternative mental elements. Accordingly, it suffices for the commission of the offence of terrorism financing that either "intention" or "knowledge" be present. In support of its claims, Ukraine relies entirely upon the mental element of "knowledge". Accordingly, the Court will confine its analysis to the interpretation of the phrase "in the knowledge that they are to be used", an element on which the Parties hold divergent views.

* *

60. Ukraine submits that proof of the mental element of "knowledge" may be satisfied where funds are provided or collected for the benefit of an organization or group that is "notorious" for the commission of terrorist acts. Ukraine emphasizes that it is not necessary to establish the funder's knowledge that the funds provided are to be used for specific acts of terrorism, and argues that Article 2, paragraph 3, of the ICSFT reinforces this interpretation. Ukraine also states that it is not necessary that any such group has previously been characterized by the international community as a terrorist organization.

61. The Russian Federation contends, regarding Article 2, paragraph 1, of the ICSFT, that the phrase "[i]n the knowledge that they are to be used", in its ordinary meaning, refers to actual awareness that the funds are to be used to carry out a terrorist act. The Respondent argues that for the mental element of knowledge to be established, the Applicant must prove that the funder acted in the certain knowledge (and not merely with the risk) that the funds collected or provided would be used, in full or in part, to carry out a terrorist act referred to in Article 2, paragraph 1 *(a)* or *(b)*, of the ICSFT, rather than for some other purpose. The Russian Federation adds that, contrary to what Ukraine asserts, the members of the DPR and LPR have never been characterized in the same way as "notorious terrorist groups . . . such as Al-Qaida". The Russian Federation further argues that Ukraine has not met the high threshold required for establishing the "knowledge" element, in view of the fact that the DPR and LPR are not and have never been characterized as terrorist groups at the international level.

* *

62. The ordinary meaning of the term "knowledge" is an awareness of a fact or circumstance. For the mental element of "knowledge" to be established, it must be shown that, at the time of collecting or providing the funds in question, the funder was aware that they were to be used, in full or in part, in order to carry out a predicate act under Article 2, paragraph 1 *(a)* or *(b)*, of the ICSFT.

63. Article 2, paragraph 3, stipulates that "[f]or an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs *(a)* or *(b)*". Accordingly, the funder's knowledge may be established even where the funds collected or provided are not ultimately used to carry out a predicate act.

64. A determination of whether the element of "knowledge" is present must be made on the basis of objective factual circumstances. The element of "knowledge" may be established if there is proof that the funder knew that the funds were to be used for the commission of a predicate act. In this regard, it may be relevant to look to the past acts of the group receiving the funds in order to establish whether a group is notorious for carrying out predicate acts; for instance, where a group has previously been characterized as being terrorist in nature by an organ of the United Nations. The existence of the element of "knowledge" may be inferred from such circumstances. On the other hand, the characterization by a single State of an organization or a group as "terrorist" is insufficient, on its own, to displace the need for proof of the funder's knowledge that the funds in question are to be used to carry out a predicate act under Article 2, paragraph 1 *(a)* or *(b)*.

(c) ***Article 2, paragraph 1*** **(a)** ***and*** **(b)*****, of the ICSFT***

65. Article 2, paragraph 1, of the ICSFT requires that for the offence of terrorism financing to be established, the funder must act with the intention or knowledge that these funds are to be used to carry out an act defined in Article 2, paragraph 1 *(a)* or *(b)*. The Parties disagree regarding the scope and interpretation of these predicate acts.

* *

66. Ukraine contends that Article 2, paragraph 1 *(a)*, identifies specific acts prohibited by prior conventions on terrorism. Ukraine submits that the question of whether an act amounts to a predicate act prohibited under Article 2, paragraph 1 *(a)* or *(b)*, is to be determined objectively and does not require a determination of the subjective intent of the perpetrator of such an act. In this regard, Ukraine considers that the "purpose" of an act may be inferred from its "nature or context" in order to determine whether it constitutes a predicate act.

67. The Russian Federation does not dispute that Article 2, paragraph 1 *(a)*, applies to acts falling within the scope of the treaties listed in the annex of the ICSFT. However, it disagrees with Ukraine as to the interpretation of Article 2, paragraph 1 *(b)*. In the view of the Russian Federation, it is necessary that there be a finding of subjective direct intent that civilians be harmed or killed for a predicate act to have been committed. Furthermore, the Russian Federation submits that the act must have had the primary purpose of spreading terror or compelling a government that goes beyond the ordinary military goals of a party in an armed conflict.

* *

68. The Court recalls its prior conclusion that the predicate acts stipulated in Article 2, paragraph 1 *(a)* and *(b)*, are themselves not offences falling within the scope of the ICSFT and are only relevant as constituent elements of the offence of terrorism financing (see paragraph 58 above). Indeed, it is not necessary that a predicate act should have occurred for the offence of terrorism financing to have been committed (see paragraph 63 above). Accordingly, the Court will only interpret the scope of Article 2, paragraph 1 *(a)* and *(b)*, to the extent necessary to inform its conclusions regarding the alleged violations by the Russian Federation of its obligations with respect to co-operation in the prevention and suppression of the offence of terrorism financing.

69. The Court notes that the Parties agree that the category of predicate acts specified in Article 2, paragraph 1 *(a)*, is defined by reference to the treaties listed in the annex to the ICSFT. With respect to the category of predicate acts specified in Article 2, paragraph 1 *(b)*, the Court notes that it is not enough for deliberate killings or serious bodily injury to civilians to have occurred. It is also essential to demonstrate that "the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".

(d) ***Proof of predicate acts under Article 2, paragraph 1* (a) *or* (b)*, of the ICSFT***

70. The Applicant claims that armed groups in eastern Ukraine supported by the Russian Federation have committed a variety of acts constituting predicate acts prohibited under Article 2, paragraph 1 *(a)* or *(b)*, of the ICSFT. First, Ukraine alleges that Malaysia Airlines Flight 17 (hereinafter "Flight MH17") was downed over eastern Ukraine by members of the DPR using a Buk-TELAR ground-to-air missile system in violation of Article 1, paragraph 1 *(b)*, of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, thereby constituting a predicate act under Article 2, paragraph 1 *(a)*, of the ICSFT. Secondly, Ukraine argues that armed groups in eastern Ukraine engaged in a series of kidnappings and extrajudicial killings of individuals who had provided support for, or were otherwise associated with, the Ukrainian Government, or had advocated for Ukrainian unity. Thirdly, Ukraine alleges that members of the DPR and LPR, supported by the Russian Federation, carried out a series of rocket attacks and shelling in eastern Ukraine intended to terrorize civilians and exert political pressure on the Government of Ukraine. These include the shelling of a civilian checkpoint in Volnovakha on 13 January 2015; the bombardment of a civilian area of the city of Mariupol on 24 January 2015; a rocket attack against a residential area of Kramatorsk on 10 February 2015; and the indiscriminate shelling of the city of Avdiivka in early 2017. Fourthly, Ukraine alleges that armed groups directly supported by officials of the Russian Federation committed bombing attacks in Ukrainian cities, making use of weapons provided by individuals in the Russian Federation.

71. Ukraine further contends that the support allegedly provided by officials of the Russian Federation and private persons within the jurisdiction of the Russian Federation, to the armed groups responsible for those incidents provides a basis for concluding that terrorism financing offences under Article 2 of the ICSFT have been committed by those officials and private persons.

*

72. The Russian Federation disputes that predicate acts set forth in Article 2, paragraph 1 *(a)* or *(b)*, of the ICSFT have been committed and contests many of Ukraine's factual assertions. It argues that, by failing to prove the commission of the alleged predicate acts with "fully conclusive evidence", Ukraine has failed to establish the requirements for the commission of an offence of terrorism financing under Article 2 of the ICSFT.

73. First, with respect to the shooting down of Flight MH17, the Russian Federation disputes that the aircraft was shot down by persons supported by the Russian Federation, or that it provided a Buk-TELAR missile system which was used for that purpose. Furthermore, the Respondent asserts that, in any event, there was no intent to shoot down a civilian aircraft and that the act therefore does not qualify as a predicate act prohibited under Article 2, paragraph 1 *(a)*, of the ICSFT. Secondly, the Russian Federation denies Ukraine's allegations regarding killings conducted by armed groups, arguing that the evidence does not conclusively show that there was a political motivation behind

any of the alleged killings, to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. Thirdly, the Respondent contests Ukraine's account of the shelling incidents. The Respondent puts forward evidence that, in its view, demonstrates that the attacks were aimed at military targets and did not have the purpose of terrorizing civilians or compelling political action. Fourthly, with respect to the alleged bombings, the Russian Federation suggests that many or all of the incidents may have been "staged" by Ukrainian security services and generally contests the evidence provided by Ukraine regarding both the nature of the attacks and the alleged support the alleged perpetrators received from individuals in the Russian Federation.

* *

74. Before turning to the examination of the alleged violation by the Russian Federation of its obligations under the ICSFT, the Court will make several preliminary observations. The question before the Court is whether the Respondent has violated its obligations under the ICSFT to take measures for, and to co-operate in, the prevention and suppression of terrorism financing, including by acting to freeze the accounts of suspected terrorism funders, assisting in the investigation of such offences, initiating prosecutions or otherwise taking practicable measures to prevent the financing of terrorism. Answering this question requires the Court to interpret and apply a series of obligations invoked by Ukraine under Articles 8, 9, 10, 12 or 18 of the ICSFT. While the Court will only examine allegations of offences of terrorism financing to the extent necessary to resolve the claims of Ukraine, its interpretation and analysis of the Parties' obligations under Articles 8, 9, 10, 12 and 18 of the ICSFT will be guided by its interpretation of Articles 1 and 2 of that Convention, in particular, its interpretation of the term "funds" as defined in Article 1 (see paragraph 53 above). Consequently, it is not necessary for the Court to evaluate alleged predicate acts the commission of which is sustained solely by the supply of weapons or other means used to commit such acts.

75. The Court further recalls that the offence of terrorism financing is distinct from the commission of predicate acts set out in Article 2, paragraph 1 *(a)* and *(b)*, of the ICSFT (see paragraph 58 above). In order to decide on the alleged violation of the obligations invoked by Ukraine, it is not necessary for the Court to first determine whether the specific incidents alleged by Ukraine constitute predicate acts described in Article 2, paragraph 1 *(a)* or *(b)*, of the ICSFT.

76. Finally, the Court notes that it does not have sufficient evidence before it to characterize any of the armed groups implicated by Ukraine in the commission of the alleged predicate acts as groups notorious for committing such acts. In the circumstances, the funder's knowledge that the funds are to be used to carry out a predicate act under Article 2 of the ICSFT cannot be inferred from the character of the recipient group (see paragraph 64 above). Accordingly, to establish the element of knowledge, it must be shown that, at the time the funds were allegedly collected or provided to the groups, the alleged funder knew that the funds were to be used to carry out predicate acts under Article 2, paragraph 1 *(a)* or *(b)*, of the ICSFT.

3. Questions of proof

77. The Parties disagree regarding the standard of proof required to substantiate the Applicant's claims under the ICSFT. Referencing the jurisprudence of the Court, Ukraine argues that the Court should apply a standard of proof requiring "sufficient" or "convincing" evidence to establish the alleged violation of obligations under the ICSFT. Ukraine also argues in favour of a more liberal recourse to inferences of fact and circumstantial evidence in the present case where relevant evidence may be outside its "exclusive territorial control".

78. The Russian Federation asserts that Ukraine must prove the commission of terrorism financing offences with evidence that is "fully conclusive". In the view of the Respondent, this standard of proof must be met to show that it has violated its obligations under the ICSFT, and the Court should not draw any inferences of fact from an alleged "pattern of conduct" unless terrorism financing is the only reasonable inference to be drawn from the circumstances.

* *

79. It is well established that, "as a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 54, para. 115, citing *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 26, para. 33; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 660, para. 54).

80. The Court recalls that it has sometimes "allowed . . . a more liberal recourse to inferences of fact and circumstantial evidence" when a State lacks effective control over the territory where evidence is located (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 67, para. 157, citing *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18). This practice may be relevant for certain allegations made in the present case regarding conduct that took place in areas over which Ukraine lacks effective control.

81. The Court further recalls that the standard of proof may vary from case to case, taking into account factors including the gravity of the allegation. In this regard, the Court has noted that "charges of exceptional gravity" such as the crime of genocide, require proof at "a high level of certainty" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 129-130, paras. 209-210). In other cases not involving allegations of exceptional gravity, however, the Court has applied a less exacting standard of proof.

82. Ukraine's claims concern the Russian Federation's alleged violation of obligations under Articles 8, 9, 10, 12 and 18 of the ICSFT. Those obligations relate to the taking of specific measures

and co-operating in the prevention or suppression of the financing of terrorism. In the Court's view, the Applicant's claims, while undoubtedly serious, are not of the same gravity as those relating to the crime of genocide and do not require the application of a heightened standard of proof.

83. Thus, in deciding Ukraine's claims, the Court will, in addition to assessing the relevance and probative value of the evidence adduced by Ukraine, determine whether such evidence is convincing.

84. The Court also notes that each provision of the ICSFT invoked by the Applicant imposes a distinct obligation upon States parties to that Convention. In each case, the Court must first ascertain the threshold of evidence of terrorism financing that must be met for an obligation under that provision of the ICSFT to arise. Such an evidentiary threshold may differ depending on the text of the provision under examination and the nature of the obligation it imposes. If the Court finds that, for a given provision of the ICSFT, the relevant obligation did arise for the Russian Federation, the Court must then determine whether the Russian Federation has violated that obligation.

85. The Court will now turn to the examination of the alleged violations by the Russian Federation of its obligations under the ICSFT.

B. Alleged violations of obligations under the ICSFT

1. Alleged violation of Article 8, paragraph 1

86. Article 8, paragraph 1, of the ICSFT reads as follows:

> "Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture."

* *

87. Ukraine argues that by failing to take appropriate measures to identify, detect and freeze or seize funds used for terrorism financing, the Russian Federation has violated its obligations under Article 8 of the ICSFT. Ukraine contends that the obligation to take the preventive measure of freezing funds is triggered by a "reasonable suspicion" that the funds in question may be used or allocated for the financing of terrorist activity, a standard that, it notes, has been recommended by many international organizations and adopted by States when implementing relevant domestic legislation. In support of applying its "reasonable suspicion" standard, Ukraine emphasizes that the freezing of assets is a proactive measure taken to prevent terrorism financing before it occurs.

88. Ukraine relies upon a range of Notes Verbales and requests for mutual legal assistance that were provided to the Russian Federation between 2014 and 2017. It asserts that these documents

contained the names of dozens of individuals and organizations along with information regarding corresponding bank accounts, bank card numbers, taxpayer identification numbers, tax-registration codes and other identifying administrative information. Ukraine further submits that it notified the Russian Federation in each of these instances that the identified individuals and associations had purposefully and knowingly used the specified accounts to collect and transfer money to finance terrorist activities in Ukraine. In Ukraine's view, this information, along with widely reported and known instances of fundraising for the DPR and LPR, was sufficient to give rise to reasonable suspicion that the funds in question would be used for terrorism financing, thereby obligating the Russian Federation to take action to freeze the funds. Ukraine argues that the Russian Federation, after receiving this information, failed to take any action to identify, detect, freeze or seize the funds at issue, in violation of its obligation under Article 8, paragraph 1, of the ICSFT.

*

89. The Russian Federation, for its part, denies any violation of its obligations under Article 8 of the ICSFT. It argues that Article 8 of the ICSFT only applies in circumstances where it has been established that offences under Article 2 of the ICSFT have been committed and with respect to funds that have been proved to be associated with the commission of such offences. It therefore disputes that Article 8 applies when there is merely "reasonable suspicion" that the funds in question may be used or allocated for the financing of acts of terrorism and it considers that the use of such a standard has no basis in the text of that provision.

90. The Russian Federation further argues that the Applicant has failed to establish either that predicate acts were committed or that the funds in the accounts referred to were used or allocated to be used for purposes of financing those acts. It contends that the communications cited by Ukraine provided no information whatsoever as to either how the alleged provision of financing to the specified individuals constituted financing of the DPR or LPR or how the alleged provision of financing to the DPR or LPR constituted financing of terrorism. In the view of the Russian Federation, Ukraine's allegations of terrorism and terrorism financing were made in bad faith and actually concerned peaceful campaigns of humanitarian assistance to the civilian population in eastern Ukraine. Finally, the Russian Federation also points out that several of the accounts referenced in the Ukrainian communications were located in Ukraine, not the Russian Federation. Accordingly, the Russian Federation denies that it had any obligation to freeze these funds or accounts.

* *

91. Article 8 of the ICSFT imposes upon States parties various obligations, *inter alia*, to identify, detect, freeze or seize funds used or allocated for the purpose of committing the offences set forth in Article 2 of the ICSFT. The Court will begin by considering the evidentiary threshold for

an obligation under Article 8 of the ICSFT to arise. In the view of the Court, the applicable threshold under Article 8 of the ICSFT may differ depending on the scope and nature of the precise obligation at issue. For instance, the obligation to identify and detect funds allocated for the purpose of terrorism financing entails a lower threshold than the obligation to freeze such funds. Similarly, the decision to freeze funds may involve the application of a different evidentiary threshold than the more consequential decision of seizing funds. Ukraine has not pointed to any specific funds or accounts that the Russian Federation has allegedly failed to identify or detect. The Court notes that the Applicant is primarily concerned with the alleged non-compliance by the Russian Federation with its obligation to freeze certain funds belonging to individuals and organizations alleged to be involved in terrorism financing. It is therefore necessary to ascertain the evidentiary threshold required for a State party to the ICSFT to be required to freeze funds alleged to be used or allocated for terrorism financing.

92. The Court is of the view that the freezing of funds is a preventive measure that does not require that the commission of the offence of terrorism financing under Article 2 of the ICSFT be established. At the same time, the Court acknowledges that the freezing of funds is a serious step that can significantly limit the ability of the holder of those funds to use and dispose of them. In light of the foregoing, it is the Court's view that the obligation under Article 8 to freeze funds only comes into operation when the relevant State party has reasonable grounds to suspect that those funds are to be used for the purpose of terrorism financing.

93. The Court notes that this standard of reasonable grounds to suspect is in line with that adopted by the Financial Action Task Force (hereinafter the "FATF") in its Special Recommendations on Terrorist Financing. The FATF is an intergovernmental body that takes action, *inter alia*, to tackle money laundering and terrorism financing, including by issuing recommendations to assist States in implementing and fulfilling their obligations under relevant international instruments, such as the ICSFT, and monitoring compliance with them. Although not all States parties to the ICSFT are members of the FATF, the practice of States within the FATF in the interpretation and application of the ICSFT is relevant when interpreting its provisions. The Court further notes that the Russian Federation is a member of the FATF, while Ukraine has co-operated with the FATF with respect to the issuance of mutual evaluation reports summarizing and evaluating Ukraine's implementation of anti-money laundering and anti-terrorism financing measures. The Court also observes that Article 8 provides that, for its implementation, "[e]ach State Party shall take appropriate measures, in accordance with its domestic legal principles". In this regard, it is relevant that Russian domestic law allows for the freezing of assets where there are "sufficient grounds to suspect" their use in terrorism financing. The Court considers that the standard used in Russian domestic law is analogous to one of reasonable grounds to suspect.

94. The Court must next determine whether the information available to the Respondent was sufficient to oblige it to take action to freeze any particular funds. The obligations under Article 8 are not, by its terms, contingent on a State party receiving information from another State party. Accordingly, a State party may be required to take action under Article 8 regardless of the means by which it becomes aware of particular funds used or allocated for the purpose of committing the offences set forth in Article 2 of the ICSFT. In the present case, Ukraine's arguments primarily relate

to the communications it submitted to the Russian Federation regarding the alleged use of certain funds and accounts for the purpose of committing offences under Article 2. The Court will therefore focus its analysis on these communications.

95. Of the Notes Verbales and requests for legal assistance submitted to the Court by Ukraine, only four contain descriptions of specific persons and accounts alleged to have been associated with the financing of predicate acts under the ICSFT. These include two Notes Verbales sent by the Ministry of Foreign Affairs of Ukraine to the Ministry of Foreign Affairs of the Russian Federation on 12 August 2014 and 29 August 2014, respectively. Both Notes Verbales generally allege the transfer of funds from the Russian Federation to the DPR and LPR and include allegations concerning identified individuals and the use of specified bank accounts, bank cards and electronic wallets for such transfer of funds. In both Notes Verbales, Ukraine referred to Article 8 of the ICSFT and requested that the Russian authorities take action to identify, detect, freeze and seize all funds used or allocated for committing the alleged offences.

96. Also relevant are two requests for legal assistance made by the Central Investigations Department of the Ministry of Internal Affairs of Ukraine to the competent authorities of the Russian Federation on 11 November 2014 and 3 December 2014. Although these communications were less detailed than the Notes Verbales of August 2014, both requests contained allegations concerning the raising of funds for the LPR and provided the Russian Federation with information regarding specific bank accounts allegedly used for that purpose.

97. After examining the allegations and evidence contained in these documents, the Court concludes that they do not contain sufficiently specific and detailed evidence to give the Russian Federation reasonable grounds to suspect that the accounts, bank cards and other financial instruments listed therein were used or allocated for the purpose of committing the offences under Article 2 of the ICSFT. In particular, the documents provide only vague and highly generalized descriptions of the acts that were allegedly committed by members of the DPR and LPR and were alleged to qualify as predicate acts under Article 2, paragraph 1 *(a)* or *(b)*, of the ICSFT. Accordingly, the evidence does not demonstrate the funders' "knowledge" that the funds being provided would be used to commit acts that qualify as predicate acts. Nor has Ukraine demonstrated that the Russian Federation should have been aware of this information from another source. In the absence of convincing evidence to the contrary, the Russian Federation had no reasonable grounds to suspect that the funds in question were to be used for the purpose of terrorism financing and, accordingly, was not required to freeze those funds.

98. In light of the foregoing, the Court concludes that it has not been established that the Russian Federation has violated its obligations under Article 8, paragraph 1, of the ICSFT. Therefore, Ukraine's claim under Article 8 cannot be upheld.

2. Alleged violation of Article 9, paragraph 1

99. Article 9, paragraph 1, of the ICSFT provides:

> "Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information."

* *

100. Ukraine contends that the Russian Federation repeatedly failed to investigate alleged terrorism financing offences committed by individuals present in the territory of the Russian Federation and, in so doing, violated its obligations under Article 9. Ukraine alleges that it submitted numerous requests to undertake investigations and, in response, the Russian Federation made no serious attempt to investigate the individuals named in the Ukrainian communications or entirely ignored the Ukrainian requests. The Applicant considers that Article 9 is broadly worded and sets a relatively low evidentiary threshold for the obligation to arise. According to Ukraine, the obligation under Article 9 "to investigate the facts contained in the information" arises as soon as a State party receives information concerning an alleged terrorism financing offence and, if "the circumstances so warrant", the State "shall take the appropriate measures to ensure [the suspect's] presence for the purposes of prosecution or extradition". In its view, there is no requirement that a State should have received information identifying a specific person or providing detailed information establishing a reasonable suspicion that an offence of terrorism financing has been committed for it to be required to initiate an investigation.

101. The Russian Federation denies any violation of obligations under Article 9 of the ICSFT. In its view, Article 9 does not require a State party to examine every allegation of terrorism financing. The requesting State must provide sufficient information with respect to a specific person present in the requested State's territory, as well as evidence giving rise to a "reasonable suspicion" that an offence of terrorism financing under Article 2 of the ICSFT has taken place. The Russian Federation considers that the information it received from Ukraine did not contain sufficient or even credible allegations of terrorism financing by specific persons. In particular, the Respondent emphasizes that the Notes Verbales referred to by Ukraine contained little information other than conclusive statements. Furthermore, the Russian Federation notes that its request to Ukraine for additional information, including "factual data", on Ukraine's criminal investigations received no response. The Russian Federation therefore submits that it was under no duty to investigate any individuals present in its territory and that Ukraine has failed to establish that there has been a breach of Article 9 of the ICSFT.

* *

102. Article 9 of the ICSFT concerns the obligation of a State party to the ICSFT to investigate allegations of the commission of terrorism financing offences by alleged offenders present in its territory.

103. The Court will once again begin by considering the evidentiary threshold for the obligation to investigate the facts of an alleged terrorism financing offence to arise. The threshold set by Article 9, paragraph 1, is relatively low. For the obligation to investigate to arise, Article 9, paragraph 1, requires only that a State party receive information that a person who has committed or who is "alleged" to have committed the offence of terrorism financing may be present in its territory. In circumstances where the information only "alleges" the commission of an offence under Article 2, it is not necessary that the commission of the offence be established. Indeed, it is precisely the purpose of an investigation to uncover the facts necessary to determine whether a criminal offence has been committed. All the details surrounding the alleged offence may not yet be known and the facts provided may therefore be general in nature. Moreover, for an obligation to investigate to arise, Article 9 does not require that a State party receive information from another State party. Credible information received from any other source may give rise to the obligation to investigate.

104. At the same time, however, the Court considers that Article 9 does not require the initiation of an investigation into unsubstantiated allegations of terrorism financing. Requiring States parties to undertake such investigations would not be in line with the object and purpose of the ICSFT.

105. If a State party has received sufficient information of alleged terrorism financing committed by an individual present on its territory, it is required to undertake a meaningful investigation into the alleged facts in accordance with the laws and procedures it would ordinarily follow when presented with information on the commission of a serious crime. Furthermore, in fulfilling its obligation to investigate, a State party must also endeavour to co-operate with any other interested States parties and must promptly inform them of the results of its investigation (see Article 9, paragraph 6, of the ICSFT). Such an obligation to co-operate in investigating terrorism financing offences is also informed by the object and purpose of the ICSFT, which is, as stated in its preamble, to "enhance international cooperation among States" in preventing and suppressing terrorism financing.

106. The Court will next consider whether the Russian Federation received sufficient information to require it to investigate any alleged offences under Article 2 of the ICSFT. Ukraine has pointed to several Notes Verbales sent from its Foreign Ministry to the Foreign Ministry of the Russian Federation which, it argues, contained credible allegations of terrorism financing by individuals in the territory of the Respondent. The Court will focus its attention on three of these documents: the Notes Verbales dated 12 August 2014, 29 August 2014 and 3 November 2014. The Court observes that the other Notes Verbales submitted to the Court concern only allegations of the provision of means to be used to commit predicate acts, including the supply of weapons, ammunition and military equipment. They therefore allege facts that fall outside the scope of Article 2 of the ICSFT (see paragraph 53 above).

107. In the view of the Court, the aforementioned three documents, in particular the Notes Verbales dated 12 August 2014 and 29 August 2014, contained sufficiently detailed allegations to

give rise to an obligation by the Russian Federation to undertake investigations into the facts alleged therein. The information received included a summary of the types of conduct allegedly undertaken by members of armed groups associated with the DPR and LPR that Ukraine considered to constitute predicate acts under the ICSFT, the names of several individuals suspected of terrorism financing, and details regarding the accounts used and the types of items purchased with the funds transferred. The Court considers that such information met the relatively low threshold set by Article 9 and thus required investigation by the Respondent.

108. In light of the above conclusion, the Court must now determine whether the Russian Federation met its obligation to undertake a meaningful investigation into the facts alleged in the Notes Verbales. The Ministry of Foreign Affairs of the Russian Federation first responded to the Ukrainian communications in a Note Verbale dated 14 October 2014. In that communication, the Ministry informed Ukraine about the "need to provide the Russian side with factual data on the issues brought up" in the Ukrainian communications. However, the Russian Federation provided no clarification as to the precise additional information that was required.

109. Subsequently, on 31 July 2015, in response to the information received from Ukraine, the Ministry of Foreign Affairs of the Russian Federation sent Ukraine a Note Verbale that included further details on the actions taken by the Russian competent authorities. This included the results of investigations into two of the alleged offenders. In both cases, the Russian Federation concluded that the individuals were not involved in providing financial support to the DPR and LPR. However, no clear information was provided by the Respondent concerning the other alleged offenders described in the Ukrainian communications as being present in Russian territory. With regard to one allegation, the Russian Federation stated that it had issued orders to obtain the personal data and account information of the alleged offenders. With respect to several other alleged offenders, the Russian Federation responded that the persons either "d[id] not exist in the Russian Federation" or their location could not be identified. Finally, with respect to the information received in the Ukrainian Note Verbale of 29 August 2014, the Russian Ministry of Foreign Affairs merely responded that the "investigative and operational work to identify the persons mentioned . . . is being processed at [the] current time".

110. The Court takes note of the amount of time that elapsed before the Russian Federation provided the aforementioned responses to the Ukrainian Notes Verbales. In this regard, the Court observes that the 2019 Mutual Evaluation Report issued by the FATF regarding the Russian Federation's anti-money laundering and counter-terrorist financing measures stated that the Russian Federation generally answers requests for mutual legal assistance "within one to two months" (Financial Action Task Force, *Anti-money laundering and counter-terrorist financing measures – Russian Federation*, Fourth Round Mutual Evaluation Report (December 2019), p. 203). It is therefore notable that, almost one year after receiving the Ukrainian allegations, the Russian Federation appeared to have failed even to identify several of the alleged offenders. Furthermore, to the extent the Respondent encountered difficulties ascertaining the location or identity of some of the individuals named in the Ukrainian communications, it was required to seek to co-operate with Ukraine to undertake the necessary investigations and specify to Ukraine what further information may have been required (see paragraph 105 above).

111. In light of the foregoing, the Court concludes that the Russian Federation has violated its obligations under Article 9, paragraph 1, of the ICSFT.

3. Alleged violation of Article 10, paragraph 1

112. Article 10, paragraph 1, of the ICSFT, reads:

> "The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State."

* *

113. Ukraine submits that the Russian Federation violated its obligations under Article 10, paragraph 1, of the ICSFT by failing to take any action to extradite or prosecute alleged offenders of terrorism financing offences present in its territory. The Applicant considers that the obligations under Article 10 apply regardless of whether another State provided information about the offence or whether a State party should have been aware of terrorism financing taking place in its territory. In addition, Ukraine asserts that the Russian Federation may not use its own failure to investigate terrorism financing offences as an excuse to avoid taking action to prosecute or extradite individuals suspected of engaging in terrorism financing.

114. The Russian Federation, for its part, argues that it has complied with its obligations under Article 10 of the ICSFT. It contends that the obligation to prosecute or extradite under Article 10 is only triggered in circumstances where information provided to the State party describes an offence of terrorism financing and identifies a specific alleged offender. The Respondent further emphasizes that Article 10, paragraph 1, does not impose an absolute obligation to prosecute or extradite and allows for a situation where the prosecuting authorities may decide that no sufficient basis for prosecution exists in light of the limited available evidence of terrorism financing offences. The Russian Federation asserts that it had no obligation to submit any cases for prosecution given the failure by Ukraine to establish even a reasonable suspicion that the persons it identified had engaged in terrorism financing.

* *

115. Article 10, paragraph 1, requires States parties to the ICSFT to either prosecute or extradite alleged offenders of terrorism financing offences under Article 2. The Court observes that the Applicant has not brought to its attention any requests for extradition concerning alleged offenders and that the Applicant's argument accordingly appears to be limited to an alleged violation by the Russian Federation of its obligation to prosecute.

116. The Court begins by noting that the wording of Article 10, paragraph 1, bears a strong resemblance to language found in many other international conventions, including Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter the "Convention against Torture"). The Court had occasion to consider the scope of the latter provision in its Judgment in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*I.C.J. Reports 2012 (II)*, p. 422).

117. In that Judgment, the Court described the relevant provision as follows:

> "As is apparent from the *travaux préparatoires* of the Convention, Article 7, paragraph 1, is based on a similar provision contained in the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970. The obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the 'obligation to prosecute') was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties' judicial systems. These two conventions emphasize, moreover, that the authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State concerned (Article 7, paragraph 2, of the Convention against Torture and Article 7 of the Hague Convention of 1970). It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure." (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 454-455, para. 90.)

118. Just as with the obligation to prosecute or extradite in the Convention against Torture, the obligations found in Article 10, paragraph 1, of the ICSFT are ordinarily implemented after the relevant State party has performed other obligations under the ICSFT, such as the obligation under Article 9 to conduct an investigation into the facts of alleged terrorism financing (see *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 455, para. 91). Ordinarily, it is only after an investigation has been conducted that a decision may be taken to submit the case to the competent authorities for the purpose of prosecution. In addition, just as with the obligation discussed by the Court in *Belgium* v. *Senegal*, the *aut dedere aut judicare* obligation found in Article 10 of the ICSFT does not impose an absolute obligation to prosecute (*ibid.*, p. 455, para. 90). The competent authorities of the States parties to the ICSFT retain the responsibility to determine whether prosecution is warranted, based on the available evidence and applicable legal rules, so long as such a decision is taken in the same manner as in the case of other grave offences under the law of that State.

119. The Court notes that the decision to submit a case to the competent authorities for purposes of prosecution is a serious one that requires, at a minimum, reasonable grounds to suspect that an offence has been committed. The Court recalls its finding that the information provided by Ukraine to the Russian Federation did not give rise to reasonable grounds to suspect that terrorism financing offences within the meaning of Article 2 of the ICSFT had been committed (see paragraph 97 above). In light of that finding, the Court does not consider that the Russian Federation was obligated under Article 10 of the ICSFT to submit any specific cases to the competent authorities for the purpose of prosecution.

120. Based on the foregoing, the Court concludes that it has not been established that the Russian Federation has violated its obligations under Article 10, paragraph 1, of the ICSFT. Therefore, Ukraine's claim under Article 10 of the ICSFT cannot be upheld.

4. Alleged violation of Article 12, paragraph 1

121. Article 12 of the ICSFT provides in part:

> "1. States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings.
>
> . . . . . .
>
> 5. States Parties shall carry out their obligations under paragraphs 1 and 2 in conformity with any treaties or other arrangements on mutual legal assistance or information exchange that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law."

* *

122. Ukraine contends that the Russian Federation has violated its obligations under Article 12, paragraph 1, of the ICSFT by failing to provide any assistance in relation to Ukraine's investigations of terrorism financing offences. Ukraine relies upon at least 12 requests for legal assistance received by the Russian Federation from Ukraine. The Applicant takes the position that it was not required, in these requests, to specifically refer to the ICSFT and submits that the Russian Federation was aware that Ukraine was seeking assistance related to terrorism financing.

123. Ukraine states that the Russian Federation has cited supposed "procedural formalities" and "technicalities" as reasons to withhold assistance. It also questions the Russian Federation's refusal to provide legal assistance on grounds of sovereignty and security, arguing that the Respondent was required to explain its reasons for refusal in more detail than it did and that its invocation of these exceptions was made in bad faith. Additionally, Ukraine highlights the lengthy delays of the Russian Federation in responding to its requests for mutual legal assistance, which it argues further demonstrate the bad faith of the Respondent and constitute a breach of its obligations under Article 12.

*

124. The Russian Federation, for its part, denies any violation of its obligations under Article 12, paragraph 1. It considers that the provision only applies where there are ongoing investigations and criminal proceedings, where those proceedings concern allegations that amount

to an offence under Article 2 of the ICSFT, and where there are no reasons to deny mutual legal assistance under applicable treaties or legal arrangements between the parties. The Respondent argues that the requests for assistance referred to by Ukraine did not mention or relate to the offence of terrorism financing under Article 2 of the ICSFT, but instead pertained to distinct offences under Ukrainian law.

125. The Russian Federation submits that it rejected or postponed the performance of Ukraine's requests either because Ukrainian authorities failed to comply with applicable treaty requirements, including the translation of documents into the Russian language, or because the requests posed a risk to sovereignty or security. Finally, the Respondent considers that it was not required to provide a detailed explanation for its refusal of certain Ukrainian requests in light of the practice of both Parties of invoking sovereignty or security reasons to deny requests for legal assistance without a detailed explanation.

* *

126. Article 12 of the ICSFT requires States parties to the ICSFT to assist other States parties in their investigations into terrorism financing. In its oral arguments, the Applicant stated that, according to its data, 91 requests for legal assistance were made of the Russian Federation between 2014 and 2020, of which only 29 were executed. The Respondent, for its part, submits that, during the same period, Russian authorities in fact received 814 requests for legal assistance from Ukraine, of which 777 were fully executed. The Court is unable, based on the evidence before it, to verify the contentions of either Party. It may only assess those requests for legal assistance that were submitted to the Court, which are limited to the 12 above-mentioned requests made between September 2014 and November 2017.

127. The Court will now consider whether the evidence demonstrates that the Russian Federation failed to comply with its obligations under Article 12 with respect to these 12 requests for legal assistance. The Court must first determine whether the requests fall within the scope of Article 12. In this regard, the Court recognizes that States possess significant discretion in implementing the ICSFT into their domestic law. All that is necessary for an investigation to fall within the scope of Article 12 is that the subject-matter of the investigation pertain to offences covered by Article 2 of the ICSFT. The Court therefore does not consider that the ICSFT itself must be specifically mentioned in a request for legal assistance for the obligation under Article 12 to come into operation.

128. Of the 12 requests for legal assistance that have been submitted by Ukraine, only three involved investigations into the provision of funds to persons or organizations alleged to have engaged in the commission of predicate acts. These were the requests for legal assistance sent by Ukraine to the competent Russian authorities on 11 November 2014, 3 December 2014 and 28 July 2015, all of which concerned allegations that citizens of the Russian Federation were involved in fundraising for the DPR or LPR. The other nine requests for legal assistance concerned either allegations of the commission of possible predicate acts or allegations relating to the provision of means used to commit such acts, including the supply of weapons, ammunition and military equipment. In accordance with the Court's interpretation of Article 1, such conduct does not fall within the scope of Article 2 of the ICSFT and the requests containing such allegations therefore

cannot give rise to a violation by the Russian Federation of its obligations under Article 12. The Court will therefore limit its analysis to whether the Respondent fulfilled its obligations under Article 12 with respect to the aforementioned three requests for legal assistance.

129. The Court observes that, pursuant to Article 12, paragraph 5, of the ICSFT, the obligations under paragraph 1 of Article 12 must be carried out in conformity with other treaties of mutual legal assistance in force between the relevant States parties. Applicable treaties in the present case include the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters of 22 January 1993.

130. The requests for legal assistance of 11 November 2014 and 3 December 2014 both involved allegations that members of the Russian State Duma were engaged in raising funds for the LPR and had posted public announcements online for that purpose. The request of 28 July 2015 contained allegations that the Chief of the General Staff of the Russian armed forces was implicated in the financing of "extra-legal armed groups" operating in eastern Ukraine and in the establishment of the DPR and LPR. However, none of the three requests described in any detail the commission of alleged predicate acts by the recipients of the provided funds. Nor did they indicate that the alleged funders knew that the funds provided would be used for the commission of predicate acts (see paragraph 64 above). Accordingly, the Court considers that the requests for legal assistance cited by Ukraine did not give rise to an obligation by the Russian Federation under Article 12 of the ICSFT to afford Ukraine "the greatest measure of assistance" in connection with the criminal investigations in question. In view of the above finding, the Court is not required to determine whether the Russian Federation's refusal of these requests for legal assistance fell within the permissible grounds for denying such assistance under the mutual legal assistance treaties in force between the Parties.

131. For the aforementioned reasons, the Court concludes that it has not been established that the Russian Federation has violated its obligations under Article 12, paragraph 1, of the ICSFT. Ukraine's claim under Article 12 of the ICSFT therefore cannot be upheld.

5. Alleged violation of Article 18, paragraph 1

132. Article 18, paragraph 1, of the ICSFT, reads as follows:

> "States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, inter alia, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:
>
> *(a)* Measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2;
>
> *(b)* Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts

are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:

(i) Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions;

(ii) With respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity;

(iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith;

(iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international."

* *

133. Ukraine argues that Article 18, paragraph 1, of the ICSFT contains a wide-ranging obligation to "cooperate in the prevention of [terrorism financing] offences", which includes "taking all practicable measures . . . to prevent and counter preparations" for the commission of such offences. It contends that this provision is not limited to the adoption of a regulatory framework for the prevention of terrorism financing and submits that it incorporates the obligation to take all practicable measures to prevent offences under Article 2 of the ICSFT from taking place. The Applicant further emphasizes that this obligation applies to the commission of terrorism financing offences by both private persons and State officials. It maintains that Article 18 imposes an obligation to "cooperate" in the prevention of terrorism financing and that, accordingly, this obligation is violated by the failure to take such measures when they are called for, regardless of whether acts of terrorism financing ultimately occur.

134. In Ukraine's view, the Russian Federation violated its obligations under Article 18 by failing to take at least four "practicable measures" to prevent terrorism financing. First, Ukraine submits that the Russian Federation failed to take measures to prevent its State officials from financing terrorism. It argues that the Respondent failed to direct its officials to refrain from providing assets to groups known to commit acts of terrorism in Ukraine. Second, the Applicant

asserts that the Russian Federation took no steps to investigate private actors who were openly financing terrorism in eastern Ukraine or to prevent such financing from occurring. Third, Ukraine argues that the Russian Federation failed to take the practicable measure of policing its border to prevent the transfer of weapons or other forms of support to armed groups, despite Ukrainian requests for co-operation in border control. Finally, the Applicant alleges that the Russian Federation failed to monitor and disrupt financial and fundraising networks operating in Russian territory, including networks associated with the financing of the DPR and LPR.

*

135. The Russian Federation, for its part, contends that the obligations imposed by Article 18, paragraph 1, are far more limited than Ukraine suggests. In the view of the Respondent, this provision sets out only the obligation to create a regulatory framework aimed at blocking or hindering terrorism financing and providing for information sharing. It emphasizes that Article 18, paragraph 1, does not impose a strict obligation to prevent terrorism financing but only to "cooperate in the prevention of" offences under Article 2 of the ICSFT. The provision thus only imposes an obligation of conduct, not of result, that is fulfilled by a State party's adoption of a suitable regulatory framework. The Russian Federation also asserts that Article 18, paragraph 1, only imposes an obligation to prevent acts that actually constitute terrorism financing and that, accordingly, to uphold Ukraine's claim the Court must determine that acts of terrorism financing have taken place. In this regard, it relies on the Court's findings in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* that a breach of the obligation to prevent genocide requires that genocide has actually been committed *(Bosnia and Herzegovina* v. *Serbia and Montenegro)* (*I.C.J. Reports 2007 (I)*, p. 221, para. 431).

136. The Russian Federation denies Ukraine's claim that it has breached its obligations under Article 18, paragraph 1. It maintains that Ukraine has failed to establish that the provision of funds to the DPR and LPR constituted an offence under Article 2 of the ICSFT. Furthermore, it argues that Ukraine's claim fails because it concerns the provision of weapons, which are not "funds" under the ICSFT, and because Ukraine has failed to identify any failure by the Russian Federation to adopt a regulatory framework to prevent terrorism financing. Finally, the Respondent submits that, even if Article 18 were construed broadly and applied to the incidents alleged by Ukraine, it could at most impose a due diligence obligation to prevent the transfer of funds, which Ukraine has not shown to have been violated.

* *

137. The Court will begin by considering the scope of the obligation imposed by Article 18, paragraph 1. This provision obliges States parties to

> "cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, inter alia, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories".

138. The Court recalls its finding in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, which involved the interpretation and application of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention") (*(Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 43). In that case, the Court held that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed" (*ibid.*, p. 221, para. 431). In the Court's view, this finding does not apply in the context of Article 18 of the ICSFT. Unlike Article I of the Genocide Convention, which imposes the obligation to "prevent" a harmful act from occurring, the obligation under Article 18, paragraph 1, refers to the obligation to "cooperate in the prevention" of terrorism financing. The object of Article 18, paragraph 1, is to foster co-operation in the prevention of offences under Article 2, rather than to directly prevent the commission of those offences. Accordingly, the Court considers that it is not necessary to find that the offence of terrorism financing has been committed for a State party to have breached its obligations under Article 18, paragraph 1, of the ICSFT.

139. The Court will next examine the types of measures encompassed by Article 18, paragraph 1. The Court considers that the ordinary meaning of the term "all practicable measures" supports a broader reading of Article 18, paragraph 1, than the Respondent suggests. The provision, by its terms, encompasses all reasonable and feasible measures that a State may take to prevent the commission of the offence of terrorism financing under Article 2 of the ICSFT. Such measures include, but are not limited to, the adoption of a regulatory framework to monitor and prevent transactions with terrorist organizations.

140. The Court acknowledges that Article 18, paragraph 1, refers specifically to the obligation of States parties to the ICSFT to "adapt[] their domestic legislation". However, this reference to legislative measures is preceded by the term "inter alia", showing that it is only intended to be an example of the types of measures States are required to take, rather than a firm limit on the scope of the obligations imposed by Article 18. The Court also notes that Article 18 is the only article in the ICSFT that specifically mentions the "prevention" of terrorism financing offences. This context suggests that the phrase "all practicable measures" should not be interpreted too restrictively. Thus, the Court considers that Article 18, paragraph 1, encompasses a certain range of possible measures to prevent terrorism financing, including, but not limited to, legislative and regulatory measures.

141. The Court will now turn to consider Ukraine's submission that the Russian Federation has violated its obligations under Article 18, paragraph 1. The Court will examine each of Ukraine's arguments in turn.

142. The Court recalls that the first of Ukraine's arguments referred to above (paragraph 134) concerns the allegation that the Russian Federation failed to instruct its officials not to engage in terrorism financing. The Court recalls its finding in its 2019 Judgment that "all States parties to the ICSFT are under an obligation to take appropriate measures and to co-operate in the prevention and suppression of offences of financing acts of terrorism committed by whichever person" (*I.C.J. Reports 2019 (II)*, p. 585, para. 61). This includes actions taken to prevent terrorism financing by State officials (*ibid.*). At the same time, however, the Court also recalls its finding that "[t]he financing by a State of acts of terrorism is not addressed by the ICSFT" and consequently "lies outside the scope of the Convention" (*ibid.*, p. 585, para. 59). In essence, Ukraine requests that the

Court find that the Russian Federation violated its obligations under the ICSFT not because of actions taken by State officials in their individual capacity, but because of the Russian Federation's alleged policy of financing armed groups in eastern Ukraine. This request does not fall within the scope of Article 18 of the ICSFT and therefore cannot be upheld.

143. The Court will next address Ukraine's second argument, which concerns whether the Russian Federation breached its obligations under Article 18 by failing to investigate and prevent the financing of terrorism by private persons. With respect to the Russian Federation's alleged failure to investigate terrorism financing, the Court considers that these allegations are not covered by Article 18, but instead relate to Ukraine's claims of a violation of Articles 9, 10 and 12, which the Court has already addressed (see paragraphs 99-131 above). Moreover, as for Ukraine's argument that the Russian Federation took no steps to investigate private actors who were openly financing terrorism, the Court considers that Ukraine has not substantiated such allegations. Nor has Ukraine pointed to specific measures that the Russian Federation failed to take to prevent the commission of terrorism financing offences. Accordingly, the Court sees no basis for finding a violation of Article 18 as concerns the Russian Federation's alleged failure to investigate and prevent the financing of terrorism by private persons.

144. Regarding Ukraine's third argument, concerning the issue of the policing of the border between the Parties, the Court observes that Ukraine's evidence concerning the alleged flow of support for armed groups operating in Ukraine across the border is limited to allegations relating to the supply of weapons and ammunition. The Court recalls its finding that the supply of weapons and ammunition as a means for committing predicate acts falls outside the material scope of the ICSFT (see paragraph 53 above). In the circumstances, the Court finds no convincing evidence demonstrating a failure by the Russian Federation to take practicable measures to prevent the movement of "funds" into Ukraine for purposes of terrorism financing.

145. Finally, in relation to Ukraine's fourth argument, the Court will examine whether the Russian Federation violated its obligation under Article 18 by failing to monitor and disrupt certain fundraising networks operating in its territory and by declining to designate the DPR or LPR as extremist or terrorist in nature. With respect to the first component of Ukraine's argument, the Court recalls its finding that the Russian Federation had no reasonable grounds to suspect the funds in question were to be used for the purpose of terrorism financing and accordingly was under no obligation to freeze those funds (see paragraph 97 above). In the absence of such reasonable suspicion, the Russian Federation was likewise not obligated under Article 18 to restrict all funding for the DPR and LPR. With respect to the second component of Ukraine's argument, concerning the decision by the Russian Federation not to include the DPR and LPR on its list of known extremist and terrorist groups, the Court finds that, in the circumstances of this case, the Russian Federation was not under an obligation to designate a group as a terrorist entity under its domestic law, as a preventive measure.

146. In light of the foregoing, the Court concludes that it has not been established that the Russian Federation has violated its obligations under Article 18, paragraph 1, of the ICSFT. Ukraine's claim under Article 18 of the ICSFT therefore cannot be upheld.

6. General conclusions on the alleged violations of obligations under the ICSFT

147. On the basis of all the preceding considerations and findings, the Court concludes that the Russian Federation has violated its obligations under Article 9, paragraph 1, of the ICSFT.

C. Remedies

148. The Court recalls that, in respect of its claims under the ICSFT, Ukraine has requested, in addition to declaratory relief, the cessation by the Russian Federation of ongoing violations, guarantees and assurances of non-repetition, compensation and moral damages (see paragraph 27 above).

149. By the present Judgment, the Court declares that the Russian Federation has violated its obligations under Article 9, paragraph 1, of the ICSFT and continues to be required under that provision to undertake investigations into sufficiently substantiated allegations of acts of terrorism financing in eastern Ukraine.

150. The Court does not consider it necessary or appropriate to grant any of the other forms of relief requested by Ukraine.

III. The International Convention on the Elimination of All Forms of Racial Discrimination

151. The Court recalls that both Ukraine and the Russian Federation are parties to CERD. As the Court has already stated in its 2019 Judgment, the aspect of the Parties' dispute under CERD concerns allegations by Ukraine that the Russian Federation has breached its obligations under CERD through discriminatory measures taken against Crimean Tatars and ethnic Ukrainians in Crimea (see paragraph 30 above).

A. Preliminary issues under CERD

152. In addressing Ukraine's claims under CERD, the Court will first consider certain preliminary issues relevant to its decision on this aspect of the dispute.

1. Invocation of the "clean hands" doctrine in respect of CERD

153. The Russian Federation contends that the "clean hands" doctrine precludes Ukraine from making claims under CERD. The Russian Federation asserts that, since 1991, Ukraine has failed to protect certain ethnic groups in Crimea and that, prior to 2014, representatives of different ethnic groups, including Crimean Tatars, regularly protested against their situation in Crimea. The Respondent also asserts that, outside Crimea, Ukraine fails to protect certain ethnic groups from violence and hate speech, that objects of those groups' cultural heritage are being vandalized, and that some ethnic groups suffer from unemployment and lack of adequate housing. The Russian Federation further alleges that restrictions have progressively been imposed on the use of the Russian language and culture.

154. According to Ukraine, the Russian Federation seeks to distract from its own misconduct by asserting that Ukraine is mistreating ethnic minorities in its territory, including Crimean Tatars. Ukraine asserts that, before the Russian Federation's purported annexation, it undertook significant efforts to build a genuinely multi-ethnic society in Crimea. It maintains that the allegations by the Russian Federation that Ukrainians and the Ukrainian Government are oppressing Russian speakers are baseless. Finally, Ukraine underlines that the Russian Federation has refrained from raising any counter-claims challenging Ukraine's responsibility under the Convention. In its view, this omission demonstrates that the Russian Federation's invocation of the clean hands doctrine is not only false, but also legally irrelevant to the case.

* *

155. As indicated above, the Court does not consider that the "clean hands" doctrine is applicable in an inter-State dispute where the Court's jurisdiction is established and the application is admissible (see paragraph 38). Therefore, the Court cannot uphold the defence raised by the Respondent based on the "clean hands" doctrine with respect to Ukraine's claims under CERD.

2. Nature and scope of the alleged violations

156. The Parties disagree about the nature and scope of the alleged violations to be examined by the Court in the present case. The Court recalls that, in its 2019 Judgment, it stated that it would address, at the merits stage of the proceedings, "the question of whether the Russian Federation has actually engaged in the campaign of racial discrimination alleged by Ukraine, thus breaching its obligations under CERD" (*I.C.J. Reports 2019 (II)*, p. 606, para. 131).

* *

157. Ukraine contends that the Russian Federation has committed numerous individual violations of CERD which, taken together, constitute a pattern and practice of discriminatory conduct directed against the Crimean Tatar and Ukrainian ethnic communities in Crimea. According to Ukraine, the Court's 2019 Judgment does not exclude arguments that the Russian Federation has committed multiple violations of CERD which, viewed in the aggregate, constitute a campaign of racial discrimination. In its view, a "pattern of conduct" and "campaign of racial discrimination" by the Russian Federation violates CERD, as demonstrated by illustrative, individual instances of acts that also constitute racial discrimination. According to Ukraine, the many individual violations of CERD that Ukraine has demonstrated, when viewed as a whole, support the conclusion that the Russian Federation has engaged in a systematic campaign of discrimination.

158. The Russian Federation, for its part, submits that the present case is limited in scope. It maintains that Ukraine has not brought before the Court a case concerning discrete incidents constituting alleged violations of CERD by the Russian Federation, but rather a claim that the Russian Federation has engaged in a "systematic campaign of racial discrimination" against Crimean Tatar

and ethnic Ukrainian communities in Crimea. According to the Russian Federation, Ukraine tries to shift the focus of its claim to isolated and unconnected instances of alleged racial discrimination. However, in the Russian Federation's view, the Court's 2019 Judgment makes it plain that the sole claim that Ukraine may advance in this case is one of a "systematic racial discrimination campaign", and not allegations of individual instances of racial discrimination. It was, after all, because of the particular formulation of Ukraine's claim that the Court rejected the Russian Federation's objection to the admissibility of Ukraine's Application on the ground of non-exhaustion of local remedies.

* *

159. The Court considers that the disagreement between the Parties regarding the nature and scope of the alleged violations to be examined by the Court is more apparent than real. Both Parties agree that the 2019 Judgment is determinative. In the 2019 Judgment, the Court rejected the objection of the Russian Federation, based on the requirement of exhaustion of local remedies, to the admissibility of Ukraine's Application. The Court held that this requirement does not apply to the claim submitted to the Court by Ukraine because

> "Ukraine does not adopt the cause of one or more of its nationals, but challenges, on the basis of CERD, the alleged pattern of conduct of the Russian Federation with regard to the treatment of the Crimean Tatar and Ukrainian communities in Crimea" (*I.C.J. Reports 2019 (II)*, p. 606, para. 130).

160. At the same time, the Court noted "that the individual instances to which Ukraine refers in its submissions emerge as illustrations of the acts by which the Russian Federation has allegedly engaged in a campaign of racial discrimination" (*I.C.J. Reports 2019 (II)*, p. 606, para. 130).

161. Accordingly, the Court is not called upon to determine, in the operative part of its Judgment, whether violations of obligations under CERD have occurred in individual instances. This does not prevent the Court from examining, "as illustrations", any "acts by which the Russian Federation has allegedly engaged in a campaign of racial discrimination" (*I.C.J. Reports 2019 (II)*, p. 606, para. 130). In this regard, the Court notes that the expression "campaign of racial discrimination" has been used by Ukraine to characterize the Russian Federation's "overall pattern of conduct". In its 2019 Judgment, the Court found admissible Ukraine's claim alleging a "pattern of conduct" of racial discrimination by the Russian Federation (*ibid.*). This may relate to each category of violations alleged by Ukraine. In order to arrive at the conclusion that a pattern of racial discrimination has occurred, the Court must be satisfied, first, that a significant number of individual acts of racial discrimination within the meaning of Article 1, paragraph 1, of CERD have taken place, and, secondly, that these acts together constitute a pattern of racial discrimination.

3. Questions of proof

162. Having established the nature and scope of the alleged violations to be examined in the present case, the Court notes that the Parties disagree with respect to a number of facts. The Court

observes that the differences between the Parties relate less to the occurrence of certain factual situations than to the inferences to be drawn from them for the purpose of proving an act of racial discrimination and a "pattern" of racial discrimination.

163. The Court notes that the Parties disagree about various questions of proof. The Court will therefore address, in turn, the standard and methods of proof, and the weight to be given to certain forms of evidence, before applying the relevant rules of international law (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 53, para. 111; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 72, para. 167).

(a) ***Burden and standard of proof***

164. Ukraine submits that the Russian Federation provides no justification for departing from the Court's usual requirement of "sufficient" or "convincing evidence" to prove serious claims falling short of genocide. It argues that the high threshold applied by the Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* does not apply in the present case. While acknowledging that its allegations are serious in nature, Ukraine argues that the acts concerned are not of the same kind as those that were at issue in that Judgment. Ukraine further rejects the Russian Federation's assertion that Ukraine must meet a higher standard of proof as a result of Ukraine's characterization of the Russian Federation's conduct as a "systematic campaign" of racial discrimination.

165. Ukraine argues that it is not in a position to provide direct proof of certain facts owing to its lack of access to Crimea and that it should therefore be allowed a more liberal recourse to inferences of fact and circumstantial evidence, in accordance with the Court's Judgments in the *Corfu Channel (United Kingdom* v. *Albania)* and *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda)* cases. According to Ukraine, the Russian Federation has not only directly impeded Ukraine's ability to collect statistical data in Crimea, but it has also — in the words of the Committee on the Elimination of Racial Discrimination (hereinafter the "CERD Committee") — "refus[ed] . . . to discuss and respond to questions posed by the [CERD] Committee" on its conduct in Crimea.

*

166. According to the Russian Federation, Ukraine must meet a standard of proof that is appropriate to the gravity of its allegations. In its view, a claim that a State is involved in a systematic campaign of racial discrimination and cultural erasure is exceptionally grave. Citing the Court's Judgments in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* and the *Corfu Channel* cases, the Russian Federation contends that the gravity of Ukraine's claim — a "systematic racial discrimination campaign" — requires that the Applicant provide "proof at a high level of certainty appropriate to the seriousness of the allegation" that is "fully conclusive". It contends that the same standard applies for the attribution of such acts.

167. The Russian Federation further argues that the proposition that Ukraine lacks access to Crimea is irrelevant in this case, because statistical data is publicly available. It points out that, in the Court's jurisprudence, the consideration of circumstantial evidence requires a high standard of proof.

* *

168. The Court recalls the general principle that it is for the party alleging a fact to demonstrate its existence (see paragraph 79 above). Consequently, it is for Ukraine to demonstrate the existence of the facts alleged in support of its claims.

169. While the burden of proof rests in principle on the party which alleges a fact, this does not relieve the other party of its duty to co-operate "in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 163). The Court has also recognized that a State that is not in a position to provide direct proof of certain facts "should be allowed a more liberal recourse to inferences of fact and circumstantial evidence" (*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18). Bearing in mind some of the obligations in question and the circumstances of the present case, including the lack of access of Ukraine to Crimea, the Court considers that the burden of proof varies depending on the type of facts which it is necessary to establish (see *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 660-661, paras. 55-56).

170. The Court notes that the Parties disagree on the applicable evidentiary standard for proving a "pattern" of racial discrimination. It recalls that the standard of proof may vary from case to case, *inter alia*, depending on the gravity of the allegation (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 129-130, paras. 209-210). In cases involving allegations of massive human rights violations, the Court has previously required "convincing" evidence (see e.g. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 241, para. 210, and p. 249, para. 237). In the present case, the Court will assess whether there is convincing evidence when considering the allegations made by Ukraine under CERD.

171. The Court will therefore examine whether there is convincing evidence that individual acts of racial discrimination have taken place and, if so, whether these acts together constitute a "pattern" of racial discrimination (see paragraph 161 above).

(b) ***Methods of proof***

172. Responding to the Russian Federation's contention that it is necessary to prove its allegations with statistical data, Ukraine argues that neither the Court nor the CERD Committee have ever set forth a requirement for statistical data in order to prove discrimination under CERD. Ukraine further points out that the Ukrainian Government has been temporarily excluded from Crimea and is therefore in no position to compile statistics, although it has proffered such analyses where the data

exists. Moreover, Ukraine emphasizes that statistical comparisons offered by the Russian Federation are inconclusive. In its view, these comparisons do not indicate if a specific ethnic group was more frequently affected than others within a specific region, nor do they account for the qualitative significance of the impact on the ethnic group in question.

173. According to the Russian Federation, "differentiation in treatment" must be demonstrated by comparison using "statistical data". Regarding the weight to be attributed to the evidence presented, the Russian Federation is of the view that the evidence put forward by Ukraine stems from individuals who do not have first-hand knowledge of the situation in Crimea and that the reports by the Office of the High Commissioner for Human Rights (hereinafter the "OHCHR") on the situation in Crimea can hardly be treated as compelling evidence because the OHCHR has not visited Crimea to collect evidence first-hand, in spite of the Russian Federation's invitations to do so.

* *

174. In order to rule on Ukraine's allegations, the Court must assess the relevance and probative value of the evidence proffered by the Parties in support of their versions of the facts in relation to the different claims (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 74, para. 180; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 200, para. 58). The Court recalls that it has applied various criteria to assess evidence (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 55, para. 120; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 129-130, paras. 209-210). It considers that racial discrimination may be proved by statistical evidence that is reliable and significant, as well as by any other methods of reliable proof.

175. As to the weight to be given to certain kinds of evidence, the Court recalls that it

> "will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them *(Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains." (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 130-131, para. 213; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 55, para. 121.)

The Court has also stated that the probative value of reports from official or independent bodies

> "depends, among other things, on (1) the source of the item of evidence (for instance partisan, or neutral), (2) the process by which it has been generated (for instance an anonymous press report or the product of a careful court or court-like process), and (3) the quality or character of the item (such as statements against interest, and agreed or uncontested facts)" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 76, para. 190; see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 56, para. 122).

176. The Court will consider the probative value of such reports on a case-by-case basis, in accordance with these criteria.

177. Concerning statements by witnesses, the Court recalls that "witness statements which are collected many years after the relevant events, especially when not supported by corroborating documentation, must be treated with caution" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 63, para. 147). Moreover, the Court has noted that "any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness . . . cannot take the place of evidence" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 42, para. 68). In determining the probative value of evidence provided by a party, the Court also treats with caution statements by witnesses who are not disinterested in the outcome of the case, especially when not supported by corroborating documentation. In determining the evidentiary weight of any witness statement, the Court will take these considerations into account.

178. Finally, the Court has held that certain materials, such as press articles and extracts from publications, are regarded "not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e. as illustrative material additional to other sources of evidence" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 40, para. 62) or when they are "wholly consistent and concordant as to the main facts and circumstances of the case" (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 10, para. 13; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 204, para. 68). The Court sees no reason to depart from this approach when assessing the probative value of such materials.

4. Article 1, paragraph 1, of CERD

179. The Parties disagree about the meaning of "racial discrimination" as defined in Article 1, paragraph 1, of CERD.

* *

180. Ukraine submits that the definition of "racial discrimination" in Article 1, paragraph 1, of CERD comprises three elements: (i) a "distinction, exclusion, restriction or preference" that is (ii) "based on" a protected ground, namely race, colour, descent, or national or ethnic origin, and that (iii) has the "purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms".

181. According to Ukraine, the first element, the requirement of a "distinction, exclusion, restriction or preference", encompasses all forms of racial discrimination. It argues that this broad understanding is also supported by the *travaux préparatoires* of the Convention.

182. In Ukraine's view, the second requirement that discrimination be "based on" a protected ground is a broad concept encompassing not only restrictions that are expressly based on a protected ground, but also those that "directly implicate" a person or group on one or more of those grounds. In support of this interpretation, Ukraine points out that the CERD Committee has explained in its General Recommendation No. XIV that "the words 'based on' do not bear any meaning different from 'on the grounds of'". According to Ukraine, the fact that discriminatory conduct is also motivated by political reasons does not preclude such conduct from being "based on" a protected ground. The Applicant emphasizes that, if this were the case, a State could avoid responsibility under CERD by additionally asserting political reasons for its actions. Ukraine illustrates this argument by recalling that the deportation of the Crimean Tatars in 1944 was motivated by accusations of collaboration with Germany during World War II but that this measure would have had to be qualified as a distinction based on ethnic origin if CERD had been in force in 1944.

183. Regarding the third element, Ukraine argues that Article 1, paragraph 1, protects against conduct that can be demonstrated to have a discriminatory purpose, as well as effects-based discrimination. With respect to discriminatory purpose, Ukraine submits that such purpose may be deduced both from the stated purpose of a measure or inferred from circumstantial evidence. In its view, circumstantial evidence of racial animus may be drawn from the nature and context of a measure, or where a facially neutral measure targets in fact a protected group. Ukraine is of the view that there is no requirement that discrimination be intentional and that discrimination in effect — which it understands as being synonymous with the term "indirect discrimination" — is covered by Article 1, paragraph 1. Citing the CERD Committee's General Recommendation No. XIV on the definition of racial discrimination, Ukraine argues that a discriminatory effect exists if a facially neutral measure "results in a disproportionate prejudicial impact" or "has an unjustifiable disparate impact" on a protected group. In its view, a disparate impact is justifiable where it is based on a justification that is "legitimate" when "judged against the objectives and purposes of the Convention". This, in turn, requires that the relevant measure is necessary, has a legitimate aim and is proportionate, in that the expected benefit in furtherance of the legitimate aim outweighs any adverse impact on human rights.

184. Ukraine claims that the prohibition of racial discrimination under CERD is absolute and that no derogation from it is permitted, whether the measure in question is discriminatory in purpose or in effect. Ukraine argues that, to the extent that the Russian Federation asserts that national

security, anti-extremism or public order justify certain restrictions of substantive human rights, the Russian Federation has failed to meet the widely accepted legal requirements for such restrictions to be imposed.

*

185. The Russian Federation, in turn, contends that the term "racial discrimination" under Article 1, paragraph 1, of CERD contains four elements: (i) a "distinction, exclusion, restriction or preference" that is (ii) "based on" one or more criteria mentioned in Article 1, paragraph 1, having (iii) the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise (iv) on an equal footing, of human rights and fundamental freedoms.

186. The Russian Federation agrees that the definition contained in Article 1, paragraph 1, of CERD encompasses discriminatory purpose, as well as discriminatory effect. However, it argues that Ukraine's broad understanding of "indirect discrimination" should be rejected. According to the Russian Federation, Ukraine's definition of "indirect discrimination", as "equal treatment which has a disproportionate effect on a group defined by the enumerated grounds" or as a "disparate impact" arising from "inequality of results rather than inequality of treatment" is incompatible with the four elements which, in its view, define racial discrimination, as well as with the Court's Judgment in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*.

187. Regarding the first element, the Russian Federation emphasizes that the obligations under the Convention hinge upon "differential treatment", i.e. a "distinction, exclusion, restriction or preference". In its view, the concept of "indirect discrimination" as put forward by Ukraine is incompatible with this element since "equal treatment" cannot constitute racial discrimination.

188. With respect to the second element, the Russian Federation states that any differentiation of treatment must be "based on" one of the criteria enumerated in Article 1, paragraph 1, and that ethnicity cannot incorporate the protection of political opinions or religion. This means that "indirect discrimination" would only fall within the scope of CERD if the differential treatment "directly targeted or singled out Tatar and Ukrainian communities as such".

189. As for the third element, the Russian Federation accepts that racial discrimination by effect can constitute a violation of CERD, but it argues that Ukraine's broad understanding of "indirect discrimination" is not covered by the Convention. In its view, a disparity of results between ethnic groups does not by itself constitute racial discrimination, unless it is an objective consequence of a distinction, exclusion, restriction or preference based on race, colour, descent, national origin or ethnic origin. According to the Russian Federation, not every disparity amounts to racial discrimination, especially where such disparity is just a secondary or collateral effect of a measure. The Russian Federation stresses that a "disparate" effect only amounts to racial discrimination if it can be causally linked to an act of differential treatment on racial grounds.

190. With respect to the fourth element, the Russian Federation argues that the wording "nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms" makes it plain that there must be an actual nullification or impairment (i.e. a violation) of an existing right, and not a mere possibility thereof. In its view, the definition of racial discrimination within the meaning of Article 1, paragraph 1, therefore necessarily presupposes a violation of a human right protected under international law.

191. The Russian Federation finally argues that a measure does not qualify as discriminatory in effect if it can be "reasonably justified" or deemed legitimate in the circumstances. In its view, possible justifications include, among others, reasonable limitations to human or civil rights as may be necessary in a democratic society, provided for under the applicable law and subject to due process, in order to protect public order from acts of terrorism and extremism.

* *

192. The Parties disagree on the meaning of "racial discrimination" in Article 1, paragraph 1, of CERD as well as on whether any conduct of the Russian Federation qualifies as racial discrimination within the meaning of that provision. The Court will, at the outset, interpret the term "racial discrimination" under Article 1, paragraph 1, of the Convention to the extent that it is necessary to determine whether the Russian Federation has violated substantive or procedural obligations under CERD.

193. Article 1, paragraph 1, of CERD provides that

> "the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

194. The Convention prohibits all forms and manifestations of racial discrimination as set forth by this definition. Accordingly, any differentiation of treatment that is "based on" one of the prohibited grounds — race, colour, descent, or national or ethnic origin — is discriminatory in the sense of Article 1, paragraph 1, of the Convention, when the resulting impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms arises from its purpose or effect (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, pp. 108-109, para. 112).

195. "Racial discrimination" under Article 1, paragraph 1, of CERD thus consists of two elements. First, a "distinction, exclusion, restriction or preference" must be "based on" one of the prohibited grounds, namely, "race, colour, descent, or national or ethnic origin". Secondly, such a differentiation of treatment must have the "purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights".

196. Any measure whose purpose is a differentiation of treatment based on a prohibited ground under Article 1, paragraph 1, constitutes an act of racial discrimination under the Convention. A measure whose stated purpose is unrelated to the prohibited grounds contained in Article 1, paragraph 1, does not constitute, in and of itself, racial discrimination by virtue of the fact that it is applied to a group or to a person of a certain race, colour, descent, or national or ethnic origin. However, racial discrimination may result from a measure which is neutral on its face, but whose effects show that it is "based on" a prohibited ground. This is the case where convincing evidence demonstrates that a measure, despite being apparently neutral, produces a disparate adverse effect on the rights of a person or a group distinguished by race, colour, descent, or national or ethnic origin, unless such an effect can be explained in a way that does not relate to the prohibited grounds in Article 1, paragraph 1. Mere collateral or secondary effects on persons who are distinguished by one of the prohibited grounds do not, in and of themselves, constitute racial discrimination within the meaning of the Convention (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, pp. 108-109, para. 112).

197. When determining whether the Russian Federation has violated its obligations under CERD, the Court will be guided by the above interpretation of Article 1, paragraph 1, of CERD.

5. Crimean Tatars and ethnic Ukrainians as protected groups

198. According to Ukraine, both Parties agree that Crimean Tatars and ethnic Ukrainians in Crimea constitute ethnic groups protected under CERD and their differences over the precise definition of an ethnic group are legally irrelevant. Ukraine argues that a frequently observed characteristic of ethnic groups is a desire to live together within a common political State. Ukraine is of the view that the Court's Judgment in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)* does not preclude this position, since the question at issue in that case was the meaning of the term "national origin", rather than "ethnic origin".

199. The Russian Federation agrees that Crimean Tatars and ethnic Ukrainians constitute ethnic groups protected under CERD. However, the Russian Federation insists that there is no room in CERD for political views or political identification to be incorporated into the concept of "ethnic origin". Any such incorporation would distort this term beyond recognition, which in turn may diminish the effectiveness of the Convention as the "non-political and universal Convention" the drafters envisioned. According to the Russian Federation, the Court's Judgment in the case

concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)* indicated in no unclear terms that "references to 'origin' denote, respectively, a person's bond to a national or ethnic group at birth".

* *

200. The Court recalls that the Parties agree that Crimean Tatars and ethnic Ukrainians constitute ethnic groups protected under CERD (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 595, para. 95). It sees no reason to call this characterization into question. The Court observes in this context "that the definition of racial discrimination in the Convention includes 'national or ethnic origin"' and that "[t]hese references to 'origin' denote, respectively, a person's bond to a national or ethnic group at birth", as do "the other elements of the definition of racial discrimination, . . . namely race, colour and descent" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 98, para. 81). Accordingly, the political identity or the political position of a person or a group is not a relevant factor for the determination of their "ethnic origin" within the meaning of Article 1, paragraph 1, of CERD.

B. Alleged violations of Articles 2 and 4 to 7 of CERD

201. Before turning to the alleged violations of obligations under CERD, the Court recalls that its jurisdiction is limited by virtue of Article 22 of CERD to Ukraine's claims under that Convention. In the present case, the Court lacks jurisdiction to rule on alleged breaches of other obligations under international law, such as those deriving from other international human rights instruments. However, the fact that a court or tribunal does not have jurisdiction to rule on alleged breaches of those obligations does not mean that they do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, and they remain responsible for acts contrary to international law which are attributable to them (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 46, para. 86; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 52-53, para. 127).

1. Disappearances, murders, abductions and torture of Crimean Tatars and ethnic Ukrainians

202. Ukraine submits that the Russian Federation violated its obligations under CERD, in particular Articles 2, paragraph 1 *(a)* and *(b)*, 5 *(b)* and 6, by directly engaging in acts of physical violence against Crimean Tatars and ethnic Ukrainians in Crimea, by encouraging and tolerating such acts through its agents and, in any event, by failing to prevent and effectively investigate the alleged incidents.

203. Ukraine refers to 13 incidents of physical violence against named Crimean Tatars and ethnic Ukrainians as "illustrations" of what it considers to be the Russian Federation's "systematic pattern of violence and intimidation". These incidents include the murder of Reshat Ametov, and the abduction and torture of Mykhailo Vdovchenko, Andrii Shchekun, Anatoly Kovalsky, Aleksandr Kostenko and Renat Paralamov. Ukraine emphasizes that these instances are not exhaustive. In its view, the Russian Federation is responsible for all these incidents, whether they occurred before or after 18 March 2014.

204. According to Ukraine, the acts of physical violence of which it complains were based on a racial or ethnic distinction. In support of its assertion, Ukraine contends that the acts targeted prominent activists, thereby depriving the Crimean Tatar and ethnic Ukrainian communities respectively of current or potential future leaders. Ukraine argues that these acts were designed to force into submission ethnic groups presumed to be opposing the Russian occupation.

205. To substantiate its allegations, Ukraine relies on reports by intergovernmental and non-governmental organizations showing, in its view, that Crimean Tatars and ethnic Ukrainians have been particularly hard hit by such physical violence. Referring to UN reports, Ukraine argues that nine out of ten persons who have disappeared and who are still missing are either Crimean Tatar or ethnic Ukrainian. According to Ukraine, these reports prove not just discriminatory effect, but also discriminatory purpose. In response to the Russian Federation's argument that Ukraine has failed to supply statistical data, Ukraine maintains that it has provided statistical evidence and that more detailed statistics are not required to prove a CERD violation. Ukraine points out that the Russian Federation has failed to offer credible data refuting Ukraine's claims despite having unfettered access to the relevant data.

206. Ukraine also asserts that the Russian Federation violated Article 6 of CERD by failing to investigate the disappearances and other acts of physical violence. In support of its allegations, Ukraine mainly relies on witness statements and reports by intergovernmental organizations, in particular on two reports by the OHCHR.

*

207. The Russian Federation argues that Ukraine has not proved that any of the alleged incidents are attributable to the Russian Federation. The Respondent asserts that none of the incidents alleged by Ukraine can be linked to the ethnicity of the respective victims and that it has complied with its obligations to investigate all these incidents. It points out that even the UN reports relied on by Ukraine attributed the incidents to the political views of the victims, rather than to their ethnicity. The Russian Federation further argues that Ukraine cannot rely on incidents that allegedly occurred prior to what the Respondent calls the "reunification" of Crimea with the Russian Federation on 18 March 2014, since they are not within the Court's jurisdiction *ratione temporis* as defined in the 2019 Judgment.

208. The Russian Federation also contends that these incidents cannot validly be said to have disproportionally affected any ethnic group. In its view, these incidents are unconnected and isolated

and thus do not establish a pattern of physical violence directed against the Crimean Tatar and ethnic Ukrainian population. The Russian Federation argues that Ukraine has failed to provide a full-scale statistical analysis of the reported cases in comparison with other ethnic groups and with the population of Crimea as a whole. The Russian Federation refers to statistical information originating from the Office of the Russian Federation's Prosecutor General, which, in its view, proves that Crimean Tatars and ethnic Ukrainians were not disproportionately affected by disappearances. According to the Russian Federation, most of the disappeared persons in relation to whom criminal proceedings have been initiated are ethnic Russians, who account for almost 80 per cent of all missing persons in Crimea. The Russian Federation also emphasizes that the OHCHR reports relied on by Ukraine do not support its allegations and are, moreover, based on inadequate methodologies.

209. The Russian Federation also rejects the allegation of Ukraine that it violated its obligations under Article 6 of CERD by failing to investigate the alleged incidents of physical violence in a satisfactory manner. According to the Russian Federation, a proper criminal investigation is a matter of legal due process rather than achieving a particular result. The Respondent argues that Ukraine has not established the existence of any investigative irregularities. In support of its assertion, the Russian Federation provides documents which, in its view, prove that investigations were undertaken in a satisfactory manner.

210. The Russian Federation thus contends that its responsibility under CERD is not engaged by the incidents of physical violence alleged by Ukraine and that Ukraine's claims in this regard must be rejected.

* *

211. The Court notes that the Parties agree that several incidents of physical violence have occurred in Crimea since early March 2014. This includes the murder of Reshat Ametov in March 2014, the disappearances of Timur Shaimardanov and Seiran Zinedinov in May 2014, and the disappearance of Ervin Ibragimov in May 2016. Further, the Court takes note of reports by the OHCHR stating that "from 3 March 2014 to 30 June 2018 . . . at least 42 persons were victims of enforced disappearances" (OHCHR, Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine) (13 September 2017 to 30 June 2018), UN doc. A/HRC/39/CRP.4, para. 32; see also OHCHR, United Nations Human Rights Monitoring Mission in Ukraine, Briefing Paper: "Enforced Disappearances in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, Temporarily Occupied by Russian Federation", 31 March 2021, pp. 3-12). These reports also support Ukraine's allegations regarding the ill-treatment of abducted persons in Crimea, indicating that "[p]erpetrators have used torture and ill-treatment to force victims to self-incriminate or testify against others" (*ibid.*, p. 1; see also OHCHR, Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine) (22 February 2014 to 12 September 2017), UN doc. A/HRC/36/CRP.3 (25 Sept. 2017), para. 101).

212. The Court observes that it must determine whether an act of racial discrimination as defined in Article 1 of the Convention has occurred before it can decide whether the Russian

Federation has violated its obligations under Articles 2, paragraph 1 *(a)* and *(b)*, and 5 *(b)* of CERD. Therefore, the Court must first examine whether the acts of physical violence alleged by Ukraine constitute instances of racial discrimination within the meaning of Article 1, paragraph 1, of CERD.

213. The Court notes that Ukraine relies on two main arguments to substantiate its claim that the alleged acts of physical violence were based on the ethnic origin of the targeted individuals. First, with respect to the 13 alleged incidents of physical violence concerning named persons, Ukraine asserts that the targeted individuals were prominent Crimean Tatar and ethnic Ukrainian activists representing their respective ethnic communities. Secondly, Ukraine refers to reports of intergovernmental and non-governmental organizations to show that individuals affected by acts of physical violence in Crimea were disproportionately of Crimean Tatar and ethnic Ukrainian origin.

214. With respect to Ukraine's first argument, the Court observes that reports by the OHCHR confirm that several targeted persons were pro-Ukrainian activists, as well as members and affiliates of the *Mejlis* (OHCHR, Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine) (22 February 2014 to 12 September 2017), UN doc. A/HRC/36/CRP.3 (25 Sept. 2017), para. 81 and note 105 (Ametov), paras. 86, 98, 101 and 104; OHCHR, United Nations Human Rights Monitoring Mission in Ukraine, Briefing Paper: "Enforced Disappearances in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, Temporarily Occupied by Russian Federation", 31 March 2021, p. 8 (Shaimardanov, Zinedinov and Ibragimov)). The reports of intergovernmental organizations and other publications relied on by Ukraine further indicate that the victims were attacked for their political and ideological positions, in particular for their opposition to the March 2014 referendum held in Crimea and their support for the Ukrainian Government. For example, one report noted that these acts constituted "retaliation for their political affiliation or position" (*ibid.*, p. 1). Another report referred to "[c]ircumstances which may suggest political motives" (OHCHR, Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine) (22 February 2014 to 12 September 2017), UN doc. A/HRC/36/CRP.3 (25 Sept. 2017), para. 104). The Court recalls that the political identity or the political position of a person or a group is not a relevant factor for the determination of their "ethnic origin" within the meaning of Article 1, paragraph 1, of CERD (see paragraph 200 above). The Court therefore considers that the prominent political role and views of these persons within their respective communities do not, as such, establish that they were targeted on the basis of their ethnic origin.

215. The Court notes that, according to Ukraine's second argument, a large proportion of Crimean Tatars and ethnic Ukrainians were among the persons affected by physical violence, demonstrating discriminatory treatment based on ethnic origin. The limited statistical evidence furnished by Ukraine is mainly derived from reports of intergovernmental organizations (see paragraph 205 above). While the Court generally ascribes particular weight to reports by international organizations that are specifically mandated to monitor the situation in a given area (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 125, para. 360), it must also take into consideration the lack of access to Crimea of the Human Rights Monitoring Mission in Ukraine on whose observations the relevant reports are based (OHCHR, Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine) (22 February 2014 to 12 September 2017), UN doc. A/HRC/36/CRP.3 (25 Sept. 2017), paras. 2 and 35).

216. Bearing these considerations in mind, the Court observes that the above-mentioned reports confirm that physical violence in Crimea was not only suffered by Crimean Tatars and ethnic Ukrainians, but also by persons of Russian and Central Asian origin (OHCHR, Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine) (22 February 2014 to 12 September 2017), UN doc. A/HRC/36/CRP.3 (25 Sept. 2017), para. 102; OHCHR, Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine), 13 September 2017 to 30 June 2018, UN doc. A/HRC/39/CRP.4, para. 33; OHCHR, United Nations Human Rights Monitoring Mission in Ukraine, Briefing Paper: "Enforced Disappearances in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine, Temporarily Occupied by Russian Federation", 31 March 2021, p. 4).

217. The Court acknowledges that Ukraine is not in a position to provide further evidence owing to its lack of access to Crimea. However, even when allowing a more liberal recourse to inferences of fact and circumstantial evidence for that reason (see paragraph 169 above), the Court is not convinced by the evidence placed before it that Crimean Tatars and ethnic Ukrainians were subjected to acts of physical violence based on their ethnic origin. In fact, any disparate adverse effect on the rights of Crimean Tatars and ethnic Ukrainians can be explained by their political opposition to the conduct of the Russian Federation in Crimea and not by considerations relating to the prohibited grounds under CERD (see paragraph 196 above). Since the conditions set forth in Article 1, paragraph 1, of CERD are not met, it is not necessary for the Court to examine whether any of the acts in question are attributable to the Russian Federation, nor to determine the precise date on which the Russian Federation started to exercise territorial control over Crimea.

218. With respect to Ukraine's claim that the Russian Federation did not effectively investigate the acts of physical violence involving Crimean Tatar and ethnic Ukrainian persons, the Court recalls that Article 6 provides that

> "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention".

219. The Court observes that Article 6 constitutes a procedural safeguard for the prohibition of racial discrimination by establishing an obligation for States to provide effective protection and remedies through judicial and other State organs against any acts of racial discrimination. This obligation encompasses a duty to investigate allegations of racial discrimination where there are reasonable grounds to suspect that such discrimination has taken place. In this regard, a violation of Article 6 does not require that a violation of any of the substantive guarantees under CERD has occurred. Article 6 may also be violated if, in a given case, there were reasonable grounds to suspect that racial discrimination occurred and measures to effectively investigate the incident in question were not taken at the relevant time, even if these suspicions proved to be unfounded at a later stage.

220. The Court takes note of the Russian Federation's contention that it has conducted investigations into the incidents of physical violence alleged by Ukraine. At the same time, the Court observes that doubts regarding the effectiveness of these investigations have been expressed in

reports of intergovernmental organizations. For example, the OHCHR, in its report on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine) covering the period from 22 February 2014 to 12 September 2017, stated that

> "[t]he [contact] group [focusing on the disappearances] convened for the first time on 14 October 2014 in the presence of investigative authorities and the relatives of five missing Crimean Tatar men but achieved little beyond information-sharing and the decision to transfer the investigations to the central Investigation Department of the Russian Federation. Of the 10 disappearances mentioned, criminal investigations were still ongoing in only one case as of 12 September 2017. They were suspended in six cases due to the inability to identify suspects, and in three cases no investigative actions have been taken as the disappearances were allegedly not reported." (UN doc. A/HRC/36/CRP.3 (25 Sept. 2017), para. 103.)

However, the evidence does not establish that the Russian Federation failed to effectively investigate whether the acts complained of by Ukraine amount to racial discrimination. Ukraine has not demonstrated that, at the relevant time, reasonable grounds to suspect that racial discrimination had taken place existed which should have prompted the Russian authorities to investigate. Consequently, Ukraine has failed to substantiate its allegation that the Russian Federation has violated its duty to investigate under Article 6 of CERD.

221. The Court concludes that it has not been established the Russian Federation has violated its substantive or procedural obligations under CERD on account of the incidents of physical violence alleged by Ukraine.

2. Law enforcement measures, including searches, detentions and prosecutions

222. According to Ukraine, the Russian Federation violated CERD, in particular Articles 2, paragraph 1, 4, 5 *(a)* and 6, by singling out and subjecting both the Crimean Tatar leadership and the wider Crimean Tatar population to manifestly disproportionate law enforcement measures based on its anti-extremism laws, in particular in the form of arbitrary searches, detentions and prosecutions. It contends that the Russian Federation's anti-extremism laws are in themselves evidence of the discriminatory purpose of these law enforcement measures. In its view, the broad and vague character of these laws makes them prone to be abused to arbitrarily silence groups vulnerable to discrimination, such as ethnic minorities.

223. The Russian Federation maintains that it did not violate CERD through what it considers to be law enforcement measures adopted against members of the Crimean Tatar leadership and against certain other members of the Crimean Tatar community in response to extremist, separatist and terrorist activities in Crimea. It contends that its domestic legal framework on which the law enforcement measures are based, consisting of Federal Law No. 114-FZ of 25 July 2002 "On counteracting extremist activities" (hereinafter the "Anti-Extremism Law"), Federal Law No. 35-FZ of 6 March 2006 "On combatting terrorism" (hereinafter the "Anti-Terrorism Law") and the Decree of the Head of the Republic of Crimea No. 26-U of 30 January 2015 "On approval of the Comprehensive Plan countering the ideology of terrorism in the Republic of Crimea, for 2015-2018", complies with the standards enshrined in many international legal instruments.

* *

224. The Court will first determine whether the law enforcement measures taken by the Russian Federation constitute acts of racial discrimination in the sense of Article 1, paragraph 1, of CERD before deciding whether the Respondent has violated its obligations under the Convention to prevent, protect against and remedy such acts.

225. Accordingly, the Court will first consider the question of whether the legislation adopted by the Russian Federation in itself constitutes racial discrimination, and then turn to the allegations concerning the application of such legislation. In this regard, the Court takes note of Ukraine's claim that the measures undertaken by the Russian Federation were based on anti-extremism legislation which, according to Ukraine, is in itself evidence of racial discrimination.

226. The Court notes that the conformity of the relevant laws of the Russian Federation, in particular the provisions on "extremist activities", with the human rights obligations of that State has been called into question by international judicial and monitoring bodies. In this regard, it notes that the European Court of Human Rights (hereinafter the "ECtHR") found that

> "the extremely broad definition of 'extremist activities' in section 1 of [the Anti-Extremism Law] which does not require any elements of violence or hatred opens up the possibility of having individuals and organisations prosecuted on extremism charges for entirely peaceful forms of expression or worship, such as those pursued by the applicants in the instant case. That broad definition of 'extremism' not only could — and did — lead to arbitrary prosecutions, but also prevented individuals or organisations from being able to anticipate that their conduct, however peaceful and devoid of hatred or animosity it was, could be categorised as 'extremist' and censured with restrictive measures." (ECtHR, *Taganrog LRO and Others* v. *Russia*, Apps. Nos. 32401/10 and 19 others, Judgment (merits and just satisfaction) of 7 June 2022, paras. 158; ECtHR, *Ibragim Ibragimov and Others* v. *Russia*, Apps. Nos. 1413/08 and 28621/11, Judgment of 28 August 2018, para. 85.)

227. The Court further takes note of the Opinion of the Venice Commission of the Council of Europe according to which the Anti-Extremism Law, "on account of its broad and imprecise wording", gives "too wide discretion in its interpretation and application, thus leading to arbitrariness" and carries "potential dangers to individuals and NGOs" and "can be interpreted in harmful ways" (European Commission for Democracy through Law (Venice Commission), Revised Draft Opinion on the Federal Law "On combating extremist activity" of the Russian Federation, doc. CDL(2012)011rev, 1 June 2012, paras. 77-78).

228. The Court observes that it is not called upon to review the compatibility of the domestic legislation of States parties to CERD with their international human rights obligations generally. Instead, the Court's role is limited to examining whether such legislation either has the purpose of differentiating between persons or groups of persons distinguished by one of the prohibited grounds contained in Article 1, paragraph 1, of CERD, or is likely to produce a disparate adverse effect, in this case, on the rights of Crimean Tatars or ethnic Ukrainians.

229. In this regard, no evidence has been put before the Court which would suggest that the purpose of the relevant domestic law is to differentiate between persons, based on one of the prohibited grounds contained in Article 1, paragraph 1, of CERD. Instead, the above-referenced domestic legal framework regulates the prevention, prosecution, and punishment of certain broadly defined criminal offences. Moreover, Ukraine has not provided evidence that this legal framework is likely to produce a disparate adverse effect on the rights of Crimean Tatars or ethnic Ukrainians. Therefore, the Court is of the view that the domestic legal framework in and of itself does not constitute a violation of CERD. However, this finding is without prejudice to the question whether the application of such domestic legislation is in breach of obligations under CERD. The Court notes that both Parties distinguish between the application of these domestic laws to the wider Crimean Tatar population, on the one hand, and to persons forming part of the Crimean Tatar leadership, on the other. It will therefore address these two categories separately and in turn.

(a) ***Measures taken against persons of Crimean Tatar origin***

230. Ukraine argues that the Russian Federation has subjected the wider Crimean Tatar community to arbitrary searches and detentions in order to unsettle the entire community. According to Ukraine, since the referendum in March 2014, these practices have included conducting searches of Crimean Tatar mosques, schools and private homes, which have continued after the filing of the Application by Ukraine. It claims that these searches have been based mainly on allegations of religious extremism, which had not been part of the history of Crimea before its control by the Russian Federation, suggesting that they are a pretext for discrimination. Ukraine also points to "blockades" of roads leading to villages, to searches of public spaces including markets, restaurants and cafés favoured by Crimean Tatars, and to the targeting of Crimean Tatars on the basis of their appearance.

231. To substantiate its claim that these acts amount to racial discrimination, Ukraine refers to United Nations General Assembly resolution 75/192, reports by the United Nations Secretary-General, reports by the OHCHR, observations by the CERD Committee, statements by intergovernmental organizations and reports by non-governmental organizations.

232. Ukraine asserts that the Russian Federation's compliance with its own domestic law does not justify the acts of which the Applicant complains, and that these laws are in themselves evidence of racial discrimination. It emphasizes that international courts and monitoring bodies have expressed concern that these laws do not contain clear and precise criteria for defining "extremist" conduct.

233. Ukraine maintains that, in any event, the application by the Russian Federation of its domestic law was discriminatory. In this regard, Ukraine points out that the measures of the Russian Federation against "religious" extremism, including against members of Hizb-ut Tahrir or Tablighi Jamaat, were pretextual and disproportionately affected the predominantly Muslim Crimean Tatar community. Ukraine also argues that the Russian Federation violated Article 4 by targeting Crimean Tatars as religious extremists, thereby fuelling mutual distrust between ethnic communities and making racial discrimination more likely.

*

234. With respect to Ukraine's allegations concerning a pattern of discriminatory searches and detentions against the wider Crimean Tatar population, the Russian Federation maintains that these measures were mostly directed against "religious extremism", "Muslim radicalism" and "Islamic terrorism", and were not based on the ethnic origin of the Crimean Tatar community. In its view, the said measures were based on objective and reasonable grounds and taken in accordance with the applicable domestic law, excluding any possibility of racial discrimination under CERD. The Russian Federation underlines that the relevant legislation, such as the Anti-Extremism Law and the Anti-Terrorism Law, complies with international law, in particular with human rights standards.

235. The Russian Federation maintains that the evidence relied on by Ukraine lacks probative value. With respect to measures adopted against members of Hizb-ut Tahrir or Tablighi Jamaat, the Russian Federation points out that these are justified and constitute legitimate limitations and that the ECtHR has confirmed the legality of the ban of these organizations, in other countries as well as in the Russian Federation. It contends that the fact that some of the persons subjected to searches and detentions were Crimean Tatars is not sufficient to establish racial discrimination. Rather, it argues that the domestic legal framework concerning suspected extremist activities and banned organizations is applied in the same way to everyone, including non-Crimean Tatar individuals and organizations, and that a differentiation of treatment based on ethnic origin cannot thus be established. The high number of Crimean Tatars concerned is, according to the Russian Federation, a reflection of the fact that Muslims in Crimea mostly happen to be Crimean Tatars, and not ethnic Russians or ethnic Ukrainians. The Respondent points out that religious extremism had been identified as a security concern in Ukraine before the referendum in March 2014.

236. The Russian Federation asserts that the fact that Ukraine only referred to Crimean Tatars and not to ethnic Ukrainians in its allegations of racially-discriminatory law enforcement measures demonstrates that such measures were not based on unlawful distinctions on the grounds of ethnic origin, but served to fight extremism in Crimea in accordance with the law.

* *

237. The Court begins by emphasizing that law enforcement measures that are applied to persons or groups solely on the basis of an assumption that they are prone to commit certain types of criminal offences because of their ethnic origin are unjustifiable under CERD. In the present case, Ukraine has provided evidence suggesting that persons of Crimean Tatar origin have been particularly exposed to law enforcement measures taken by the Russian Federation. The Court must therefore examine whether these measures had either the purpose of targeting Crimean Tatars or a disparate adverse effect on the rights of members of this group.

238. In this regard, the Court attributes considerable weight to reports of several UN organs and monitoring bodies according to which the measures in question disproportionately affected Crimean Tatar persons. This is the case, in particular, with respect to reports by the United Nations

Secretary-General and the OHCHR, which state that "Crimean Tatars were disproportionately subjected to police and FSB raids of their homes, private businesses or meeting places, often followed by arrests" (OHCHR, Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine) (13 September 2017 to 30 June 2018), UN doc. A/HRC/39/CRP.4 (21 Sept. 2018), para. 31; see also United Nations, General Assembly, Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, Report of the Secretary-General, doc. A/74/276 (2 Aug. 2019), para. 18). The disproportionate number of persons of Crimean Tatar origin who were subjected to abusive raids has been reported by the Commissioner for Human Rights of the Council of Europe. Moreover, the Court notes that the United Nations General Assembly, in its resolution 75/192 concerning the "Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine", stated that it was

> "[d]eeply concerned about continued reports that the law enforcement system of the Russian Federation conducts searches and raids of private homes, businesses and meeting places in Crimea, which disproportionally affect Crimean Tatars".

In light of these materials, the Court finds that Ukraine has sufficiently demonstrated that the law enforcement measures concerned produced a disparate adverse effect on the rights of persons of Crimean Tatar origin. It is therefore necessary to consider whether such effect can be explained in a way that does not relate to the prohibited grounds in Article 1, paragraph 1, of CERD (see paragraph 196 above).

239. The Court notes that the Russian Federation has described the circumstances that motivated the law enforcement measures taken against persons of Crimean Tatar origin in certain individual cases. In this regard, the Court observes that the Russian Federation justifies many of the law enforcement measures as being part of its fight against religious "extremism" and "terrorism". The Russian Federation links a large number of its law enforcement measures to the affiliations of the persons concerned with religious groups that have been banned throughout the Russian Federation and in other countries, and recalls that the bans of these organizations have been considered lawful by international judicial bodies.

240. With respect to other individual cases, the Russian Federation points to circumstances which, in its view, gave rise to the belief that the persons in question were involved in criminal activities, notably attacks on law enforcement officials, disrupting the public order, trading in stolen goods, weapons, ammunition and drugs, and extorting money. Other measures were, according to the Russian Federation, undertaken as part of a "large-scale strategic training exercise" which was conducted at six different locations at the same time across the whole territory over which the Russian Federation exercises control. With respect to some searches, the Russian Federation cites "public health" concerns linked to the sale of spoilt food.

241. The Court notes that the stated purpose of certain measures appears to have served as a pretext for targeting persons who, because of their religious or political affiliation, the Russian Federation deems to be a threat to its national security. However, the Court is of the view that Ukraine has not presented convincing evidence to establish that persons of Crimean Tatar origin were subjected to such law enforcement measures based on their ethnic origin. Therefore, the Court does not consider that these measures are based on the prohibited grounds contained in Article 1, paragraph 1, of CERD.

242. With respect to Ukraine's claim that the Russian Federation violated Article 4 of CERD, the Court notes that Article 4 *(a)* and *(b)* requires States parties to adopt immediate and effective measures for the prevention, eradication and punishment of speech that seeks to promote or justify racial hatred or to incite discrimination based on one or more of the prohibited grounds contained in Article 1, paragraph 1. Moreover, Article 4 *(c)* specifically provides that States parties shall not permit "public authorities or public institutions, national or local, to promote or incite racial discrimination". However, in the present case, the Court is not convinced that Ukraine has presented convincing evidence that statements have been made by State officials of the Russian Federation that were directed against Crimean Tatars based on their ethnic or national origin. Nor did Ukraine prove its allegation that the Russian Federation failed to comply with its obligation to prevent, eradicate and punish speech by private persons seeking to promote or justify racial hatred against Crimean Tatars and ethnic Ukrainians based on their national or ethnic origin.

243. Turning to Ukraine's claims that the Russian Federation violated Article 6 by failing to investigate effectively allegations of discriminatory law-enforcement measures taken against Crimean Tatars and ethnic Ukrainians, the Court considers that Ukraine failed to demonstrate that there were, at the relevant time, reasonable grounds to suspect that racial discrimination had taken place, which should have prompted the Russian authorities to investigate (see paragraphs 219-220 above). Therefore, the Court is not persuaded that Ukraine has established that the Russian Federation violated its obligation to investigate.

244. For these reasons, the Court is not convinced that the Russian Federation has engaged in law enforcement measures that discriminate against persons of Crimean Tatar origin based on their ethnic origin.

(b) ***Measures taken against the*** **Mejlis**

245. As far as persons belonging to the Crimean Tatar leadership are concerned, Ukraine asserts that the Russian Federation has restricted the movements of Crimean Tatar leaders, banning them from entering Crimea or preventing them from leaving Crimea. Ukraine further contends that the Russian Federation took measures against the *Mejlis* and its leaders prior to the ban on the *Mejlis* in April 2016, including searching its building and seizing assets from entities associated with it. Ukraine adds that the Russian Federation has resorted to discriminatory prosecutions and convictions of certain *Mejlis* leaders, including two of its Deputy Chairmen, namely Akhtem Chiygoz, for his participation in a demonstration in front of the Crimean Parliament building on 26 February 2014, and Ilmi Umerov, on charges of separatism. Ukraine alleges that both were mistreated in detention before being released. According to Ukraine, the measures taken against these leading figures of the Crimean Tatar community served "to intimidate the wider Crimean Tatar community" and to deprive them of their political leadership and their ability to advocate for their rights. To substantiate its claim that these acts amount to racial discrimination, Ukraine points to reports by intergovernmental and non-governmental organizations and to witness statements of the individuals concerned. Moreover, Ukraine asserts that, rather than protecting the Crimean Tatar and ethnic Ukrainian communities from racial discrimination, the courts have actively participated in the discriminatory conduct by convicting Crimean Tatar leaders on "trumped-up" charges. In the Applicant's view, the Russian Federation has thus also violated its obligations under Article 6 of CERD.

246. The Russian Federation argues that these measures adopted against the *Mejlis* and persons belonging to the Crimean Tatar leadership were taken in application of its own domestic law, were directed against political extremism and separatism and were thus not based on ethnic origin. With respect to the restrictions on the movements of Crimean Tatar leaders, the Russian Federation argues that entry to Crimea was validly denied to some individuals on the ground that they were not Russian citizens and that CERD does not apply to distinctions between citizens and non-citizens. With respect to the remaining cases, the Russian Federation submits that Ukraine has failed to establish that these restrictions were based on the ethnic origin of those involved. Regarding the measures taken against the *Mejlis* and against persons and organizations affiliated with the *Mejlis* prior to its ban, the Russian Federation argues that these were based on the non-compliance with the law by the person or entity concerned and not on ethnic grounds. The Russian Federation maintains that the retroactive prosecutions and convictions of Akhtem Chiygoz, Ilmi Umerov and others relating to demonstrations on 26 February 2014 were not based on ethnic grounds, but on the involvement of those persons in extremist activities and in undermining "the territorial integrity of the Russian Federation". The Russian Federation rejects Ukraine's allegation that the individuals in question were mistreated during their detention. The Respondent also maintains that the measures adopted against members of the *Mejlis* were based on objective and reasonable grounds, complied with the standard procedure applicable in such cases, and had nothing to do with racial discrimination.

* *

247. The Court notes that the Russian Federation does not contest the occurrence of the alleged measures taken against the *Mejlis* prior to its ban and against Crimean Tatar leaders, but disputes that they constitute acts of racial discrimination within the scope of Article 1, paragraph 1, of CERD. According to the Russian Federation, these measures were not based on the ethnic origin of the persons concerned, but rather on their involvement in what the Russian Federation considers to be "extremist" and "separatist" conduct.

248. The Court recalls that the fact that targeted persons belong to the leadership of an ethnic group does not, in and of itself, suffice to establish that measures which adversely affect such persons amount to racial discrimination (see paragraph 214 above). Ukraine would also need to demonstrate that the relevant measures were "based on" the ethnic origin of the persons or the ethnically representative character of the institutions subjected to these measures. The Court considers that the context in which the measures were taken indicates that they were in response to the political opposition that these persons and institutions displayed against the exercise of territorial control by the Russian Federation in Crimea.

249. In the Court's view, Ukraine has not substantiated the claim that Crimean Tatar leaders who had engaged in political opposition against the control of Crimea by the Russian Federation were disproportionately affected by law enforcement measures compared with other persons who were engaged in similar conduct. The Court thus considers that the measures concerned were not based on the ethnic origin of the targeted persons and thus do not fall within the scope of Article 1, paragraph 1, of CERD.

250. The Court notes Ukraine's allegation that the measures taken against the Crimean Tatar leadership served to intimidate and unsettle the entire Crimean Tatar population. Ukraine invokes witness statements and reports by intergovernmental and non-governmental organizations in support of that allegation. The Court recalls its observation that witness statements which are collected many years after the relevant events, especially when not supported by corroborating documentation, must be treated with caution (see paragraph 177 above). Given their lack of specificity with respect to that allegation by Ukraine, the Court finds that the reports relied on by Ukraine are of limited value in confirming that the relevant measures are of a racially discriminatory character.

251. Taking all these considerations into account, the Court concludes that it has not been established that the measures taken by the Russian Federation against the members of the *Mejlis* were based on the ethnic origin of the persons concerned.

3. Ban on the *Mejlis*

252. Ukraine alleges that the Russian Federation violated CERD, in particular its Articles 2, paragraph 1 *(a)*, 4, 5 and 6, by imposing a ban on the *Mejlis* on 26 April 2016.

253. Ukraine argues that the *Mejlis* was the representative body of the Crimean Tatars. It contends that the *Mejlis*, a body indirectly elected by the entire Crimean Tatar population, has long been recognized by international organizations as representing the Crimean Tatar population. In its view, none of the alternative bodies referred to by the Russian Federation share its legitimacy and representativeness. In response to the Russian Federation's claim that the Crimean Tatar population and other Crimean Tatar institutions have distanced themselves from the *Mejlis* and expressed support for the ban, Ukraine argues that these institutions either do not possess the same electoral legitimacy or have been installed by the Russian Federation's "occupation authorities" in order to undermine the *Mejlis*. The Applicant also emphasizes that, in its Order on provisional measures, the Court recognized that none of these organizations can claim the same role as the *Mejlis* as the legitimate representative institution of the Crimean Tatar people.

254. In Ukraine's view, the ban on the *Mejlis* forms part of a sustained campaign aimed at dismantling the Crimean Tatar community's central political and cultural institution. Ukraine argues that its claim is not premised on the argument that CERD grants minorities a right to a representative body. Rather, it asserts that, first, the ban on the *Mejlis* exemplifies the Russian Federation's concerted discriminatory attack on the political and civil rights of Crimean ethnic groups, including the rights to equal treatment before tribunals, freedom of opinion and expression, and freedom of association and of peaceful assembly, and, secondly, that the ban on the *Mejlis* indicates that the Crimean Tatar community itself is being singled out for discriminatory treatment.

255. According to Ukraine, the Russian Federation cannot justify the ban on the *Mejlis* on grounds of national security. Ukraine claims that the prohibition of racial discrimination is absolute and, accordingly, cannot be justified on the basis of the Russian Federation's domestic law. Ukraine

asserts that even if CERD allows for restrictions based on national security reasons, the ban did not comply with the strict requirements for such restrictions. Relying on expert reports, Ukraine argues that the Russian Federation's domestic anti-extremism laws as such have a discriminatory impact. It maintains that the outright ban on the *Mejlis* was, in any event, disproportionate. It contends that it targets the Crimean Tatar community, relying on a statement by the OHCHR according to which the ban could be perceived as a collective punishment against the Crimean Tatar community. Ukraine also cites statements by the United Nations General Assembly, the CERD Committee, and the European Parliament calling for a lifting of the ban.

256. Ukraine maintains that the reasons given for the ban on the *Mejlis* are without any factual basis. In its view, that ban was a collective punishment of the Crimean Tatar people for opposing the Russian Federation's aggression. It rejects the Russian Federation's assertion that the *Mejlis* has historically been an extremist group, highlighting instead the lingering effects of the persecution of the Crimean Tatar people by Stalin in 1944. Moreover, Ukraine points out that the *Mejlis* has never been banned by the Ukrainian Government. Ukraine maintains that the allegations of extremist and violent activities attributed by the Russian Federation to the *Mejlis* are factually inaccurate and pretextual. Specifically with respect to the 2015 "civil blockade", Ukraine argues that the blockade was a peaceful and principled protest which was open to the public, which took place within the territory of Ukraine and which was directed against Ukrainian legislation that was understood as facilitating trade with Crimea. Ukraine asserts that, in any event, the blockade does not justify a ban on the *Mejlis* because the *Mejlis* did not initiate, organize or participate in the blockade. In its view, the participating *Mejlis* members, Mr Chubarov and Mr Dzhemilev, did so in their personal capacity. Moreover, Ukraine points out that all the attempts undertaken by members of the *Mejlis* to achieve a lifting of the ban have failed.

257. In Ukraine's view, the ban of the *Mejlis* forms part of the Russian Federation's "disinformation campaign" designed to dismantle the Crimean Tatar community's central political and cultural institution and to vilify Crimean Tatars and thus violates Article 4. Ukraine further alleges that the courts of the Russian Federation participated in the discriminatory conduct by brushing off applications by Crimean Tatar litigants seeking review of the ban of the *Mejlis* and that the Russian Federation therefore also violated its obligation under Article 6 of CERD.

*

258. The Russian Federation, for its part, contends that the ban on the *Mejlis* does not violate CERD.

259. The Russian Federation argues that its ban on the *Mejlis* was not directed at the Crimean Tatar community as such. In its view, the *Mejlis* has never been, *de jure* or *de facto*, the representative body of the Crimean Tatars in Crimea, but rather an executive body responsible to the Qurultay. The Respondent points out that the Crimean Tatar community is represented by many organizations and associations in Crimea. It emphasizes that among all existing institutions, organizations and

associations that purport to defend the interests of the Crimean Tatar community, including the Qurultay, the *Mejlis* was the only organization that was banned, due to its violent activities. The Russian Federation also points out that the majority of members of the Crimean Tatar community does not feel represented by the *Mejlis* and expressed support for restrictions against it.

260. The Russian Federation claims that, in any event, the ban on the *Mejlis* falls outside the scope of CERD. It argues that CERD does not provide for a right of minorities to have and maintain a representative body. It claims that the ban did not violate its obligations under Article 2, paragraph 1 *(a)*, of CERD as this provision applies to institutions like the *Mejlis* only to the extent that it represents the Crimean Tatar community, which is, according to the Russian Federation, not the case. Regarding Article 4 of CERD, the Respondent maintains that Ukraine has not demonstrated how the ban could possibly infringe this provision. It contends that the ban does not violate its obligations under Article 5 *(a)* of CERD, arguing that this provision cannot be understood to grant a substantive right, but only a procedural one. The Russian Federation points out that representatives of the *Mejlis* were provided with means to request a judicial review and appeal the decisions on the ban, that they were heard and allowed to be represented in court. It asserts that the ban on the *Mejlis* does not violate its obligations under Article 5 *(c)* of CERD since the Crimean Tatars have not been prevented from participating in government or in public affairs on the basis of their ethnicity. With respect to Article 5 *(d)* (ix) of CERD, the Russian Federation contends that this right is not applicable to the *Mejlis* since the *Mejlis* was neither an "assembly" nor "peaceful".

261. The Russian Federation argues that, in any event, the ban on the *Mejlis* was based on security reasons, due to concerns over extremist activities, which in its view constitute a "valid ground" for restrictive measures under the applicable domestic and international rules. Relying on expert reports, the Respondent emphasizes that in banning the *Mejlis*, it did not treat the *Mejlis* differently from other extremist organizations. Referring to the list of extremist organizations kept by the Government which currently contains 101 entities, it states that these entities are composed of individuals belonging to different ethnicities, including primarily pseudo-Russian nationalists.

262. To substantiate its allegations regarding the violent activities of the *Mejlis*, the Russian Federation points, firstly, to the trade and transport blockades of Crimea in 2015 which, in its view, severely affected the population and environment of Crimea. It rejects Ukraine's claim that the members of the *Mejlis* participating in the blockade did so in their personal capacity and insists that they acted as representatives of the *Mejlis*. The Russian Federation also argues that the *Mejlis* did not dissociate itself from the actions of Mr Dzhemilev and Mr Chubarov, chairpersons of the *Mejlis*. In support of its allegations regarding the *Mejlis*' involvement in the blockade, the Respondent refers to reports by UN organizations and to the decision of the Supreme Court of the Russian Federation upholding the ban on appeal on 29 September 2016.

263. Apart from the alleged involvement of the *Mejlis* in the blockade, the Russian Federation argues that the *Mejlis* was involved in a series of violent and extremist activities stretching over an extensive period of time which were considered in detail by the Supreme Court of the Russian

Federation in its decision to uphold the ban and were not addressed by Ukraine. The Russian Federation maintains that the ban was proportionate as it was preceded by several warnings to members of the *Mejlis*. It also points out that the *Mejlis* and its leaders continue to incite and engage in violent activities despite the ban. In response to Ukraine's allegations that all attempts to appeal the ban after the decision of the Supreme Court of the Russian Federation have failed, the Respondent underlines that the severe threat to national security and public order emanating from the *Mejlis* continues to exist.

264. The Russian Federation rejects Ukraine's allegation that the ban of the *Mejlis* violates Article 4 and points out that Ukraine has not explained how Article 4 could possibly be relevant in this context. With respect to the violation of Article 6 alleged by Ukraine, the Russian Federation maintains that the representatives of the *Mejlis* had the opportunity to appeal the decision on the ban, that their positions were heard, and their attorneys allowed to present their position in full, as reflected in the text of the judgments, and thus the Russian Federation did not violate its obligations under CERD.

* *

265. The Court notes at the outset that various intergovernmental organizations and monitoring bodies have called upon the Russian Federation to lift the ban on the *Mejlis* because of its negative impact on civil and political rights (United Nations General Assembly resolution 71/205, Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine) adopted on 19 December 2016, doc. A/RES/71/205 (1 Feb. 2017), para. 2 *(g)*; CERD, Concluding observations on the combined twenty-fifth and twenty-sixth periodic reports of Russian Federation (25 April 2023), para. 24 *(d)*). However, the Court does not have jurisdiction, in the present case, to examine the conformity of the ban on the *Mejlis* with the international human rights obligations of the Russian Federation generally. Instead, its jurisdiction is confined by Article 22 of CERD to assessing the conformity of the ban on the *Mejlis* with the Russian Federation's obligations under CERD (see paragraph 201 above).

266. The Court must determine whether an act of racial discrimination as defined in Article 1, paragraph 1, of the Convention has occurred before it can decide whether the Russian Federation violated its obligations under Articles 2, paragraph 1 *(a)* and *(b)*, and 5 *(a)* and *(c)* of CERD. It thus has to assess whether the ban on the *Mejlis* constitutes an act of racial discrimination within the meaning of Article 1, paragraph 1, of CERD (see paragraph 212 above). To this end, the Court will examine whether the ban on the *Mejlis* amounts to a differentiation of treatment that is based on a prohibited ground and whether it has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by the Crimean Tatars of their human rights and fundamental freedoms.

267. The ban entails the exclusion of the *Mejlis* from public life in Crimea. However, for the ban to amount to racial discrimination, Ukraine would also need to demonstrate that this exclusion was based on the ethnic origin of the Crimean Tatars as a group or of the members of the *Mejlis*, and that it had the purpose or effect of nullifying or impairing the enjoyment of their rights.

268. The Court takes note of the OHCHR Report on the human rights situation in Ukraine (16 May to 15 August 2016), according to which "the ban on the Mejlis, which is a self-government body with quasi-executive functions, appears to deny the Crimean Tatars — an indigenous people of Crimea — the right to choose their representative institutions" (para. 177 of the Report). It also notes the subsequent OHCHR Report on the human rights situation in Ukraine (16 August to 15 November 2016) according to which "none of the Crimean Tatar NGOs currently registered in Crimea can be considered to have the same degree of representativeness and legitimacy as the Mejlis, elected by the Crimean Tatars' assembly, namely the Kurultai" (para. 188 of the Report).

269. The Court acknowledges that the *Mejlis* has historically played an important role in representing the interests of the Crimean Tatar community since that community resettled in Crimea in 1991, after being deported to Central Asia in 1944. At the same time, the Court is of the view that the *Mejlis* is neither the only, nor the primary institution representing the Crimean Tatar community. The Court does not need to decide whether the Crimean Tatar institutions that were established after 2014 also play a role in genuinely representing the Crimean Tatar people. It suffices for the Court to observe that the *Mejlis* is the executive body of the Qurultay by which its members are elected and to which they remain responsible (Organization for Security and Co-operation in Europe (OSCE), High Commissioner on National Minorities (HCNM), "The Integration of Formerly Deported People in Crimea, Ukraine: Needs Assessment" (August 2013), p. 16). The Qurultay is, in turn, elected directly by the Crimean Tatar people and, as Ukraine acknowledges, it is "regarded by most Crimean Tatars as their representative body". The Qurultay has not been banned, nor is there sufficient evidence before the Court that it has been effectively prevented by the authorities of the Russian Federation from fulfilling its role in representing the Crimean Tatar community. Therefore, the Court is not convinced that Ukraine has substantiated its claim that the ban on the *Mejlis* deprived the wider Crimean Tatar population of its representation. It follows that it is not necessary in this case for the Court to determine under which circumstances the treatment of institutions representing groups that are distinguished by their national or ethnic origin may violate obligations under CERD.

270. The ban on the *Mejlis*, by its very nature, also produces a disparate adverse effect on the rights of persons of Crimean Tatar origin in so far as the members of the *Mejlis* are, without exception, of Crimean Tatar origin. However, the Court needs to assess whether this effect can be explained in a way that does not relate to the prohibited grounds in Article 1, paragraph 1 (see paragraph 196 above).

271. Based on the evidence before it, it appears to the Court that the *Mejlis* was banned due to the political activities carried out by some of its leaders in opposition to the Russian Federation, rather than on grounds of their ethnic origin. This was confirmed by Ukraine in its Reply, according to which, "[t]he real reason for the ban is the opposition of the Crimean Tatar people, voiced by the Mejlis, to Russia's illegal acts of aggression".

272. The Court thus concludes that Ukraine has not provided convincing evidence that the ban of the *Mejlis* was based on the ethnic origin of its members, rather than its political positions and activities, and would therefore constitute an act of discrimination within the meaning of Article 1, paragraph 1, of CERD.

273. With respect to Ukraine's claim that the Russian Federation violated Article 4 of CERD, the Court is not satisfied that Ukraine has convincingly established that, by adopting the ban of the *Mejlis*, authorities or institutions of the Russian Federation promoted or incited racial discrimination (see paragraph 242 above). The Court is thus not persuaded that the Russian Federation violated its obligations under this provision.

274. Turning to Ukraine's claim that the Russian Federation violated its obligations under Article 6 of CERD by failing to provide effective redress against the ban on the *Mejlis*, the Court observes that Ukraine did not establish that effective redress was denied by the Russian Federation.

275. For these reasons the Court concludes that it has not been established that the Russian Federation has violated its obligations under CERD by imposing a ban on the *Mejlis*.

4. Measures relating to citizenship

276. Ukraine claims that the Russian Federation violated its obligations under CERD, in particular Articles 5 *(c)*, 5 *(d)* (i), 5 *(d)* (ii), 5 *(d)* (iii), 5 *(e)* (i) and 5 *(e)* (iv), through the introduction of its own nationality and immigration framework into Crimea, as part of the Federal Constitutional Law No. 6-FKZ of 21 March 2014 "On the Admission of the Republic of Crimea into the Russian Federation and the Formation of New Constituent Entities of the Russian Federation: The Republic of Crimea and the Federal City of Sevastopol" (also known as the "Law on Admission").

277. Ukraine argues that the exclusions contained in Article 1, paragraph 2, and Article 1, paragraph 3, of CERD do not apply to the special citizenship régime imposed by the Russian Federation. Ukraine points out that the Court concluded, in its 2019 Judgment, that the measures of which Ukraine complains, including forced citizenship, "fall within the provisions of the Convention". Moreover, it submits that the Russian Federation's position is incompatible with a pronouncement of the CERD Committee.

278. Ukraine further asserts that the Russian Federation "weaponized" its citizenship law to advance a policy and practice of racial discrimination against the Crimean Tatar and ethnic Ukrainian communities. In its view, this facially neutral citizenship law served to facilitate discrimination against Crimean Tatars and ethnic Ukrainians. Accordingly, Ukraine argues, this citizenship régime had the purpose or effect of suppressing the core civil rights of the two communities.

279. In Ukraine's view, discrimination stems from the fact that the Russian Federation has forced members of the Ukrainian and Crimean Tatar ethnic groups to choose between receiving Russian citizenship and swearing allegiance to the Russian Federation or retaining Ukrainian citizenship and accepting restrictions on their civil and political rights on the territory of Crimea. Ukraine argues that this choice does not represent a voluntary, informed or free choice. Ukraine further contends that Crimean Tatars and ethnic Ukrainians were disproportionately affected compared with ethnic Russians residing in Crimea.

280. Ukraine submits that the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)* did not address the discriminatory "downstream effects" of a forced citizenship régime on a group protected under CERD. In its view, the Court addressed a distinct question in that case, namely whether discrimination based on a person's current nationality falls within the scope of the prohibition of racial discrimination within the meaning of the Convention.

*

281. The Russian Federation contends that its citizenship régime in Crimea does not violate CERD and that Ukraine's claims should thus be rejected.

282. In the Russian Federation's view, the introduction and implementation of its citizenship laws in Crimea, including the grant of citizenship, restrictions of citizenship and restrictions based on citizenship, do not fall within the scope of Article 1, paragraph 1, of CERD. The Russian Federation argues that distinctions, restrictions or preferences based on citizenship are excluded from the scope of CERD by Article 1, paragraphs 2 and 3. It refers to the Court's Judgment in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)* in support of its contention that citizenship, as pertaining to "nationality", is not covered by any of the criteria mentioned in Article 1, paragraph 1, including the criterion of "national origin".

283. The Russian Federation further argues that, even if Ukraine's claim fell within the scope of Article 1, paragraph 1, of CERD, it could only concern the question whether the grant of citizenship and the associated régime constituted discrimination against any particular nationality, or any particular group as enumerated in Article 1, paragraph 1, of the Convention. The Russian Federation maintains that its citizenship régime is not discriminatory against any particular nationality or group. It points out that the provisions in question apply to all residents of Crimea without distinction based on their ethnicity.

284. The Russian Federation contends that the so-called "downstream" effects of its citizenship régime are of a "collateral or secondary" character and are thus not capable of falling within the scope of Article 1, paragraph 1. The Russian Federation further alleges that its citizenship régime is consistent with longstanding international practice. It emphasizes that inhabitants of Crimea, including ethnic Ukrainians and Crimean Tatars, were not forced to receive Russian citizenship but were merely given an option in that respect.

* *

285. The Court must determine whether the citizenship régime introduced by the Russian Federation in Crimea and the measures based thereon fall within the scope of Article 1 of CERD.

286. The Court notes that differential treatment "between citizens and non-citizens" (Article 1, paragraph 2) and "legal provisions of States Parties concerning nationality, citizenship or naturalization" (Article 1, paragraph 3) are per se excluded from the scope of the Convention. These paragraphs imply that CERD is not concerned with the grounds on which, or the way in which, nationality is granted. However, they cannot be understood as excluding from the scope of CERD any application of citizenship laws that results in an act of discrimination based on national or ethnic origin by purpose or effect.

287. In the present case, the Court does not find that Ukraine has convincingly established that the application of the Russian citizenship régime in Crimea amounts to a differentiation of treatment based on ethnic origin. To establish discrimination against Crimean Tatars and ethnic Ukrainians based on their ethnic origin, Ukraine mainly relies on the difficulty faced by the persons concerned when choosing between the legal consequences of adopting Russian citizenship or retaining Ukrainian citizenship. However, the Court is of the view that those legal consequences flow from the status of being either a Russian citizen or a foreigner. The respective status applies to all persons over whom the Russian Federation exercises jurisdiction regardless of their ethnic origin. While the measures may affect a significant number of Crimean Tatars or ethnic Ukrainians residing in Crimea, this does not constitute racial discrimination under the Convention (see *Application of the international Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, pp. 108-109, para. 112).

288. For these reasons, the Court concludes that it has not been established that the Russian Federation has violated its obligations under CERD through the adoption and application of its citizenship régime in Crimea.

5. Measures relating to culturally significant gatherings

289. Ukraine contends that the Russian Federation violated its obligations under CERD, in particular Articles 2, paragraph 1 *(a)*, 5 *(d)* (ix) and 5 *(e)* (vi), by suppressing gatherings that are of cultural importance to both the Crimean Tatar and the ethnic Ukrainian communities.

290. Ukraine asserts that, in the Crimean peninsula, the Russian Federation has unlawfully replaced Ukraine's régime for public assemblies with its own more restrictive laws. In its view, these laws represent a "precondition" for a multitude of infringements by the Russian Federation of its obligations under CERD, as they give officials of the Russian Federation wide discretion to arbitrarily restrict the rights of freedom of expression and assembly. In support of its claim, Ukraine relies on two cases decided by the ECtHR in which that court held that the powers granted under these laws "are often used in an arbitrary and discriminatory way".

291. Moreover, Ukraine claims that the Russian Federation violated its obligations under CERD by applying those laws in a discriminatory manner to deny the Crimean Tatar and ethnic Ukrainian communities the ability to commemorate culturally important events. In this regard, Ukraine refers to examples of restrictions applied to culturally significant gatherings of both communities, which constitute, in its view, a pattern of discrimination. Regarding Crimean Tatar gatherings, Ukraine refers, *inter alia*, to the restrictions on commemorating the *Sürgün* between 2014 and 2017 and International Human Rights Day. With respect to ethnic Ukrainian gatherings, Ukraine points to the persecution of Sergei Dub for celebrating Ukrainian Flag Day in 2014 and the interference with the commemoration of Taras Shevchenko's birthday in 2015.

292. According to Ukraine, both the high number and the culturally significant character of ethnic Ukrainian and Crimean Tatar cultural gatherings blocked by the Russian Federation indicate a discriminatory effect. In support of its argument that Crimean Tatars and ethnic Ukrainians were disproportionately affected, Ukraine relies on reports of intergovernmental and non-governmental organizations. Ukraine further relies on an expert report by Professor Magocsi to establish that the commemoration of historical figures and events is central to the Crimean Tatar cultural identity, and on witness statements and correspondence relating to the various applications made, and rejections received, for culturally significant events. In response to the Russian Federation's argument that the Crimean Tatars were not treated less favourably than ethnic Russians, Ukraine argues that several applications by ethnic Russians to commemorate culturally significant events were successful.

293. Ukraine asserts that the justifications which the Russian Federation advances for restricting the public gatherings in question cannot constitute a defence to a violation of CERD given that CERD's prohibition on racial discrimination is absolute and permits no exceptions on national security or other grounds. It points out that while the International Covenant on Civil and Political Rights and the European Convention on Human Rights may allow for limitations and derogations in narrow circumstances, those treaties make equally clear that such limitations and derogations may not be applied in a racially discriminatory manner.

*

294. According to the Russian Federation, all the measures of which Ukraine complains were taken because the applicants had failed to comply with the requirements of Russian law for the holding of such events and thus do not violate any of its obligations under CERD.

295. The Russian Federation argues that the Russian laws apply uniformly throughout the entire territory of the Russian Federation and without any discrimination based on national or ethnic origin. The Russian Federation further points out that the legal framework governing the holding of

public events in Crimea relies on a system of prior notification of intended events by their organizers to the competent authorities. It notes that the holding of a notified public event may be refused, suspended or terminated and that the reasons therefore, provided for by statutory law, constitute legitimate limitations on the exercise of the right to freedom of peaceful assembly. The Respondent maintains that the question whether these requirements are too strict in light of international standards is beyond the scope of the Court's jurisdiction under CERD.

296. According to the Russian Federation, Ukraine has not shown that the measures were taken on the basis of ethnicity and not for other reasons, namely security considerations. It points out that Ukraine failed to provide comparative statistics that would prove that the events of Crimean Tatars and ethnic Ukrainians were specifically targeted or were treated differently from those organized by Russians.

297. The Russian Federation states that its review of the individual incidents relied on by Ukraine reveals that Ukraine has not established that the law has been applied in a discriminatory or arbitrary manner against any ethnic group in Crimea, including the Crimean Tatars and ethnic Ukrainians, when compared with ethnic Russians. In its view, the "culturally significant" nature of the gatherings was used by the *Mejlis* as a pretext to organize events of a political nature. The Russian Federation points out that gatherings by Crimean Tatars and ethnic Ukrainians were allowed by the authorities and relies on witness statements to this effect.

298. In the Respondent's view, the two cases decided by the ECtHR and cited by Ukraine, *Lashmankin* v. *Russia* and *Navalnyy* v. *Russia*, as well as statistical data from Crimea on public events, demonstrate that the two communities were not disproportionately affected by the regulation of public gatherings. In response to Ukraine's reliance on several cases in which events organized by ethnic Russians were permitted, the Russian Federation argues that these permissions were based on their compliance with the applicable requirements under Russian domestic law. It further maintains that the pro-Russian attitude of the Crimean Tatar organization whose gatherings were permitted does not undermine the value of these events as evidence of the lack of racial discrimination.

299. The Russian Federation emphasizes that both the freedom of expression and the freedom of assembly are subject to limitations. It contends that the facts confirm that the measures in question were based on an objective and reasonable justification, were legitimate and lawful, and bore no link to racial discrimination.

* *

300. The Court will first determine whether an act of racial discrimination as defined in Article 1 of the Convention has occurred before deciding whether the Respondent has violated its obligations under the Convention to prevent, protect against and remedy such acts. The determination

of a violation of the Russian Federation's obligations under Articles 2, paragraph 1 *(a)*, 5 *(d)* (ix) and 5 *(e)* (vi) of CERD thus requires that the restrictions of gatherings by Crimean Tatars and ethnic Ukrainians constitute acts of racial discrimination in the sense of Article 1, paragraph 1, of CERD.

301. In this regard, the Court takes note of Ukraine's claim that the measures undertaken by the Russian Federation were based on legislation which is prone to being abused for discriminatory treatment. The Court observes that the conformity of the relevant laws of the Russian Federation, notably the provisions on "extremism", with that State's human rights obligations has been called into question by international judicial and expert bodies owing to the risk of arbitrary interpretation and abuse (see *Lashmankin and Others* v. *Russia*, ECtHR App. No. 57818/09, Judgment (merits) of 7 February 2017, para. 415; *Navalnyy* v. *Russia*, ECtHR App. No. 29580/12, Judgment of 15 November 2018, para. 118; Venice Commission, Opinion on the Federal Law No. 54-FZ of 19 June 2004, "On assemblies, meetings, demonstrations, marches and picketing" of the Russian Federation (adopted 16-17 Mar. 2012) para. 49).

302. The domestic legal framework regulates the prevention, prosecution, and punishment of certain broadly defined criminal offences. There is no evidence that would suggest that the purpose of the relevant domestic legislation is to differentiate based on one of the prohibited grounds contained in Article 1, paragraph 1, of CERD. Moreover, Ukraine has not provided evidence that this legal framework is likely to produce a disparate adverse effect on the rights of persons of Crimean Tatar or ethnic Ukrainian origin. Therefore, the Court is of the view that the domestic legal framework does not, in and of itself, constitute a violation of an obligation under CERD. However, this finding is without prejudice to the question whether the application of the relevant domestic legislation constitutes an act of discrimination based on one of the prohibited grounds under Article 1, paragraph 1, of CERD by its effect (see paragraph 196 above).

303. The Court observes that reports by intergovernmental and non-governmental organizations suggest that prohibitions and other restrictions imposed on gatherings commemorating certain events produced a disparate adverse effect on the rights of Crimean Tatars. The Court notes in particular the observation made in a report of the OHCHR that: "Crimean Tatars were particularly affected, receiving such warnings in advance of commemorative dates for Crimean Tatars" (OHCHR, *Civic Space and Fundamental Freedoms in Ukraine, 1 November 2019 – 31 October 2021* (7 Dec. 2021), para. 77).

304. As far as restrictions on culturally significant gatherings by ethnic Ukrainians are concerned, the Court considers it to be proved that the Russian Federation imposed restrictive measures regarding the celebration of Ukrainian Flag Day and the birthday of Taras Shevchenko, and that these measures produced a disparate adverse effect on the rights of persons of ethnic Ukrainian origin involved in the organization of and wishing to participate in culturally significant events.

305. However, the Court notes that the Russian Federation has provided explanations for these restrictions that do not relate to one of the prohibited grounds contained in Article 1, paragraph 1, of

the Convention. There is evidence that certain ethnic Ukrainian and Crimean Tatar organizations have in fact been successful in applying to hold events and that multiple events organized by ethnic Russians have been denied. Moreover, given the context of these restrictions, and the fact that the ECtHR has in several decisions confirmed that the approach of the Russian Federation towards public gatherings is generally restrictive (see e.g. *Lashmankin and Others* v. *Russia*, ECtHR App. No. 57818/09, Judgment (merits) of 7 February 2017, paras. 419-420; *Navalnyy* v. *Russia*, ECtHR App. No. 29580/12, Judgment of 15 November 2018, para. 118), Ukraine has not, in the Court's view, sufficiently substantiated its assertion that the restrictions were based on one or more of the prohibited grounds referred to in Article 1, paragraph 1. Accordingly, the Court is not convinced that Ukraine has sufficiently established that Crimean Tatars and ethnic Ukrainians have been discriminated against based on their ethnic origin.

306. For these reasons, the Court concludes that it has not established that the Russian Federation has violated its obligations under CERD by imposing restrictions on gatherings of cultural importance to the Crimean Tatar and the ethnic Ukrainian communities.

6. Measures relating to media outlets

307. Ukraine claims that the Russian Federation violated its obligations under CERD, specifically Articles 2, paragraph 1, 5 *(d)* (viii) and 5 *(e)* (vi), by imposing restrictions on persons and institutions representing the media serving the Crimean Tatar and ethnic Ukrainian communities in Crimea (hereinafter the "Crimean Tatar and Ukrainian media").

308. Ukraine submits that the Russian Federation has enforced a registration requirement as a "means of excluding potentially critical voices" in the media, in particular those of Crimean Tatars and ethnic Ukrainians. According to Ukraine, the Russian Federation has further imposed its own anti-extremism laws in Crimea which allow it to arbitrarily interfere with freedom of expression.

309. Ukraine further asserts that the Russian Federation has applied its legal framework in a way which discriminates against Crimean Tatar and Ukrainian media organizations and journalists. According to Ukraine, the Court's Judgment in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)* does not preclude Ukraine's allegations concerning restrictions on media organizations falling within the scope of CERD where the discriminatory impact of the restrictions falls on protected groups, rather than just the media corporations themselves. In this regard, Ukraine argues that Crimean Tatars and ethnic Ukrainians have been disproportionately disadvantaged by the Russian Federation's application of its re-registration requirements. In support of its allegations, Ukraine further points to individual instances of denial of registration and re-registration, and harassment of media organizations and journalists. To substantiate its allegation of discriminatory treatment of Crimean Tatar and Ukrainian media outlets, Ukraine refers to reports of international and non-governmental organizations.

310. Ukraine argues that, as a result of the discriminatory application of the Russian Federation's laws in Crimea, the number of media outlets serving the Crimean Tatar and ethnic Ukrainian communities has significantly decreased since the introduction of the media laws and anti-extremism legislation in Crimea in 2014. Moreover, the content offered by the remaining media outlets does not compare, in its view, to the authentic and diverse content offered by Crimean Tatar and Ukrainian media outlets previously active and accessible in Crimea.

*

311. The Russian Federation claims that Ukraine's allegations with respect to the treatment of Crimean Tatar and Ukrainian media are unfounded and that its claims in this regard should thus be rejected.

312. The Russian Federation submits that Ukraine has failed to establish that the legal framework applicable to the activities of the media in Crimea is discriminatory. The Russian Federation points out that its legal framework governing media activities is similar to Ukraine's own legal framework in this regard.

313. With respect to allegations concerning media restrictions, the Russian Federation recalls that the Court confirmed, in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)*, that CERD "concerns only individuals or groups of individuals" and that legal entities such as media corporations fall outside its scope. The Russian Federation further contends that Ukraine has not established that the measures taken against media corporations were specifically directed at the Crimean Tatar or ethnic Ukrainian communities as such, or that Crimean Tatar and Ukrainian media outlets were treated in a manner that qualifies as discrimination under CERD. It points out that Ukraine itself has not claimed that any of the alleged discriminatory treatment was based on any of the grounds contained in Article 1, paragraph 1, of CERD, but rather that it was based on the political opinions of the persons or entities concerned.

314. With respect to the individual instances of harassment and denial of re-registration alleged by Ukraine, the Russian Federation maintains that the small number of cases raised does not reflect the general situation of the media in Crimea and, in any event, does not evidence discriminatory treatment based on national or ethnic grounds. The Russian Federation claims that the measures taken against the media organizations and journalists in question were based on their non-compliance with the registration rules and on the conduct, qualifying as extremist under Russian laws, of the persons and entities in question.

315. The Russian Federation asserts that the media landscape in Crimea allows all cultural and ethnic groups, including Crimean Tatars and ethnic Ukrainians, to preserve and promote their history, language and culture. With respect to the alleged closure of Crimean Tatar and Ukrainian media outlets, the Russian Federation argues that the majority of them continue to operate. As for the closed outlets, the Russian Federation asserts that they were either closed by the owners themselves or in accordance with Russian media laws. The Russian Federation points to statistical data comparing the

closure of Crimean Tatar media outlets and the closure of media outlets in the Russian Federation generally, which, in its view, confirms that "far fewer Crimean Tatar media were closed by judicial decisions in Crimea compared with the rest of the Russian Federation".

* *

316. The Court will determine at the outset whether an act of racial discrimination as defined in Article 1, paragraph 1, of the Convention has occurred in relation to media outlets before deciding whether the Respondent has violated its obligations under the Convention to prevent, protect against and remedy such acts. The determination whether violations of the Respondent's obligations under Articles 2, paragraph 1, 5 *(d)* (viii) and 5 *(e)* (vi) of CERD have occurred requires that the restrictions imposed by the Russian Federation on persons and institutions representing Crimean Tatar and Ukrainian media constitute acts of racial discrimination in the sense of Article 1, paragraph 1, of CERD.

317. The Court notes Ukraine's claim that the measures taken by the Russian Federation are based on legislation that can be abused for discriminatory treatment. In this regard, the Court observes that the conformity of the Russian laws in question, notably its anti-extremism legislation, with its obligations under international human rights has been called into question by international judicial and monitoring bodies owing to the risk of their arbitrary interpretation and abuse (see paragraphs 226-227 above).

318. The Court recalls that restrictions imposed on media organizations fall within the scope of CERD only in so far as these media organizations are "collective bodies or associations, which represent individuals or groups of individuals" and the measures imposed on them are based on national or ethnic origin by purpose or effect (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 107, para. 108). It is, however, not necessary to determine whether the media organizations concerned represent individuals or groups of individuals if the measures imposed on these organizations are not based on national or ethnic origin.

319. The domestic legal framework regulates the activities of mass media and the prevention, prosecution and punishment of certain broadly defined criminal offences. The Court observes that there is no convincing evidence which would suggest that the purpose of the relevant domestic legislation is to differentiate between media outlets affiliated with persons of Crimean Tatar or ethnic Ukrainian origin and other such outlets based on one of the prohibited grounds contained in Article 1, paragraph 1, of CERD. Ukraine has also not provided evidence that this legal framework is likely to produce a disparate adverse effect on the rights of persons of Crimean Tatar or ethnic Ukrainian origin. Therefore, the Court considers that the domestic legal framework does not, in and of itself, constitute a violation of the Russian Federation's obligations under CERD. However, this finding is without prejudice to the question whether the application of the relevant domestic legislation constitutes an act of discrimination based on one of the prohibited grounds under Article 1, paragraph 1, of CERD by its effect (see paragraph 196 above).

320. The Court is of the view that the reports of international organizations referred to by Ukraine lend some support to Ukraine's allegation that Crimean Tatar and Ukrainian media outlets have been severely affected by the application and implementation of the Russian Federation's laws on mass media and the suppression of extremism (see OSCE, Office for Democratic Institutions and Human Rights (ODIHR) and the High Commissioner on National Minorities (HCNM), Report of the Human Rights Assessment Mission on Crimea (6-18 July 2015) (17 Sept. 2015), paras. 75-79; OHCHR, Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine) (22 February 2014 to 12 September 2017), UN doc. A/HRC/36/CRP.3 (25 Sept. 2017), paras. 156-157).

321. The Court also observes that some of these reports suggest the existence of a link between the measures taken with respect to Crimean Tatar media outlets and the ethnic origin of their owners or those concerned (see OSCE, ODIHR and HCNM, Report of the Human Rights Assessment Mission on Crimea (6-18 July 2015), p. 7, para. 17). At the same time, the Court notes that statements made in the said reports of intergovernmental and non-governmental organizations are vague and not corroborated by further evidence with respect to the existence of racial discrimination.

322. On the evidence submitted by Ukraine, the Court cannot find that the measures taken against Crimean Tatar and Ukrainian media outlets were based on the ethnic origin of the persons affiliated with them. The Court is of the view that the explanations given by the Russian Federation, particularly the statistically substantiated comparison between the closure of media outlets in Crimea and other territories (see paragraph 315 above), suggest that the restrictions were not based on national or ethnic origin. For the same reason, the Court is not convinced that Ukraine has established that the measures taken against persons affiliated with Crimean Tatar media outlets were based on the national or ethnic origin of those persons.

323. For these reasons, the Court concludes that it has not been established that the Russian Federation violated its obligations under CERD by imposing restrictions on Crimean Tatar and Ukrainian media and by taking measures against persons affiliated with Crimean Tatar and Ukrainian media organizations.

7. Measures relating to cultural heritage and cultural institutions

324. Ukraine submits that the Russian Federation violated its obligations under CERD, specifically Articles 2, paragraph 1, 5 *(e)* (vi) and 6, by undertaking a "general assault" on the cultural heritage of Crimean Tatar and ethnic Ukrainian communities, particularly through the destruction, demolition, failure to preserve and closure of historically and culturally significant sites and institutions.

325. As far as Crimean Tatar heritage is concerned, Ukraine alleges that the historical site of the Palace of the Crimean Khans (the "Khan's Palace") is being partly destroyed by "a culturally insensitive renovation commissioned and managed by the Crimean authorities". Citing the Court's jurisprudence, Ukraine states that "a State's vandalization of cultural heritage sites can constitute a violation of the CERD". Ukraine also refers to other examples of degradation of Crimean Tatar cultural heritage, including the demolition of Muslim burial grounds and of archaeological sites at the Palace of Kalga-Sultan Akmejitsaray. Moreover, Ukraine argues that the Russian Federation violated Article 6 of CERD by denying relief to protect Crimean Tatar cultural heritage.

326. Regarding Ukrainian cultural heritage, Ukraine refers, *inter alia*, to the closure of a Ukrainian-language drama school and to the reduction of the space available for the Lesya Ukrainka museum. It also refers to harassment of persons affiliated with Crimea-based non-governmental organizations which, in its view, are instrumental in promoting Ukrainian-language media, and harassment of staff at the Ukrainian Cultural Centre in Simferopol.

*

327. The Russian Federation, in turn, argues that none of the measures adopted by the Russian authorities of which Ukraine complains amount to racial discrimination and that Ukraine's claims should therefore be rejected.

328. Regarding allegations concerning the preservation of the cultural heritage of Crimean Tatars, the Russian Federation asserts that Ukraine is attempting to portray measures aimed at preserving sites of cultural and historical significance to the Crimean Tatar community as an assault on that community's cultural heritage. The Russian Federation maintains that works in the Khan's Palace were necessary. It considers that, in any event, the record contradicts Ukraine's allegations of defective repair and restoration of that building. The Russian Federation points to a series of photographs which, in its view, show improvements made to the condition of the Palace.

329. Regarding the alleged demolition of Muslim burial grounds and other sites, the Russian Federation contends that these allegations are unfounded and ought to be dismissed. It notes that, contrary to Ukraine's allegations, the Russian authorities have taken numerous measures with a view to maintaining and promoting the cultural heritage of the Crimean Tatar community.

330. In respect of Ukraine's invocation of Article 6 of CERD, the Russian Federation submits that the Crimean Tatar applicants whose claims were dismissed by domestic courts lacked standing under the relevant domestic law.

331. The Russian Federation further maintains that Ukraine's factual allegations regarding the closure of Ukrainian cultural institutions are incorrect. Concerning the alleged harassment of persons affiliated with cultural institutions, the Russian Federation contends that the measures taken against certain activists were connected to inspections and to investigations of violations of anti-extremism laws, not to the activity of those persons within the Ukrainian Cultural Centre in Simferopol. Moreover, it argues that the centre itself was never closed.

* *

332. The Court recalls that it will first determine whether an act of racial discrimination as defined in Article 1, paragraph 1, of the Convention has occurred before deciding whether the Respondent has violated its obligations under the Convention to prevent, protect against and remedy such acts.

333. The Court notes that the Russian Federation denies that there has been any differentiation of treatment of Crimean Tatar cultural heritage that would put the Crimean Tatar community at a disadvantage. On the contrary, the Russian Federation submits, based on legislation, documents and photographic evidence, that it has undertaken measures to preserve the cultural heritage of the Crimean Tatar community. At the same time, the Court takes note of the Concluding Observations of the CERD Committee of 1 June 2023, referred to by Ukraine, according to which

> "the Committee is deeply concerned about . . . [r]eports of the destruction of and damage to Crimean Tatar cultural heritage, including tombstones, monuments and shrines, and the lack of information on investigations carried out into such allegations and on other measures to prevent such vandalism . . . recommend[ing] that the State party . . . [e]ffectively investigate reports on the destruction of and damage to Crimean Tatar cultural heritage and adopt measures to prevent such acts" (CERD Committee, Concluding observations on the combined twenty-fifth and twenty-sixth periodic reports of the Russian Federation, doc. CERD/C/RUS/CO/25-26 (1 June 2023), paras. 23 *(b)* and 24 *(b)*).

334. The Court observes, however, that the CERD Committee does not take a position as to whether the respective reports are accurate and does not rely on first-hand evidence. Moreover, even if the preservation works undertaken by the Russian Federation with respect to the Khan's Palace were carried out negligently, the Court is not convinced that such negligence would amount to discrimination based on the ethnic origin of Crimean Tatars. The Court further finds that Ukraine has not sufficiently substantiated the alleged degradation of two other Crimean Tatar cultural sites. For these reasons, the Court is not convinced, based on the evidence provided by Ukraine, that the measures undertaken by the Russian Federation regarding the sites in question discriminate against the Crimean Tatars as a group.

335. With respect to the alleged violation of Article 6 of CERD, the Court notes that a challenge made in domestic courts by a member of the Crimean Tatar community against the use of certain contractors for the renovation works at the Khan's Palace was unsuccessful, while another court found that the same contractors had violated renovation standards when working on an object of cultural importance to the ethnic Russian community. However, the Russian Federation has given a plausible explanation for this differentiation of treatment, namely the lack of standing of the Crimean Tatar applicants, which is unrelated to the grounds contained in Article 1, paragraph 1, of CERD.

336. With respect to Ukraine's allegations concerning the degradation of certain aspects of the cultural heritage of ethnic Ukrainians, the Court is of the view that Ukraine has not established that any differentiation of treatment of persons affiliated with cultural institutions in Crimea was based on their ethnic origin. The Court notes that the Russian Federation has provided explanations for the measures taken against the persons in question that are unrelated to the prohibited grounds contained in Article 1, paragraph 1, of CERD. The Court also notes that the Russian Federation has produced

evidence substantiating its attempts at preserving Ukrainian cultural heritage and has provided explanations for the measures undertaken with respect to that heritage. Ukraine, in turn, has not substantiated how the closure of certain institutions would amount to discrimination based on ethnic origin.

337. For these reasons, the Court concludes that it has not been established that the Russian Federation has violated its obligations under CERD by taking measures relating to the cultural heritage of the Crimean Tatar and the ethnic Ukrainian communities.

8. Measures relating to education

338. Ukraine asserts that the Russian Federation has used changes to the educational system in Crimea to promote Russian language and culture at the expense of Ukrainian and Crimean Tatar languages and cultures and has taken measures impeding the education of school children from the two communities, thereby violating the prohibition of acts and practices of racial discrimination under Article 2, paragraph 1 *(a)*, of CERD, as well as the obligation under Article 5 *(e)* (v) of CERD to guarantee equality before the law in the enjoyment of the right to education and training.

339. Ukraine submits that the Russian Federation has pursued a strategy of cultural erasure by taking measures to prevent the culture of the Crimean Tatar and Ukrainian ethnic groups from being passed on to future generations through the educational system. The Applicant maintains that the radical shift in the Crimean educational system towards Russian language and culture will deprive Crimean Tatars and ethnic Ukrainians of future educational and job opportunities in their preferred country, forcing many Crimean families to relocate to mainland Ukraine in order to preserve the vestiges of their native culture. According to Ukraine, the Russian Federation's "occupation authorities" have worked overtly and covertly to limit opportunities for Crimean children to be taught in the Crimean Tatar or Ukrainian languages, accompanied by a new emphasis on Russian as the dominant language of tuition, and have reoriented both the curriculum and educational qualifications towards the Russian Federation. According to Ukraine, the changes that the Russian Federation has introduced to the Crimean education system have had a disparate impact on access to education and training in general across ethnic lines.

340. Ukraine explains that its claim does not presuppose a right to education in a minority language. To establish racial discrimination in violation of CERD, it is sufficient to show that the Russian Federation has removed access to minority language education for some ethnic groups and not others. In support of its claim, Ukraine refers to the Advisory Opinion in *Minority Schools in Albania* case in which the Permanent Court of International Justice applied the principle that "equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations" in a comparable situation.

341. Ukraine maintains that the Russian Federation has imposed restrictions on education in the Ukrainian and Crimean Tatar languages in Crimea since 2014. It alleges that many Crimean parents have found that their requests for Ukrainian- or Crimean Tatar-language instruction have been ignored by the "occupation authorities" and that other parents have felt unsafe even making such requests or under pressure to choose Russian-language education and have been harassed when daring to advocate for education in their children's native language.

342. Ukraine submits that, as a result of the Russian Federation's actions, the number of schools in Crimea serving the Ukrainian population and the number of ethnic Ukrainians in Crimea currently enrolled in Ukrainian-language schools have significantly decreased. Thus, according to Ukraine, in the 2013-2014 school year, general education in the Ukrainian language was provided to 12,694 children, however, in the following school year, the number of children receiving Ukrainian-language education fell to 2,154. In the 2015-2016 school year, that number was cut in half, reduced to less than 1,000 students. Of the seven Ukrainian-language educational institutions that existed in Crimea until 2014, only one remains in operation, and even this school had ceased instruction in Ukrainian in the first and second grades.

343. Regarding school education in the Crimean Tatar language, Ukraine claims that although the number of students receiving education in Crimean Tatar schools has remained relatively steady, the quality of education provided at these schools has decreased significantly since 2014. Until the 2017-2018 school year, textbooks were provided late, presented a heavily Russified version of history and portrayed Stalin as a hero — despite his deportation of Crimean Tatars in 1944. According to Ukraine, one tenth-grade history textbook depicted Crimean Tatars as Nazi collaborators in World War II, rehabilitating the stereotype propounded by Stalin as an excuse to deport Crimean Tatars from the Crimean peninsula in 1944. Finally, Ukraine alleges that the Russian "occupation authorities" have disrupted Ukrainian and Crimean Tatar education in Crimea by carrying out intrusive searches of the schools and educators serving those communities.

344. Ukraine alleges that, taken together, the evidence demonstrates not only the discriminatory effect of the Russian Federation's measures, but also their clear discriminatory purpose. According to Ukraine, that discriminatory purpose was made clear in June 2014, when the so-called Crimean Ministry of Education declared that studying the Crimean Tatar and Ukrainian languages "must not be conducted at the expense of instruction and study of the official language of the Russian Federation".

*

345. The Russian Federation maintains that the right to education and training under Article 5 *(e)* (v) of CERD does not encompass a right to education in a minority language. It states that the prohibition of discrimination in relation to education refers to "the right of everyone regardless of ethnic origin to have access to a national educational system without discrimination". It observes that Ukraine does not allege the existence of a right to education in a minority language under CERD and has not explained how its claim that the introduction of Russian-language education in Crimea has had a disparate impact on access to education and training across ethnic lines can stand if a specific right to education in a minority language does not exist.

346. The Russian Federation contends that the invocation by Ukraine of the Advisory Opinion of the Permanent Court of International Justice in *Minority Schools in Albania* is unfounded. It maintains that non-discriminatory access to public education is guaranteed in Crimea not only in the Russian language but also in Crimean Tatar and Ukrainian which are both recognized as official languages of the Republic of Crimea and which have been incorporated into the educational system.

The Respondent also argues that its legislation gives all Russian citizens the right to receive basic general education, which lasts for nine years, in one of the languages of the peoples of the Russian Federation, including the Ukrainian and Crimean Tatar languages. This length of general education reflects a policy choice of the Russian Federation. The Russian Federation contends that the decline in the demand for education in Ukrainian in Crimea does not in any event constitute a breach of CERD since the option to receive general education in the Ukrainian language has been maintained in the Crimean education system for everyone at all times since 2014. It presents witness statements by officials, including teachers and headmasters, according to whom schools are ready to provide education in Ukrainian should there be a demand, as well as other evidence seeking to demonstrate the accessibility of education in Ukrainian and Crimean Tatar languages in Crimea.

347. The Russian Federation does not contest that there has been a decline in the number of students opting to receive general education in the Ukrainian language since 2014, as alleged by Ukraine. However, it asserts that this decline was not due to any legal measure or constraint imposed by the Russian Federation. The Respondent presents several witness statements according to which the decrease in demand was caused by other reasons, including the reduced need for citizens to have their children receive education in the Ukrainian language, a utilitarian or pragmatic relationship to the Ukrainian language based on higher education opportunities, and restrictions on access to Ukrainian institutions of higher education established by Ukraine itself. Other factors included, according to the Russian Federation, the policy carried out by Ukraine before 2014, which consisted in forcibly imposing the Ukrainian language on students in education programmes, and the fact that some ethnic Ukrainians left Crimea after March 2014, mostly for Ukraine. The Russian Federation considers that Ukraine's allegations that requests from parents were ignored or that the parents were pressured into not choosing Crimean Tatar or Ukrainian as teaching languages are rebutted by the Russian Federation's explanations and unsupported by Ukraine's evidence.

348. With respect to education in the Crimean Tatar language, the Russian Federation maintains that it has significantly improved the conditions for those wishing to study in that language. It points out that 16 schools continue to offer full education in Crimean Tatar until the ninth grade and this number is not lower than it was before 2014. The Russian Federation disputes that the quality of education in the Crimean Tatar language is lower since 2014, offering different indicators in support, including with respect to funding.

349. The Russian Federation maintains that Ukraine's contention that textbooks "perpetuate Russian propaganda and hateful narratives, instead of historical fact" relies on only one textbook that mentioned that there were collaborators among Crimean Tatars at the time of World War II, just as there were collaborators among other ethnicities, including Russians. It adds that this element of the textbook was withdrawn after an appeal by the Crimean Tatar community.

350. With respect to the alleged discriminatory searches of Crimean Tatar and Ukrainian schools, the Russian Federation maintains that Ukraine has not established that these searches were discriminatory. The materials cited by Ukraine indicate that the operations took place mainly in religious schools and that the law enforcement authorities were looking for extremist literature as part of a preventive strategy against extremist religious organizations active in Crimea.

351. Finally, according to the Russian Federation, the point made in a letter of the Crimean Ministry of Education that studying the Crimean Tatar and Ukrainian languages "must not be conducted at the expense of instruction and study of the official language of the Russian Federation" was nothing more than a reminder of what the applicable federal law provides.

* *

352. The Court will examine whether the conduct of the Russian Federation with regard to education in Crimea qualifies as racial discrimination in the sense of Article 1, paragraph 1, of CERD and violates the obligations contained in Articles 2, paragraph 1 *(a)*, 5 *(e)* (v) and 7.

353. Article 2, paragraph 1 *(a)*, provides that

> "1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
>
> *(a)* Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation".

Article 5 *(e)* (v) provides that

> "[i]n compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> . . . . . .
>
> *(e)* Economic, social and cultural rights, in particular:
>
> . . . . . .
>
> (v) The right to education and training".

354. The Court considers that, even if Article 5 *(e)* (v) of CERD does not include a general right to school education in a minority language, the prohibition of racial discrimination under Article 2, paragraph 1 *(a)*, of CERD and the right to education under Article 5 *(e)* (v), may, under certain circumstances, set limits to changes in the provision of school education in the language of a national or ethnic minority. For those provisions to apply, the Court must first determine whether the conduct in question qualifies as racial discrimination within the meaning of Article 1, paragraph 1, of CERD.

355. Most of the measures complained of by Ukraine concern limitations to the availability of Ukrainian or Crimean Tatar as the language of instruction in primary schools. Language is often an essential social bond among the members of an ethnic group. Restrictive measures taken by a State party with respect to the use of language may therefore in certain situations manifest a "distinction, exclusion, restriction or preference based on . . . descent, or national or ethnic origin" within the meaning of Article 1, paragraph 1, of CERD.

356. States parties possess a broad discretion under CERD with respect to school curricula and with respect to the primary language of instruction. However, in designing and implementing a school curriculum, a State party may not discriminate against a national or ethnic group. The fact that a State chooses to offer school education in only one language does not, in and of itself, give rise to discrimination under CERD against members of a national or ethnic minority who wish to have their children educated in their own language.

357. Structural changes with respect to the available language of instruction in schools may constitute discrimination prohibited under CERD if the way in which they are implemented produces a disparate adverse effect on the rights of a person or a group distinguished by the grounds listed in Article 1, paragraph 1, of CERD, unless such an effect can be explained in a way that does not relate to the prohibited grounds in that Article (see paragraph 196 above). This would be the case, in particular, if a change in the education in a minority language available in public schools is implemented in such a way, including by means of informal pressure, as to make it unreasonably difficult for members of a national or ethnic group to ensure that their children, as part of their general right to education, do not suffer from unduly burdensome discontinuities in their primary language of instruction.

(a) ***Access to education in the Ukrainian language***

358. With respect to school education in the Ukrainian language, the Court notes, and the Parties agree, that there was a steep decline in the number of students receiving their school education in the Ukrainian language between 2014 and 2016. According to the OHCHR,

> "[t]he number of students undergoing instruction in Ukrainian language has dropped dramatically. In the 2013-2014 academic year, 12,694 students were educated in the Ukrainian language. Following the occupation of Crimea, this number fell to 2,154 in 2014-2015, 949 in 2015-2016, and 371 in 2016-2017 . . . Between 2013 and 2017, the number of Ukrainian schools decreased from seven to one, and the number of classes from 875 to 28." (OHCHR report, Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol (Ukraine) (22 February 2014 to 12 September 2017), UN doc. A/HRC/36/CRP.3 (25 Sept. 2017), para. 197.)

359. There was thus an 80 per cent decline in the number of students receiving an education in the Ukrainian language during the first year after 2014 and a further decline of 50 per cent by the following year. It is undisputed that no such decline has taken place with respect to school education in other languages, including the Crimean Tatar language. Such a sudden and steep decline produced a disparate adverse effect on the rights of ethnic Ukrainian children and their parents.

360. The Russian Federation exercises full control over the public school system in Crimea, in particular over the language of instruction and the conditions for its use by parents and children. However, it has not provided a convincing explanation for the sudden and radical changes in the use of Ukrainian as a language of instruction, which produces a disparate adverse effect on the rights of ethnic Ukrainians. Here, the Parties disagree about the reasons for the decline in the number of students receiving their school education in the Ukrainian language after 2014.

361. The explanations put forward by the Russian Federation for the decline are not fully convincing. It is true that, in its report, the OHCHR considers "that the main reasons for this decrease include a dominant Russian cultural environment and the departure of thousands of pro-Ukrainian Crimean residents to mainland Ukraine." However, even considering that many ethnic Ukrainian families left Crimea after 2014, the Court is not convinced that this, together with the "reorientation of the Crimean school system towards Russia", can alone account for a reduction of more than 90 per cent of genuine demand in Crimea for school instruction in the Ukrainian language.

362. Both Parties have submitted evidence to the Court regarding the degree of freedom of parents to choose Ukrainian as the principal language of instruction for their children. Ukraine has submitted witness statements according to which a significant number of parents and children have been subjected to harassment and manipulative conduct with a view to deterring them from articulating or pursuing their preference. The Russian Federation, on the other hand, has submitted witness statements according to which parents' choice of the language of instruction was genuine and not subject to pressure, as confirmed by a general unresponsiveness on the part of parents to some teachers' active encouragement to continue having their children receive instruction in Ukrainian.

363. The Court observes that the witness statements presented by both Parties were made by persons who are not disinterested in the outcome of the case. They are also not corroborated by reliable documentation. It should, however, be noted that the OHCHR has observed that "[p]ressure from some teaching staff and school administrations to discontinue teaching in Ukrainian language has also been reported". Although the Court is unable to conclude, on the basis of the evidence presented, that parents have been subjected to harassment or manipulative conduct aimed at deterring them from articulating their preference, the Court is of the view that the Russian Federation has not demonstrated that it complied with its duty to protect the rights of ethnic Ukrainians from a disparate adverse effect based on their ethnic origin by taking measures to mitigate the pressure resulting from the exceptional "reorientation of the Crimean educational system towards Russia" on parents whose children had until 2014 received their school education in the Ukrainian language.

(b) ***Access to education in the Crimean Tatar language***

364. With respect to school education in the Crimean Tatar language, the Court notes that Ukraine's claims concern the quality of the education available in that language, rather than its actual availability or a significant change in the number of students. The Court is unable to conclude, based on the evidence submitted by the Parties, that the quality of the education in the Crimean Tatar language has significantly deteriorated since 2014.

365. The Court notes with concern that there has been one instance of a textbook which referred to the history of the Crimean Tatar community in a discriminatory way. However, the Court considers that Ukraine has not refuted the assertion of the Russian Federation that this was an isolated case which was remedied following an appeal by representatives of the Crimean Tatar community.

366. The Court notes that Ukraine provided some evidence that religious schools attended by Crimean Tatar children were repeatedly searched by agents of the Russian Federation. The Court also takes note of the explanation given by the Russian Federation for these searches according to which they were undertaken for the purpose of identifying "extremist literature" distributed by "extremist religious organizations". However, Ukraine has not convincingly established a disparate adverse effect on religious schools attended by Crimean Tatar persons as compared to religious schools attended by other ethnic groups of Muslim faith.

367. Regarding the alleged violation of the obligation under Article 7 of CERD, the Court recalls that this provision sets forth that

> "States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention".

368. The Court notes that Ukraine has alleged that some incidents took place which demonstrate, in its view, that the Russian Federation did not meet its obligations under Article 7. Such incidents include the use of the textbook described in paragraph 365 above and statements by teachers justifying the deportation of Crimean Tatars in 1944. The Court recalls that Article 7 requires States parties to take immediate and effective measures to prevent incidents such as those alleged by Ukraine. However, the evidence before the Court does not demonstrate that the Russian Federation failed to adopt immediate and effective measures against racial discrimination. The Court concludes that it has not been established that the Russian Federation has violated its obligation under Article 7 of CERD.

(c) ***Existence of a pattern of racial discrimination***

369. To find whether the Russian Federation violated its obligations under CERD in the present case, the Court needs to determine if the violations found constitute a pattern of racial discrimination (see paragraph 161 above). The legislative and other practices of the Russian Federation with regard to school education in the Ukrainian language in Crimea applied to all children of Ukrainian ethnic origin whose parents wished them to be instructed in the Ukrainian language and thus did not merely concern individual cases. As such, it appears that this practice was intended to lead to a structural change in the educational system. The Court is therefore of the view that the conduct in question constitutes a pattern of racial discrimination. On the other hand, the Court is not convinced, based on the evidence before it, that the incidents with regard to school education in the Crimean Tatar language constitute a pattern of racial discrimination.

(d) *Conclusion*

370. In light of the above, the Court concludes that the Russian Federation has violated its obligations under Article 2, paragraph 1 *(a)*, and Article 5 *(e)* (v) of CERD by the way in which it has implemented its educational system in Crimea after 2014 with regard to school education in the Ukrainian language.

C. Remedies

371. Having established that the Russian Federation has violated its obligations under Article 2, paragraph 1 *(a)*, of CERD and Article 5 *(e)* (v) of CERD (see paragraph 370 above), the Court now turns to the determination of remedies for this internationally wrongful conduct.

372. The Court recalls that, in respect of its claims under CERD, Ukraine has requested, in addition to a declaration of violations, the cessation by the Russian Federation of ongoing violations, guarantees and assurances of non-repetition, compensation and moral damages (see paragraph 27 above).

373. By the present Judgment, the Court declares that the Russian Federation has violated its obligations under Article 2, paragraph 1 *(a)*, of CERD and Article 5 *(e)* (v) of CERD. It considers that the Russian Federation remains under an obligation to ensure that the system of instruction in the Ukrainian language gives due regard to the needs and reasonable expectations of children and parents of Ukrainian ethnic origin.

374. The Court does not find it necessary or appropriate to order any other remedy requested by Ukraine.

IV. ALLEGED VIOLATION OF OBLIGATIONS UNDER THE ORDER ON PROVISIONAL MEASURES OF 19 APRIL 2017

A. Compliance with provisional measures

375. In its final submissions, Ukraine requests the Court to adjudge and declare that:

"*(l)* The Russian Federation has breached its obligations under the Order indicating provisional measures issued by the Court on 19 April 2017 by maintaining limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*.

(m) The Russian Federation has breached its obligations under the Order indicating provisional measures issued by the Court on 19 April 2017 by failing to ensure the availability of education in the Ukrainian language.

(n) The Russian Federation has breached its obligations under the Order indicating provisional measures issued by the Court on 19 April 2017 by aggravating and extending the dispute and making it more difficult to resolve by recognizing the

independence and sovereignty of the so-called DPR and LPR and engaging in acts of racial discrimination in the course of its renewed aggression against Ukraine."

376. The Court indicated the following provisional measures in its Order of 19 April 2017 (*I.C.J. Reports 2017*, pp. 140-141, para. 106):

"(1) With regard to the situation in Crimea, the Russian Federation must, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,

(a) Refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis;

(b) Ensure the availability of education in the Ukrainian language;

(2) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

377. The Parties disagree about whether the Russian Federation complied with the Court's Order of 19 April 2017.

* *

378. Ukraine alleges that the Russian Federation has violated the Court's Order of 19 April 2017 by failing to lift its ban on the *Mejlis*, by failing to ensure that education in the Ukrainian language is available in Crimea, and by aggravating the dispute and making it more difficult to resolve.

379. According to Ukraine, the Order clearly required the Russian Federation to revoke its ban on the *Mejlis*, which is necessarily a "limitation[] on the . . . Mejlis". It points out that the Russian Federation has not lifted the ban. Ukraine rejects the interpretation put forward by the Russian Federation which would be tantamount to treating the obligations under the first provisional measure as self-judging. In its view, this reading is incompatible both with the precise text of the first provisional measure, as well as with the binding character of provisional measures generally. Ukraine argues that if the Court were to follow this interpretation, any State before the Court would be free to ignore a provisional measures order solely based on its belief that it might someday prevail on the merits.

380. Ukraine also submits that the Russian Federation has violated the Order as far as language education is concerned. It claims that since the Russian Federation took control of Crimea, the number of students receiving Ukrainian-language education has declined by nearly 100 per cent. More specifically, Ukraine maintains that of the seven Ukrainian-language education institutions that existed in 2014, only one remains and that even in this school Ukrainian is only taught as a subject

to a few classes in specific grades. According to Ukraine, this sharp decline is not due to a lack of demand, but to the fact that parents are harassed and discouraged from selecting a Ukrainian-language education for their children and that resources for Ukrainian-language education in Crimea are dwindling sharply.

381. Finally, Ukraine submits that the Russian Federation, through its conduct subsequent to the adoption of the Order of 19 April 2017, aggravated the dispute between the Parties both in respect of the ICSFT and of CERD.

382. Regarding the ICSFT, Ukraine argues that the dispute is defined by the Application filed by Ukraine, which requests the Court to declare that the Russian Federation must

> "immediately provide full co-operation to Ukraine in all pending and future requests for assistance in the investigation and interdiction of the financing of terrorism relating to illegal armed groups that engage in acts of terrorism in Ukraine, including the DPR, the LPR, the Kharkiv Partisans, and associated groups and individuals".

In its view, the Russian Federation aggravated the dispute by formally and retrospectively endorsing the acts undertaken by armed groups in eastern Ukraine, by recognizing the DPR and LPR, by providing them with financial and military assistance and by invading Ukraine's territory in 2022.

383. Regarding CERD, Ukraine claims that the Russian Federation has aggravated the dispute by various statements and other efforts subsequent to the adoption of the Order of 19 April 2017 which have perpetuated and aggravated racial discrimination against ethnic Ukrainians and Crimean Tatars. Ukraine points, *inter alia*, to a statement by the CERD Committee of June 2023 criticizing the Russian Federation for its "[i]ncitement to racial hatred and propagation of racist stereotypes against ethnic Ukrainians, in particular on State-owned radio and television networks, . . . as well as by public figures and government officials". Ukraine also refers to recent statements made by President Putin, who characterized Ukrainians as Nazis and denied the existence of a separate Ukrainian people and the right of Ukrainians to their own State.

*

384. The Russian Federation denies that it has violated the Court's Order indicating provisional measures.

385. The Russian Federation is of the view that the first measure does not necessarily require it to lift or suspend the ban on the activities of the *Mejlis*, since this measure only requires that it take measures in keeping with its obligations under CERD. Consistent with the fact that rights under CERD are not unlimited, it would be difficult, according to the Russian Federation, to imagine that the Court would demand that States parties to CERD renounce their right to maintain their national security and public order. The Russian Federation maintains that, it has genuinely been addressing the situation of the *Mejlis* without at the same time hampering the principle of the rule of law and undermining the protection of national security.

386. Regarding the measure concerning access to education in the Ukrainian language, the Russian Federation does not dispute the fact that there has been a decline in the number of students being taught in Ukrainian. In its view, this decline stems from the low demand for education in the Ukrainian language subsequent to what it considers the change in sovereignty in Crimea. It maintains that, despite the low demand for teaching in Ukrainian, the Russian Federation has never restricted that possibility or obstructed students' wishes to study in Ukrainian. The Russian Federation maintains that such access is not denied to those who wish to pursue it and that Ukrainian can be the language of instruction for students upon request. The Respondent asserts that possibilities to study Ukrainian at various Crimean universities continue to exist.

387. Finally, as far as the third measure is concerned, the Russian Federation is of the view that the case before the Court is limited in scope and that events that have unfolded since February 2022, which Ukraine invokes, bear no relation to the present proceedings. In its view, this is illustrated by the fact that Ukraine brought a separate Application invoking the Genocide Convention with respect to the events occurring since February 2022. Moreover, the Respondent claims that the Russian Federation has actively sought a negotiated settlement between the Parties in the context of the present case, which was rejected by Ukraine as inappropriate. In this regard, the Russian Federation points out that the Court has previously held that "pending a decision of the Court on the merits, any negotiation between the Parties with a view to achieving a direct and friendly settlement is to be welcomed".

* *

388. The Court recalls that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109).

389. The Court will address the question of compliance with each of the provisional measures contained in its Order of 19 April 2017 in turn.

With respect to the first provisional measure, the Court recalls that it ordered that

> "(1) With regard to the situation in Crimea, the Russian Federation must, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,
>
> *(a)* Refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*".

390. Ukraine claims that the Russian Federation has violated this measure by not lifting the ban on the *Mejlis*. It is uncontested between the Parties that the Russian Federation has neither suspended nor lifted the ban on the *Mejlis*. However, the Parties disagree about whether the *chapeau* of the provisional measure, by its reference to CERD, can be interpreted as leaving a margin of discretion for the Russian Federation as to how to implement its obligations under the measure.

391. The Court recalls that obligations arising from provisional measures bind the parties independently of the factual or legal situation which the provisional measure in question aims to preserve (see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 665, para. 129). The Court is of the view that the reference in the Order of 19 April 2017 to the obligations of the Russian Federation under CERD does not provide any scope for the Russian Federation to assess, for itself, whether the ban on the *Mejlis* and the confirmation of the ban by the Russian courts were, and remain, justified. The formulation in the *chapeau* "in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination" refers to the source of the rights which the measure seeks to preserve and does not qualify the measure nor confers discretion upon the Party addressed to decide whether or not to implement the measure indicated.

392. The Court therefore finds that the Russian Federation, by maintaining the ban on the *Mejlis*, has violated the Order indicating provisional measures. The Court notes that this finding is independent of the conclusion set out above (see paragraph 275 above) that the ban on the *Mejlis* does not violate the Russian Federation's obligations under CERD.

393. With respect to the second provisional measure, the Court recalls that it ordered that

> "(1) [w]ith regard to the situation in Crimea, the Russian Federation must, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,
>
> . . . . . .
>
> *(b)* [e]nsure the availability of education in the Ukrainian language".

394. The Court notes that the Order of 19 April 2017 required the Russian Federation to ensure that education in the Ukrainian language remains "available". In this regard, the Court takes note of a report by the OHCHR, according to which "instruction in Ukrainian was provided in one Ukrainian school and 13 Ukrainian classes in Russian schools attended by 318 children" (OHCHR, Report on the situation of human rights in the temporarily occupied Autonomous Republic of Crimea and city of Sevastopol, Ukraine, 13 September 2017 to 30 June 2018, UN doc. A/HRC/39/CRP.4, para. 68), which confirms that instruction in the Ukrainian language was available after the adoption of the Order. While Ukraine has shown that a sharp decline in teaching in the Ukrainian language took place after 2014, it has not been established that the Russian Federation has violated the obligation to ensure the availability of education in the Ukrainian language contained in the Order indicating provisional measures.

395. The Court therefore concludes that the Russian Federation has not violated the Order in so far as it required the Respondent to ensure the availability of education in the Ukrainian language.

396. In the Order indicating provisional measures, the Court also stated that "[b]oth Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

397. The Court observes that, subsequent to the Order indicating provisional measures, the Russian Federation recognized the DPR and LPR as independent States and launched a "special military operation" against Ukraine. In the view of the Court, these actions severely undermined the basis for mutual trust and co-operation and thus made the dispute more difficult to resolve.

398. For these reasons, the Court concludes that the Russian Federation violated the obligation under the Order to refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

B. Remedies

399. In its final submissions, Ukraine also requests the Court to adjudge and declare that the Russian Federation is required to:

> "*(l)* Provide full reparation for the harm caused for its actions, including restitution, financial compensation and moral damages, in its own right and as *parens patriae* for its citizens, for the harm Ukraine has suffered as a result of Russia's violations of the Court's Order of 19 April 2017, with such compensation to be quantified in a separate phase of these proceedings.
>
> *(m)* Regarding restitution: restore the Mejlis' activities in Crimea and its members and all their rights, including their properties, retroactive elimination of all Russian administrative and other measures contrary to the Court's Order and release of members of Mejlis currently in jail."

400. The Court recalls that orders indicating provisional measures create a legal obligation for the States involved (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 110) and that it is well established in international law that "the breach of an engagement involves an obligation to make reparation in an adequate form" (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21).

401. The Court considers that its declaration that the Russian Federation has breached the Order indicating provisional measures by maintaining the ban on the *Mejlis* and has breached its obligations under the non-aggravation measure contained in the same Order provides adequate satisfaction to Ukraine.

402. Regarding Ukraine's requests for restitution with respect to the *Mejlis*, the Court finds that, since it has concluded that the ban on the *Mejlis* does not violate the Russian Federation's obligations under CERD (see paragraph 275 above), no restitution can be due after the date of this finding, the assessment at the provisional measures stage having not been confirmed on the merits.

403. The Court does not find it necessary or appropriate to order any other remedy requested by Ukraine.

*

* *

404. For these reasons,

THE COURT,

(1) By thirteen votes to two,

Finds that the Russian Federation, by failing to take measures to investigate facts contained in information received from Ukraine regarding persons who have allegedly committed an offence set forth in Article 2 of the International Convention for the Suppression of the Financing of Terrorism, has violated its obligation under Article 9, paragraph 1, of the said Convention;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Pocar;

AGAINST: *Judge* Xue; *Judge* ad hoc Tuzmukhamedov;

(2) By ten votes to five,

Rejects all other submissions made by Ukraine with respect to the International Convention for the Suppression of the Financing of Terrorism;

IN FAVOUR: *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Salam, Iwasawa, Nolte, Brant; *Judge* ad hoc Tuzmukhamedov;

AGAINST: *President* Donoghue; *Judges* Sebutinde, Bhandari, Charlesworth; *Judge* ad hoc Pocar;

(3) By thirteen votes to two,

Finds that the Russian Federation, by the way in which it has implemented its educational system in Crimea after 2014 with regard to school education in the Ukrainian language, has violated its obligations under Articles 2, paragraph 1 *(a)*, and 5 *(e)* (v) of the International Convention on the Elimination of Racial Discrimination;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Abraham, Bennouna, Xue, Sebutinde, Bhandari, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Pocar;

AGAINST: *Judge* Yusuf; *Judge* ad hoc Tuzmukhamedov;

(4) By ten votes to five,

Rejects all other submissions made by Ukraine with respect to the International Convention on the Elimination of Racial Discrimination;

IN FAVOUR: *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Salam, Iwasawa, Nolte, Brant; *Judge* ad hoc Tuzmukhamedov;

AGAINST: *President* Donoghue; *Judges* Sebutinde, Bhandari, Charlesworth; *Judge* ad hoc Pocar;

(5) By eleven votes to four,

Finds that the Russian Federation, by maintaining limitations on the *Mejlis*, has violated its obligation under paragraph 106 (1) *(a)* of the Order of 19 April 2017 indicating provisional measures;

IN FAVOUR: *President* Donoghue; *Judges* Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Salam, Iwasawa, Nolte, Charlesworth; *Judge* ad hoc Pocar;

AGAINST: *Judges* Tomka, Xue, Brant; *Judge* ad hoc Tuzmukhamedov;

(6) By ten votes to five,

Finds that the Russian Federation has violated its obligation under paragraph 106 (2) of the Order of 19 April 2017 indicating provisional measures to refrain from any action which might aggravate or extend the dispute between the Parties, or make it more difficult to resolve;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Sebutinde, Bhandari, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Pocar;

AGAINST: *Judges* Abraham, Bennouna, Yusuf, Xue; *Judge* ad hoc Tuzmukhamedov;

(7) By eleven votes to four,

Rejects all other submissions made by Ukraine with respect to the Order of the Court of 19 April 2017 indicating provisional measures.

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Salam, Iwasawa, Brant; *Judge* ad hoc Tuzmukhamedov;

AGAINST: *Judges* Sebutinde, Nolte, Charlesworth; *Judge* ad hoc Pocar.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirty-first day of January, two thousand and twenty-four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Ukraine and the Government of the Russian Federation, respectively.

(Signed) Joan E. DONOGHUE,
President.

(Signed) Philippe GAUTIER,
Registrar.

President DONOGHUE appends a separate opinion to the Judgment of the Court; Judges TOMKA, ABRAHAM, BENNOUNA and YUSUF append declarations to the Judgment of the Court; Judge SEBUTINDE appends a dissenting opinion to the Judgment of the Court; Judges BHANDARI, IWASAWA and CHARLESWORTH append separate opinions to the Judgment of the Court; Judge BRANT appends a declaration to the Judgment of the Court; Judge *ad hoc* POCAR appends a separate opinion to the Judgment of the Court; Judge *ad hoc* TUZMUKHAMEDOV appends a separate opinion, partly concurring and partly dissenting, to the Judgment of the Court.

(Initialled) J.E.D.

(Initialled) Ph.G.

_____

Annex 56

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(QATAR *v.* UNITED ARAB EMIRATES)

PRELIMINARY OBJECTIONS

JUDGMENT OF 4 FEBRUARY 2021

2021

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

APPLICATION DE LA CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

(QATAR c. ÉMIRATS ARABES UNIS)

EXCEPTIONS PRÉLIMINAIRES

ARRÊT DU 4 FÉVRIER 2021

Official citation:

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 71

Mode officiel de citation :

Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Qatar c. Emirats arabes unis), exceptions préliminaires, arrêt, C.I.J. Recueil 2021, p. 71

ISSN 0074-4441
ISBN 978-92-1-003883-6

Sales number
N° de vente: **1221**

Printed in France/Imprimé en France

4 FEBRUARY 2021

JUDGMENT

APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(QATAR *v.* UNITED ARAB EMIRATES)

PRELIMINARY OBJECTIONS

APPLICATION DE LA CONVENTION INTERNATIONALE SUR L'ÉLIMINATION DE TOUTES LES FORMES DE DISCRIMINATION RACIALE

(QATAR c. ÉMIRATS ARABES UNIS)

EXCEPTIONS PRÉLIMINAIRES

4 FÉVRIER 2021

ARRÊT

TABLE OF CONTENTS

INTERNATIONAL COURT OF JUSTICE

YEAR 2021

2021
4 February
General List
No. 172

4 February 2021

APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(QATAR *v.* UNITED ARAB EMIRATES)

PRELIMINARY OBJECTIONS

Factual background.

Measures announced by the United Arab Emirates ("UAE") on 5 June 2017 — Severance of diplomatic relations with Qatar — Entry ban — Travel bans — Expulsion order —Closure by UAE of airspace and seaports — Additional measures relating to Qatari media corporations and speech in support of Qatar — Communication of Qatar submitted to the Committee on the Elimination of Racial Discrimination ("CERD Committee") on 8 March 2018 — Decisions on jurisdiction and admissibility of inter-State communication given by the CERD Committee on 27 August 2019 — CERD Committee rejects preliminary exceptions raised by the UAE — Appointment of an ad hoc *Conciliation Commission.*

*

Jurisdictional basis invoked and preliminary objections raised.

Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") — Preliminary objection to jurisdiction ratione materiae *— Preliminary objection based on alleged failure to satisfy procedural preconditions of Article 22 of CERD.*

*

Subject-matter of the dispute.

Applicant required to indicate subject-matter of dispute in its application — Court itself determines subject-matter of dispute on objective basis.

Qatar makes three claims of racial discrimination — First claim arising out of travel bans and expulsion order — Second claim arising from restrictions on Qatari media corporations — Third claim that measures taken result in "indirect discrimination" on the basis of Qatari national origin.

Claim arising out of travel bans and expulsion order — Qatar's contention that express reference to Qatari nationals constitutes discrimination on basis of current nationality — UAE's argument that such differentiation based on nationality does not violate CERD — Parties hold opposing views on whether the term "national origin" in Article 1, paragraph 1, of CERD encompasses current nationality.

Claim arising from restrictions on Qatari media corporations — Disagreement on whether measures directly targeted those corporations in a racially discriminatory manner.

Claim of "indirect discrimination" against persons of Qatari national origin — Qatar's assertion that expulsion order and travel bans give rise to "indirect discrimination" — Qatar's allegations that restrictions on media corporations and limitations on freedom of expression result in "indirect discrimination" — UAE's contention that claim was not presented in Application — Rules of Court do not preclude Qatar from refining the legal arguments presented in its Application or advancing new arguments — Parties hold opposing views over Qatar's claim that UAE has engaged in "indirect discrimination".

Conclusion that the Parties disagree in respect of Qatar's three claims that UAE has violated its obligations under CERD — Parties' disagreements in respect of these claims form the subject-matter of the dispute.

*

First preliminary objection: jurisdiction ratione materiae.

Question whether term "national origin" encompasses current nationality — Interpretation of "national origin" in Article 1, paragraph 1, of CERD on the basis of Article 31 and 32 of the Vienna Convention on the Law of Treaties — Ordinary meaning of term "national origin" does not encompass current nationality — Context in which term used in CERD, in particular paragraphs 2 and 3 of Article 1, supports ordinary meaning — Ordinary meaning also supported by object and purpose of CERD — The term "national origin", in accordance with its ordinary meaning, read in its context and in light of object and purpose of CERD, does not encompass current nationality — Travaux préparatoires *confirm this interpretation — Practice of the CERD Committee — General Recommendation XXX — Careful consideration by Court of position taken by CERD Committee therein — Court's conclusion reached using relevant rules of treaty interpretation — Jurisprudence of regional human rights courts of little help — Conclusion that the*

term "national origin" does not encompass current nationality — First claim consequently does not fall within scope of CERD.

Question whether measures imposed on Qatari media corporations come within scope of CERD — Convention concerns only individuals or groups of individuals — Reference to "institutions" in Article 2, paragraph 1 (a)*, does not include media corporations — Second claim, which relates to media corporations, does not fall within scope of CERD.*

Question whether "indirect discrimination" falls within scope of CERD — Whether measures capable of falling within scope of CERD if, by their purpose or effect, they result in racial discrimination against persons on the basis of their Qatari national origin — Collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE, do not constitute discrimination under CERD — Measures of which Qatar complains do not entail, either by their purpose or by their effect, racial discrimination under CERD — Court does not have jurisdiction to entertain third claim, which relates to "indirect discrimination".

*

First preliminary objection upheld — No need to consider second preliminary objection.

JUDGMENT

Present: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; *Judges* ad hoc Cot, Daudet; *Registrar* Gautier.

In the case concerning the application of the International Convention on the Elimination of All Forms of Racial Discrimination,

between

the State of Qatar,

represented by

Mr. Mohammed Abdulaziz Al-Khulaifi, Legal Adviser to H.E. the Deputy Prime Minister and Minister for Foreign Affairs of the State of Qatar, Dean of the College of Law, Qatar University,

as Agent;

Mr. Vaughan Lowe, QC, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de droit international, Essex Court Chambers, member of the Bar of England and Wales,

Mr. Pierre Klein, Professor of International Law, Université libre de Bruxelles,
Ms Catherine Amirfar, Debevoise & Plimpton LLP, member of the Bar of the State of New York,
Mr. Lawrence H. Martin, Foley Hoag LLP, member of the Bars of the District of Columbia and the Commonwealth of Massachusetts,
Mr. Nico Schrijver, Professor of International Law, Leiden University, member of the Institut de droit international,

as Counsel and Advocates;

H.E. Mr. Abdullah bin Hussein Al-Jaber, Ambassador of the State of Qatar to the Kingdom of the Netherlands,
Mr. Ahmad Al-Mana, Ministry of Foreign Affairs of the State of Qatar,
Mr. Jassim Al-Kuwari, Ministry of Foreign Affairs of the State of Qatar,
Mr. Nasser Al-Hamad, Ministry of Foreign Affairs of the State of Qatar,
Ms Hanadi Al-Shafei, Ministry of Foreign Affairs of the State of Qatar,
Ms Hessa Al-Dosari, Ministry of Foreign Affairs of the State of Qatar,
Ms Sara Al-Saadi, Ministry of Foreign Affairs of the State of Qatar,
Ms Amna Al-Nasser, Ministry of Foreign Affairs of the State of Qatar,
Mr. Ali Al-Hababi, Embassy of the State of Qatar in the Netherlands,
Mr. Rashed Al-Naemi, Embassy of the State of Qatar in the Netherlands,
Mr. Abdulla Al-Mulla, Ministry of Foreign Affairs of the State of Qatar,

as Advisers;

Mr. Pemmaraju Sreenivasa Rao, Special Adviser in the Office of the Attorney General of the State of Qatar, former member of the International Law Commission, member of the Institut de droit international,
Mr. Surya Subedi, QC (Hon.), Professor of International Law, University of Leeds, member of the Institut de droit international, Three Stone Chambers, member of the Bar of England and Wales,
Ms Loretta Malintoppi, 39 Essex Chambers, Singapore, member of the Bar of Rome,
Mr. Pierre d'Argent, Professor of International Law, Université catholique de Louvain, member of the Institut de droit international, Foley Hoag LLP, member of the Bar of Brussels,
Mr. Constantinos Salonidis, Foley Hoag LLP, member of the Bars of the State of New York and Greece,
Ms Floriane Lavaud, Debevoise & Plimpton LLP, member of the Bars of the State of New York and Paris, Solicitor of the Senior Courts of England and Wales,
Mr. Ioannis Konstantinidis, Assistant Professor of International Law, College of Law, Qatar University,
Mr. Ali Abusedra, Legal Counsel, Ministry of Foreign Affairs of the State of Qatar,
Ms Merryl Lawry-White, Debevoise & Plimpton LLP, member of the Bar of the State of New York, Solicitor Advocate of the Senior Courts of England and Wales,

Ms Ashika Singh, Debevoise & Plimpton LLP, member of the Bar of the State of New York,
Ms Julianne Marley, Debevoise & Plimpton LLP, member of the Bar of the State of New York,
Ms Rhianna Hoover, Debevoise & Plimpton LLP, member of the Bar of the State of New York,
Mr. Joseph Klingler, Foley Hoag LLP, member of the Bars of the State of New York and the District of Columbia,
Mr. Peter Tzeng, Foley Hoag LLP, member of the Bars of the State of New York and the District of Columbia,

as Counsel;

Ms Mary-Grace McEvoy, Debevoise & Plimpton LLP,
Mr. Andrew Wharton, Debevoise & Plimpton LLP,
Mr. Jacob Waltner, Debevoise & Plimpton LLP,

as Assistants,

and

the United Arab Emirates,

represented by

H.E. Ms Hissa Abdullah Ahmed Al-Otaiba, Ambassador of the United Arab Emirates to the Kingdom of the Netherlands,

as Agent;

H.E. Mr. Abdalla Hamdan AlNaqbi, Director of International Law Department, Ministry of Foreign Affairs and International Co-operation of the United Arab Emirates,
H.E. Ms Lubna Qassim Al Bastaki, Deputy Permanent Representative of the Permanent Mission of the United Arab Emirates to the United Nations Office and other international organizations in Geneva,
Mr. Scott Sheeran, Senior Legal Adviser to the Minister of State for Foreign Affairs, Ministry of Foreign Affairs and International Co-operation of the United Arab Emirates, Barrister and Solicitor of the High Court of New Zealand,

as Representatives and Advocates;

Sir Daniel Bethlehem, QC, Barrister, Twenty Essex Chambers, member of the Bar of England and Wales,
Mr. Mathias Forteau, Professor, University Paris Nanterre,

as Counsel and Advocates;

Mr. Abdulla Al Jasmi, Head of the Multilateral Treaties and Agreements Section, International Law Department, Ministry of Foreign Affairs and International Co-operation of the United Arab Emirates,
Mr. Mohamed Salim Ali Alowais, Head of the International Organizations and Courts Section, Embassy of the United Arab Emirates in the Netherlands,
Ms Majd Abdelqadir Mohamed Abdalla, Senior Legal Researcher, Multilateral Treaties and Agreements Section, International Law Department, Ministry of Foreign Affairs and International Co-operation of the United Arab Emirates,

Mr. Rashed Jamal Ibrahim Ibrahim Azzam, Legal Researcher for International Relations, International Law Department, Ministry of Foreign Affairs and International Co-operation of the United Arab Emirates,

as Representatives;

Ms Caroline Balme, Legal Adviser to the Minister of State for Foreign Affairs, Ministry of Foreign Affairs and International Co-operation of the United Arab Emirates,

Mr. Paolo Busco, Legal Adviser to the Minister of State for Foreign Affairs, Ministry of Foreign Affairs and International Co-operation of the United Arab Emirates, member of the Italian Bar, registered European lawyer with the Bar of England and Wales,

Mr. Charles L. O. Buderi, Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP, London, member of the Bars of the District of Columbia and the State of California,

Mr. Simon Olleson, Barrister, Twenty Essex Chambers, member of the Bar of England and Wales,

Ms Luciana T. Ricart, LLM, New York University School of Law, Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP, London, member of the Buenos Aires Bar Association and Solicitor of the Senior Courts of England and Wales,

Mr. Hal Shapiro, Partner, Akin Gump Strauss Hauer & Feld LLP, Washington, DC,

as Counsel;

Ms Patricia Jimenez Kwast, international law and dispute settlement consultant, DPhil candidate, University of Oxford,

as Assistant Counsel,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 11 June 2018, the State of Qatar (hereinafter referred to as "Qatar") filed in the Registry of the Court an Application instituting proceedings against the United Arab Emirates (hereinafter referred to as the "UAE") with regard to alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (hereinafter "CERD" or the "Convention").

2. In its Application, Qatar seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article 22 of CERD.

3. On 11 June 2018, Qatar also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

4. The Registrar immediately communicated to the Government of the UAE the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court, and the Request for the indication of provisional measures, in accor-

dance with Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing of the Application and the Request for the indication of provisional measures by Qatar.

5. In addition, by a letter dated 13 June 2018, the Registrar informed all Member States of the United Nations of the filing of the above-mentioned Application and Request for the indication of provisional measures.

6. Pursuant to Article 40, paragraph 3, of the Statute of the Court, the Registrar notified the Member States of the United Nations, through the Secretary-General, of the filing of the Application, by transmission of the printed bilingual text thereof.

7. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Qatar chose Mr. Yves Daudet and the UAE Mr. Jean-Pierre Cot.

8. By its Order of 23 July 2018, the Court, having heard the Parties, indicated the following provisional measures:

> "(1) The United Arab Emirates must ensure that
>
> (i) families that include a Qatari, separated by the measures adopted by the United Arab Emirates on 5 June 2017, are reunited;
>
> (ii) Qatari students affected by the measures adopted by the United Arab Emirates on 5 June 2017 are given the opportunity to complete their education in the United Arab Emirates or to obtain their educational records if they wish to continue their studies elsewhere; and
>
> (iii) Qataris affected by the measures adopted by the United Arab Emirates on 5 June 2017 are allowed access to tribunals and other judicial organs of the United Arab Emirates;
>
> (2) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve." (*I.C.J. Reports 2018 (II)*, pp. 433-434, para. 79.)

9. Pursuant to Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to States parties to CERD the notifications provided for in Article 63, paragraph 1, of the Statute. In addition, in accordance with Article 69, paragraph 3, of the Rules of Court, the Registrar addressed to the United Nations, through its Secretary-General, the notifications provided for in Article 34, paragraph 3, of the Statute.

10. By an Order dated 25 July 2018, the President of the Court fixed 25 April 2019 and 27 January 2020 as the respective time-limits for the filing in the case of a Memorial by Qatar and a Counter-Memorial by the UAE.

11. On 22 March 2019, the UAE, referring to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court, also submitted a Request for the indication of provisional measures, in order to "preserve the UAE's procedural rights" and "prevent Qatar from further aggravating or extending the dispute between the Parties pending a final decision in th[e] case".

12. The Deputy-Registrar immediately communicated a copy of the said Request to the Government of Qatar. He also notified the Secretary-General of the United Nations of the filing of the UAE's Request for the indication of provisional measures.

13. Qatar filed its Memorial in the case on 25 April 2019, within the time-limit fixed by the President of the Court.

14. On 30 April 2019, within the time-limit prescribed by Article 79, paragraph 1, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, the UAE presented preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Consequently, by an Order of 2 May 2019, having noted that, by virtue of Article 79, paragraph 5, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, the proceedings on the merits were suspended, the President of the Court fixed 30 August 2019 as the time-limit within which Qatar could present a written statement of its observations and submissions on the preliminary objections raised by the UAE.

15. By its Order of 14 June 2019, the Court, having heard the Parties, rejected the Request for the indication of provisional measures submitted by the UAE on 22 March 2019.

16. Qatar filed a written statement of its observations and submissions on the preliminary objections raised by the UAE on 30 August 2019, within the time-limit fixed by the President of the Court.

17. By a letter dated 3 September 2019, the Registrar, acting pursuant to Article 69, paragraph 3, of the Rules of Court, transmitted to the Secretary-General of the United Nations copies of the written proceedings filed thus far in the case, and asked whether the Organization intended to present observations in writing under that provision in relation to the preliminary objections raised by the UAE. By a letter dated 27 September 2019, the Under-Secretary-General for Legal Affairs of the United Nations stated that the Organization did not intend to submit any observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court.

18. By a letter dated 19 August 2020, the Agent of the UAE, referring to Article 56 of the Rules of Court and Practice Directions IX and IX*bis*, expressed the wish of her Government to produce three new documents. By a letter dated 24 August 2020, the Agent of Qatar informed the Court that his Government consented to the production of the three new documents by the UAE and expressed the wish of his Government also to produce four new documents under Article 56, paragraph 1, of the Rules of Court. By a letter dated 26 August 2020, the Agent of the UAE informed the Court that her Government had no objection to the production of the four new documents by Qatar. Accordingly, the documents submitted by both Parties were added to the case file.

19. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and the documents annexed would be made accessible to the public on the opening of the oral proceedings, with the exception of Annexes 163, 165-243, 247-263, 265-271 and Exhibit B of Annex 272 of Qatar's Memorial, and Exhibit A of Annex 272-A of Qatar's Written Statement on the Preliminary Objections of the UAE.

20. Public hearings on the preliminary objections raised by the UAE were held by video link from 31 August 2020 to 7 September 2020, at which the Court heard the oral arguments and replies of:

For the UAE: H.E. Ms Hissa Abdullah Ahmed Al-Otaiba,
H.E. Mr. Abdalla Hamdan AlNaqbi,
Ms Lubna Qassim Al Bastaki,
Sir Daniel Bethlehem,

Mr. Scott Sheeran,
Mr. Mathias Forteau.

For Qatar: Mr. Mohammed Abdulaziz Al-Khulaifi,
Mr. Pierre Klein,
Ms Catherine Amirfar,
Mr. Lawrence H. Martin,
Mr. Nico Schrijver,
Mr. Vaughan Lowe.

*

21. In the Application, the following claims were made by Qatar:

"65. Qatar, in its own right and as *parens patriae* of its citizens, respectfully requests the Court to adjudge and declare that the UAE, through its State organs, State agents, and other persons and entities exercising governmental authority, and through other agents acting on its instructions or under its direction and control, has violated its obligations under Articles 2, 4, 5, 6, and 7 of the CERD by taking, *inter alia*, the following unlawful actions:

(a) Expelling, on a collective basis, all Qataris from, and prohibiting the entry of all Qataris into, the UAE on the basis of their national origin;

(b) Violating other fundamental rights, including the rights to marriage and choice of spouse, freedom of opinion and expression, public health and medical care, education and training, property, work, participation in cultural activities, and equal treatment before tribunals;

(c) Failing to condemn and instead encouraging racial hatred against Qatar and Qataris and failing to take measures that aim to combat prejudices, including by *inter alia*: criminalizing the expression of sympathy toward Qatar and Qataris; allowing, promoting, and financing an international anti-Qatar public and social-media campaign; silencing Qatari media; and calling for physical attacks on Qatari entities; and

(d) Failing to provide effective protection and remedies to Qataris to seek redress against acts of racial discrimination through UAE courts and institutions.

66. Accordingly, Qatar respectfully requests the Court to order the UAE to take all steps necessary to comply with its obligations under CERD and, *inter alia*:

(a) Immediately cease and revoke the discriminatory measures, including but not limited to the directives against 'sympathizing' with Qataris, and any other national laws that discriminate *de jure* or *de facto* against Qataris on the basis of their national origin;

(*b*) Immediately cease all other measures that incite discrimination (including media campaigns and supporting others to propagate discriminatory messages) and criminalize such measures;

(*c*) Comply with its obligations under the CERD to condemn publicly racial discrimination against Qataris, pursue a policy of eliminating racial discrimination, and adopt measures to combat such prejudice;

(*d*) Refrain from taking any further measures that would discriminate against Qataris within its jurisdiction or control;

(*e*) Restore rights of Qataris to, *inter alia*, marriage and choice of spouse, freedom of opinion and expression, public health and medical care, education and training, property, work, participation in cultural activities, and equal treatment before tribunals, and put in place measures to ensure those rights are respected;

(*f*) Provide assurances and guarantees of non-repetition of the UAE's illegal conduct; and

(*g*) Make full reparation, including compensation, for the harm suffered as a result of the UAE's actions in violation of the CERD."

22. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of Qatar in its Memorial:

"On the basis of the facts and legal arguments presented in this Memorial, Qatar, in its own right and as *parens patriae* of its citizens, respectfully requests the Court:

1. To adjudge and declare that the UAE, by the acts and omissions of its organs, agents, persons, and entities exercising governmental authority, and through other agents acting on its instructions or under its direction and control, is responsible for violations of the CERD, namely Articles 2 (1), 4, 5, 6 and 7, including by:

(*a*) expelling, on a collective basis, all Qataris from the UAE;

(*b*) applying the Absolute Ban and Modified Travel Ban in violation of fundamental rights that must be guaranteed equally to all under the CERD, regardless of national origin, including the rights to family, freedom of opinion and expression, education and training, property, work, and equal treatment before tribunals;

(*c*) engaging in, sponsoring, supporting, and otherwise encouraging racial discrimination, including racially discriminatory incitement against Qataris, most importantly by criminalizing 'sympathy' with Qatar and orchestrating, funding, and actively promoting a campaign of hatred against Qatar and Qataris, and thereby failing to nullify laws and regulations that have the effect of creating or perpetuating racial discrimination, to take 'all appropriate' measures to combat the spread of prejudice and negative stereotypes, and to promote tolerance, understanding and friendship; and

(d) failing to provide access to effective protection and remedies to Qataris to seek redress against acts of racial discrimination under the CERD through UAE tribunals or institutions, including the right to seek reparation;

2. To adjudge and declare that the UAE has violated the Court's Order on Provisional Measures of 23 July 2018;

3. And further to adjudge and declare that the UAE is obligated to cease its ongoing violations, make full reparation for all material and moral damage caused by its internationally wrongful acts and omissions under the CERD, and offer assurances and guarantees of non-repetition.

4. Accordingly, the Court is respectfully requested to order that the UAE:

(a) immediately cease its ongoing internationally wrongful acts and omissions in contravention of Articles 2 (1), 4, 5, 6, and 7 of the Convention as requested in Chapter VII;

(b) provide full reparation for the harm caused by its actions, including *(i)* restitution by lifting the ongoing Modified Travel Ban as it applies to Qataris collectively based on their national origin; *(ii)* financial compensation for the material and moral damage suffered by Qatar and Qataris, in an amount to be quantified in a separate phase of these proceedings; and *(iii)* satisfaction in the forms of a declaration of wrongfulness and an apology to Qatar and the Qatari people, as requested in Chapter VII; and

(c) provide Qatar with assurances and guarantees of non-repetition in written form as requested in Chapter VII."

23. In the preliminary objections, the following submissions were presented on behalf of the Government of the UAE:

"239. On the basis of each of the three independent preliminary objections explained above, the United Arab Emirates respectfully requests the Court to adjudge and declare that the Court lacks jurisdiction over Qatar's Application of 11 June 2018 and that the Application is inadmissible.

240. The United Arab Emirates reserves the right to amend and supplement this submission in accordance with the provisions of the Statute and the Rules of Court. The United Arab Emirates also reserves the right to submit further objections to the jurisdiction of the Court and to the admissibility of Qatar's claims if the case were to proceed to any subsequent phase."

24. In the written statement of its observations and submissions on the preliminary objections, the following submissions were presented on behalf of the Government of Qatar:

"For the reasons described above, Qatar respectfully requests that the Court:

1. Reject the Preliminary Objections presented by the UAE;

2. Hold that it has jurisdiction to hear the claims presented by Qatar as set out in the Memorial, and that these claims are admissible; and

3. Proceed to hear those claims on the merits."

25. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of the UAE,

at the hearing of 4 September 2020:

"The United Arab Emirates respectfully requests the Court to adjudge and declare that the Court lacks jurisdiction to address the claims brought by the State of Qatar by its Application dated 11 June 2018."

On behalf of the Government of Qatar,

at the hearing of 7 September 2020:

"In accordance with Article 60 of the Rules of Court, for the reasons explained in our Written Statement of 30 August 2019 and during these hearings, Qatar respectfully asks the Court to:

(a) Reject the Preliminary Objections presented by the UAE;

(b) Hold that it has jurisdiction to hear the claims presented by Qatar as set out in its Application and Memorial; and

(c) Proceed to hear those claims on the merits;

(d) Or, in the alternative, reject the Second Preliminary Objection presented by the UAE and hold, in accordance with the provisions of Article 79*ter*, paragraph 4, of the Rules of Court, that the First Preliminary Objection submitted by the UAE does not possess an exclusively preliminary character."

* * *

I. Introduction

A. Factual Background

26. On 5 June 2017, the UAE issued a statement (hereinafter the "5 June 2017 statement") which provided, in relevant part, that

"based on the insistence of the State of Qatar to continue to undermine the security and stability of the region and its failure to honour international commitments and agreements, it has been decided to take the following measures that are necessary for safeguarding the interests of the [Gulf Cooperation Council] States in general and those of the brotherly Qatari people in particular:

. . . . . .

2. Preventing Qatari nationals from entering the UAE or crossing its point of entry, giving Qatari residents and visitors in the UAE 14 days to leave the country for precautionary security reasons. The UAE nationals are likewise banned from traveling to or staying in Qatar or transiting through its territories."

The Gulf Cooperation Council (hereinafter the "GCC") is an intergovernmental political and economic union of which Qatar and the UAE were founding members in 1981, along with the Kingdom of Bahrain, the State of Kuwait, the Sultanate of Oman and the Kingdom of Saudi Arabia.

27. In addition, the 5 June 2017 statement announced the severance of diplomatic relations with Qatar, in support of actions taken by the Kingdom of Bahrain and the Kingdom of Saudi Arabia, giving Qatari diplomats 48 hours to leave the UAE. It also proclaimed the "[c]losure of UAE airspace and seaports for all Qataris in 24 hours and banning [of] all Qatari means of transportation, coming to or leaving the UAE, from crossing, entering or leaving the UAE territories".

28. The 5 June 2017 statement explained:

"The UAE is taking these decisive measures as a result of the Qatari authorities' failure to abide by the Riyadh Agreement on returning GCC diplomats to Doha and its Complementary Arrangement in 2014, and Qatar's continued support, funding and hosting of terror groups, primarily Islamic Brotherhood, and its sustained endeavours to promote the ideologies of Daesh and Al Qaeda across its direct and indirect media in addition to Qatar's violation of the statement issued at the US-Islamic Summit in Riyadh on May 21st, 2017 on countering terrorism in the region and considering Iran a state sponsor of terrorism. The UAE measures are taken as well based on Qatari authorities' hosting of terrorist elements and meddling in the affairs of other countries as well as their support of terror groups — policies which are likely to push the region into a stage of unpredictable consequences."

29. According to an announcement posted on the website of the Ministry of Foreign Affairs and International Co-operation of the UAE on 11 June 2017, the President of the UAE had "instructed the authorities concerned to take into consideration the humanitarian circumstances of Emirati-Qatari joint families". The announcement further provided that "the Ministry of the Interior ha[d] set up a telephone line . . . to receive such cases and take appropriate measures to help them". In a statement

dated 5 July 2018, the Ministry of Foreign Affairs and International Co-operation of the UAE specified that

> "[s]ince its announcement on June 5, 2017 . . . the UAE has instituted a requirement for all Qatari citizens overseas to obtain prior permission for entry into the UAE. Permission may be granted for a limited-duration period, at the discretion of the UAE [G]overnment."

The statement added that

> "Qatari citizens already resident in the UAE need not apply for permission to continue residence in the UAE. However, all Qatari citizens resident in the UAE are encouraged to obtain prior permission for re-entry into UAE territory. All applications for entry clearance may be made through the telephone hotline announced on June 11, 2017."

30. The UAE took certain additional measures relating to Qatari media and speech in support of Qatar. In this regard, on 6 June 2017, the Attorney General of the UAE issued a statement indicating that expressions of sympathy for the State of Qatar or objections to the measures taken by the UAE against the Qatari Government were considered crimes punishable by imprisonment and a fine. The UAE blocked several websites operated by Qatari companies, including those run by Al Jazeera Media Network. On 6 July 2017, the Abu Dhabi Department of Economic Development issued a circular prohibiting the broadcasting of certain television channels operated by Qatari companies.

31. On 8 March 2018, Qatar deposited a communication with the Committee on the Elimination of Racial Discrimination (hereinafter the "CERD Committee") under Article 11 of the Convention, requesting that the UAE take all necessary steps to end the measures enacted and implemented since 5 June 2017. According to Article 11, paragraph 1, of CERD, "[i]f a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee". The UAE, through its responses dated 29 November 2018, 14 January 2019 and 19 March 2019, requested "the Committee to dismiss Qatar's Article 11 Communication for lack [of] jurisdiction and/or lack of admissibility".

32. On 11 June 2018, Qatar filed an Application in the Registry of the Court instituting the present proceedings (see paragraph 1 above).

33. In its decision on jurisdiction with regard to Qatar's inter-State communication, dated 27 August 2019, the CERD Committee con-

cluded that "it ha[d] jurisdiction to examine the exceptions of inadmissibility raised by the Respondent State" (Decision on the jurisdiction of the Committee over the inter-State communication submitted by Qatar against the UAE dated 27 August 2019, UN doc. CERD/C/99/3, para. 60). In its decision on the admissibility of the inter-State communication, also dated 27 August 2019, the CERD Committee concluded as follows:

> "64. In respect of the inter-state communication submitted on 8 March 2018 by Qatar against the United Arab Emirates, the Committee rejects the exceptions raised by the Respondent State concerning the admissibility of the inter-state communication.
>
> 65. The Committee requests its Chairperson to appoint, in accordance with article 12 (1) of the Convention, the members of an *ad hoc* Conciliation Commission, which shall make its good offices available to the States concerned with a view to an amicable solution of the matter on the basis of the States parties' compliance with the Convention." (Decision on the admissibility of the inter-State communication submitted by Qatar against the UAE dated 27 August 2019, UN doc. CERD/C/99/4, paras. 64-65.)

34. By a Note Verbale dated 27 April 2020, addressed by the Permanent Mission of the UAE in Geneva to the Office of the High Commissioner for Human Rights, the Permanent Mission "note[d] with appreciation the [Office's] Note Verbale of 9 April 2020 advising that the *ad hoc* Conciliation Commission has been appointed by the Chair of the Committee, and has been effective since 1 March 2020".

B. The Jurisdictional Basis Invoked and the Preliminary Objections Raised

35. Qatar asserts that the Court has jurisdiction over its Application pursuant to Article 22 of CERD, which provides:

> "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement."

36. Qatar and the UAE are parties to CERD. Qatar acceded to this Convention on 22 July 1976 without entering any reservation. The UAE did so on 20 June 1974 without entering any reservation relevant to the present proceedings.

37. Qatar contends that there is a dispute between the Parties with respect to the interpretation and application of CERD and that the Par-

ties have been unable to settle this dispute despite Qatar's attempts to negotiate with the UAE.

38. At the present stage of these proceedings, the UAE asks the Court to adjudge and declare that the Court lacks jurisdiction to address the claims brought by Qatar on the basis of two preliminary objections. In its first preliminary objection, the UAE maintains that the Court lacks jurisdiction *ratione materiae* over the dispute between the Parties because the alleged acts do not fall within the scope of CERD. In its second preliminary objection, the UAE asserts that Qatar failed to satisfy the procedural preconditions of Article 22 of CERD.

39. The Court notes that, in its written pleadings, the UAE had also included an objection to admissibility on the ground that Qatar's claims constitute an abuse of process. However, during the oral proceedings, counsel for the UAE stated that it was not pursuing an allegation of abuse of process at this stage of the proceedings.

40. Before addressing the preliminary objections of the UAE, the Court will determine the subject-matter of the dispute.

II. Subject-Matter of the Dispute

41. Pursuant to Article 40, paragraph 1, of the Statute and Article 38, paragraph 1, of the Rules of Court, an applicant is required to indicate the subject of a dispute in its application. The Rules of Court also require that an application "specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based" (Article 38, paragraph 2, of the Rules of Court). A Memorial "shall contain a statement of the relevant facts, a statement of law, and the submissions" (Article 49, paragraph 1, of the Rules of Court).

42. It is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the applicant's claims. In doing so, the Court examines the application, as well as the written and oral pleadings of the parties, while giving particular attention to the formulation of the dispute chosen by the applicant. It takes account of the facts that the applicant presents as the basis for its claims. The matter is one of substance, not of form (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 575, para. 24; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, pp. 308-309, para. 48).

* *

43. According to the Applicant, its "Application concerns a legal dispute between Qatar and the UAE regarding the UAE's deliberate and flagrant violations of the CERD". It claims that "[t]he UAE has enacted and implemented a series of discriminatory measures directed at Qataris based expressly on their national origin — measures that remain in effect to this day".

44. Qatar further characterizes the subject-matter of the dispute in the written statement of its observations and submissions on the preliminary objections as follows:

> "As Qatar explained in its Application, Memorial, and during the provisional measures phase of the proceedings, Qatar's claims are based on acts and omissions of the UAE that discriminate against Qataris on the basis of national origin and in violation of Articles 2, 4, 5, 6, and 7 of the CERD. These acts and omissions include, in particular, the collective expulsion of Qataris from the UAE pursuant to its 5 June Directive (the 'Expulsion Order'); the absolute ban on entry to the UAE by Qataris (the 'Absolute Travel Ban'), which was later modified by the imposition of a 'hotline' and website procedure that continue to restrict Qataris' entry into the UAE on an arbitrary and discriminatory basis (the 'Modified Travel Ban'); and the enactment of measures encouraging anti-Qatari hate propaganda and prejudice, and suppressing Qatari media and speech deemed to support Qatar (including, respectively, the 'Anti-Qatari Incitement Campaign', the 'Anti-Sympathy Law', and the 'Block on Qatari Media')."

45. Qatar states that the measures it describes as the "expulsion order" and the "travel bans", by their express reference to Qatari nationals, discriminate against Qataris on the basis of their current nationality. It points out that the definition of "racial discrimination" contained in Article 1, paragraph 1, of CERD includes discrimination on the basis of national origin. Qatar maintains that "nationality" is encompassed within the phrase "national origin".

46. Qatar also alleges that the UAE directly targeted Qatari media corporations by blocking access to their websites and broadcasts in all or part of the UAE's territory. It maintains that these measures were imposed "on racially discriminatory grounds" and that CERD extends to racial discrimination against "institutions", which it considers to include corporations.

47. Qatar also points out that CERD applies to measures that are not framed as distinctions on the basis of a protected ground but have in fact the purpose or effect of racial discrimination. It maintains that, regardless of whether the measures imposed by the UAE are explicitly based on Qatari nationality, they have the purpose or effect of nullifying or impairing the rights and freedoms of persons of Qatari national origin, in the sense of their Qatari heritage and culture. It contends that such measures give rise to "indirect discrimination".

48. As one part of its claim of indirect discrimination, Qatar asserts that the measures which discriminate on the basis of current Qatari nationality violate the UAE's obligations under CERD for another independent reason, "because they have an unjustifiable disparate impact on individuals of Qatari origin, in the sense of their heritage and culture".

49. As further support for its claim of indirect discrimination, Qatar maintains that a number of measures imposed by the UAE encourage anti-Qatari propaganda and suppress speech deemed to be in support of Qatar. It refers to the ban on Qatari media corporations as well as a 6 June 2017 announcement of the Attorney General of the UAE which stated that persons "expressing sympathy, bias or affection for" the State of Qatar or "objecting to the . . . measures . . . taken [by the UAE] against the Qatari [G]overnment" are considered to have committed crimes punishable by imprisonment and a fine (see paragraph 30 above). Qatar contends that, although this statement refers to the "Qatari Government", it is "clearly understood as a reference to Qatar *qua* State and Qatar *qua* Qataris". Additionally, Qatar alleges that the UAE has attempted to incite discrimination against Qataris, referring to statements in social and traditional media by persons it identifies as officials of the UAE, which it considers to be attributable to the UAE.

50. Qatar points out that the UAE's measures are not exclusively addressed to Qataris on the basis of their current nationality and asserts that it has from the beginning framed its case to include a claim of unjustifiable disparate impact. It alleges that the measures imposed by the UAE penalize persons of Qatari national origin based on their identification with Qatari national traditions and culture, their Qatari accent or their Qatari dress. It further alleges that these measures discriminate against persons who are not Qatari citizens on the basis of their cultural identification as "Qataris".

*

51. The UAE asserts that the subject-matter of the dispute is alleged discrimination on the basis of current Qatari nationality, a term that, in its view, is distinct from "national origin". It contends that claims arising from the measures that Qatar describes as the "expulsion order" and the "travel bans" are founded on differential treatment of persons based on their Qatari nationality.

52. The UAE maintains that Qatar seeks to blur the distinction between the terms "nationality" and "national origin" by using the two terms interchangeably and by referring obliquely to "Qataris" in its written and oral pleadings.

53. The UAE acknowledges that it has imposed restrictions on websites of some Qatari media corporations, stating that it did so on the basis of content restrictions, pursuant to UAE law. It considers that measures that address corporations do not fall within the definition of racial discrimination contained in CERD and thus that Qatar's claims with respect to the measures to restrict transmissions of Qatari media corporations are outside the scope of CERD.

54. The UAE also maintains that the restrictions on Qatari media and the other facts that Qatar invokes in support of its allegations of incitement and suppression of free speech, even if established, are not indicative of a claim of racial discrimination, but rather must be assessed in the context of the UAE's conviction that Qatar supports terrorism, extremism and intervention. It points out that Qatar itself frames its allegation of incitement by accusing the UAE of "media attacks on Qatar" and the dissemination of false reports "accusing Qatar of support for terrorism". It notes that the 6 June 2017 statement of the Attorney General of the UAE relates to persons who express support for the State of Qatar, not to persons of Qatari national origin.

55. The UAE accepts that disguised discrimination against members of a protected group would fall within the scope of CERD. However, it contends that, in the present case, the subject-matter of the dispute is limited to alleged direct discrimination on the basis of current nationality and does not extend to "indirect discrimination" because this is not the case that Qatar has pleaded. According to the UAE, Qatar has introduced legal arguments relating to "indirect discrimination" because its claim of direct discrimination on the basis of national origin does not withstand scrutiny.

* *

56. As can be seen from Qatar's characterization of the subject-matter of the dispute (see paragraph 44 above), Qatar makes three claims of racial discrimination. The first is its claim arising out of the "travel bans" and "expulsion order", which make express reference to Qatari nationals. The second is its claim arising from the restrictions on Qatari media corporations. Qatar's third claim is that the measures taken by the UAE, including the measures on which Qatar bases its first and second claims, result in "indirect discrimination" on the basis of Qatari national origin. In order to determine the subject-matter of the dispute, the Court will consider these three claims in turn.

57. As noted above (see paragraph 45), Qatar states that the "expulsion order" and the "travel bans", by their express reference to Qatari nationals, discriminate against Qataris on the basis of their current nationality. The UAE acknowledges that these measures differentiate between Qataris and other persons on the basis of their current nationality, but does not agree that the measures violate its obligations under CERD. The Parties' characterization of the basis for the challenged measures is consistent with the text of the measures themselves, which refer, *inter alia*, to "Qatari residents and visitors", "Qatari nationals", "Qataris", "Qatari citizens" and "travellers holding Qatari passports".

58. As to Qatar's first claim, taking into account Qatar's characterization of these measures and the facts on which it relies in support of its claim that the measures that it describes as the "expulsion order" and the "travel bans" discriminate against Qataris on the basis of their current nationality, in violation of the UAE's obligations under CERD, as well as the characterization by the Respondent, the Court considers that the Parties hold opposing views over this claim.

59. With regard to Qatar's second claim, the Court has noted that the UAE does not deny that it imposed measures to restrict broadcasting and internet programming by certain Qatari media corporations. The Parties disagree, however, on whether those measures directly targeted these media corporations in a racially discriminatory manner, in violation of the UAE's obligations under CERD.

60. As to its third claim, as noted above, Qatar maintains that the subject-matter of the dispute encompasses Qatar's assertion that the "expulsion order" and the "travel bans" give rise to "indirect discrimination" against persons of Qatari national origin, independent of the claim of racial discrimination on the basis of current nationality. The UAE, however,

maintains that this claim of "indirect discrimination" is not part of the case presented in Qatar's Application.

61. The Court observes that the subject-matter of a dispute is not limited by the precise wording that an applicant State uses in its application. The Rules of Court provide an applicant State with some latitude to develop the allegations in its application, so long as it does not "transform the dispute brought before the Court by the application into another dispute which is different in character" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 318-319, paras. 98 and 99).

62. Qatar's Application did not expressly set out Qatar's contention that the "travel bans" and "expulsion order" give rise to "indirect discrimination" against Qataris on a basis other than nationality. Qatar explains that it developed this argument in its Memorial in response to arguments made by the UAE during the provisional measures phase of the case. In addition, Qatar's Request for the indication of provisional measures, filed on the same day as the Application, requested the Court to order that the UAE cease "all conduct that could result, directly or indirectly, in any form of racial discrimination against Qatari individuals and entities".

63. The Court considers that the Rules of Court do not preclude Qatar from refining the legal arguments presented in its Application or advancing new arguments in response to those made by the UAE, thereby making explicit the contention that the measures that Qatar describes as the "travel bans" and "expulsion order" give rise to "indirect discrimination" against persons of Qatari national origin, in violation of the UAE's obligations under CERD.

64. The Court turns next to Qatar's other allegations of "indirect discrimination" against persons of Qatari national origin. Qatar brings these allegations on the basis of the restrictions on Qatari media corporations and other measures that, in its view, attack freedom of expression, incite anti-Qatari sentiment, and criminalize speech deemed to be in favour of Qatar or critical of the UAE's policies towards Qatar, as well as statements by the UAE or its officials that express or condone anti-Qatari hate speech and propaganda.

65. The Court notes that Qatar made specific references in its Application to the 6 June 2017 statement by the Attorney General of the UAE, the restrictions on Qatari media corporations, the UAE's "media defamation" campaign against Qatar and alleged statements by UAE officials fostering anti-Qatari sentiment.

66. The Parties address these contentions in their written and oral pleadings. Although Qatar acknowledges that the statement by the Attorney General of the UAE refers to criminal penalties for supporting the Qatari Government, not Qataris, it asserts that the risk of criminal penalties has a chilling effect and potentially alienates Qataris from their Emirati friends and family. It introduces several witness statements to substantiate its claims. In support of its contention that the UAE has fostered anti-Qatari sentiment, Qatar attaches to its Memorial a number of social media posts from persons it describes as UAE officials in which the authors criticize Qatar. Qatar claims that these statements formed part of a wider media campaign directed against it. It asserts that this criticism of Qatar has resulted in hate messages directed towards persons of Qatari national origin. Qatar also claims that the restrictions on Qatari media corporations have interfered with the free expression of Qatari ideas and culture in a broader sense and have contributed to the climate of fear which persons of Qatari national origin are said to have experienced as a result of the other measures that the UAE has taken.

67. The UAE does not dispute that its Attorney General made the statement to which Qatar objects. It acknowledges that it has made "adverse comments directed towards the State of Qatar and its behaviour" and that "others within its territory may have made similar comments against the State of Qatar". It does not accept, however, that such comments about another State can give rise to a claim of racial discrimination under CERD. The UAE also refutes Qatar's allegations of certain instances in which individuals claim to have been arrested, mistreated or to have suffered other negative consequences in the UAE for expressing sympathy with Qatar and adds that in any case the persons concerned are not of Qatari nationality or alleged to be of Qatari national origin. The UAE also argues that, by invoking the restrictions on Qatari media corporations in support of its claim of "indirect discrimination", Qatar has presented a new argument that does not form part of the case pleaded in its Application.

68. In its Application, Qatar alleges that the restrictions imposed on Qatari media corporations violate the freedom of expression of Qataris (see paragraphs 64-65 above). As the Court previously noted (see paragraph 63 above), the Rules of Court do not preclude Qatar from refining the legal arguments presented in its Application or advancing new arguments.

69. Taking into account the Application and the written and oral pleadings, as well as the facts asserted by Qatar, the Court considers that the Parties hold opposing views over Qatar's claim that the UAE has engaged in "indirect discrimination" against persons of Qatari national origin, in violation of its obligations under CERD.

70. In view of the preceding analysis, the Court concludes that the Parties disagree in respect of Qatar's three claims that the UAE has violated its obligations under CERD: first, the claim that the measures that Qatar describes as the "expulsion order" and the "travel bans", by their express references to Qatari nationals, discriminate against Qataris on the basis of their current nationality; secondly, the claim that the UAE imposed racially discriminatory measures on certain Qatari media corporations; and thirdly, the claim that the UAE has engaged in "indirect discrimination" against persons of Qatari national origin by taking these measures and other measures summarized in paragraph 64. The Parties' disagreements in respect of these claims form the subject-matter of the dispute.

III. First Preliminary Objection: Jurisdiction *Ratione Materiae*

71. The Court will now consider whether it has jurisdiction *ratione materiae* over the dispute under Article 22 of CERD.

72. In order to determine whether the dispute is one with respect to the interpretation or application of CERD, under its Article 22, the Court will examine whether each of the above claims falls within the scope of CERD (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 595, paras. 94-95). The Court will address Qatar's claims in the order mentioned above (see paragraph 70).

73. The Court observes that, as far as the first claim of Qatar is concerned, the Parties disagree on whether the term "national origin" in Article 1, paragraph 1, of the Convention encompasses current nationality. In respect of the second claim of Qatar, the Parties disagree on whether the scope of the Convention extends to Qatari media corporations. Finally, in respect of the third claim, the Parties disagree on whether the measures of which Qatar complains give rise to "indirect discrimination" against Qataris on the basis of their national origin. The Court will examine each of these questions with a view to ascertaining whether it has jurisdiction *ratione materiae* in the present case.

A. The Question whether the Term "National Origin" Encompasses Current Nationality

74. Qatar is of the view that the term "national origin", in the definition of racial discrimination in Article 1, paragraph 1, of the Convention, encompasses current nationality and that the measures of which Qatar complains thus fall within the scope of CERD. The UAE argues that the term "national origin" does not include current nationality and that the Convention does not prohibit differentiation based on the current nationality of Qatari citizens, as complained of by Qatar in this case. Thus, the Parties hold opposing views on the meaning and scope of the term "national origin" in Article 1, paragraph 1, of the Convention, which reads:

> "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

* *

75. In order to determine its jurisdiction *ratione materiae* in this case, the Court will interpret CERD and specifically the term "national origin" in Article 1, paragraph 1, thereof by applying the rules on treaty interpretation enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter the "Vienna Convention"). Although that Convention is not in force between the Parties and is not, in any event, applicable to treaties concluded before it entered into force, such as CERD, it is well established that Articles 31 and 32 of the Vienna Convention reflect rules of customary international law (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 598, para. 106; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, pp. 320-321, para. 91; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 116, para. 33).

76. The Court will interpret the term "national origin" by reference, first, to the elements set out in Article 31 of the Vienna Convention,

which states the general rule of treaty interpretation. Only then will the Court turn to the supplementary means of interpretation provided for in Article 32 in order to confirm the meaning resulting from that process, or to remove ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 321, para. 91; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 109-110, para. 160).

77. The Court will also examine the practice of the CERD Committee and of regional human rights courts. In their pleadings, the Parties expressed different opinions on that practice in relation to the interpretation of the term "national origin" in Article 1, paragraph 1, of the Convention. The Court recalls that, in its jurisprudence, it has taken into account the practice of committees established under human rights conventions, as well as the practice of regional human rights courts, in so far as this was relevant for the purposes of interpretation (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 331, para. 13; pp. 334-335, para. 24; p. 337, para. 33, and pp. 339-340, para. 40; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 457-458, para. 101; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 663-664, para. 66; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 179, para. 109, and pp. 192-193, para. 136).

1. The term "national origin" in accordance with its ordinary meaning, read in its context and in the light of the object and purpose of CERD

78. The Court recalls that Article 31, paragraph 1, of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The Court's interpretation must take account of all these elements considered as a whole (*Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 29, para. 64).

* *

79. According to the UAE, the ordinary meaning of the term "national origin" does not encompass current nationality, because the latter concept refers to a legal relationship with a State in the sense of citizenship, whereas national origin denotes "an association with a nation of people, not a State". In the Respondent's view, the five authentic texts of "the

Convention confirm that the drafters drew a distinction between the term "national origin", as used in Article 1, paragraph 1, and Article 5 of the Convention, and "nationality", as used in Article 1, paragraph 3, of the Convention. In its view, the definition of racial discrimination in the Convention refers only to characteristics that are inherent and immutable, namely race, colour, descent, or national or ethnic origin. Nationality, on the other hand, is a legal bond that can change over time. Lastly, the Respondent considers that the Convention's title and Preamble confirm that it does not prohibit differentiation on the basis of an individual's current nationality, since it concerns racial discrimination. According to the Respondent, the Preamble reaffirms the overall aim of bringing racial discrimination to an end and makes no mention of discrimination based on current nationality. It thus argues that the term "national origin" as used in Article 1, paragraph 1, of CERD is "an individual's permanent association with a particular nation of people" and does not include nationality in the sense of citizenship.

80. In Qatar's view, discrimination based on a person's current nationality falls within the prohibition of racial discrimination provided for in Article 1, paragraph 1, of the Convention. According to the Applicant, the term "national origin" refers to a person belonging to a nation by birth, or to the country from which he or she originates, as well as a person's current nationality or national affiliation. It contends that this term, as reproduced in the different languages of the Convention, does not refer only to the immutable characteristics of a person. Qatar further contends that paragraphs 2 and 3 of Article 1, which exclude from the scope of the Convention any differentiation between citizens and non-citizens and at the same time prohibit discrimination against any particular nationality, would be deprived of any *effet utile* if current nationality were not covered by the term "national origin". Relying on the Preamble, the Applicant argues that it was the drafters' intention that the Convention would not remain static but would form a comprehensive network of protections which would apply to racial discrimination, however it manifests, across different countries, contexts and time periods. According to the Applicant, excluding current nationality from the definition of racial discrimination would permit States to put in place any discriminatory policy targeting individuals or groups with the characteristics expressly mentioned in Article 1, paragraph 1, of the Convention. The adoption of such policies could be justified officially by sole reference to current nationality rather than to the characteristics in question. The Applicant thus concludes that the exclusion of nationality-based discrimination from the scope of the Convention would lead to absurd results wholly at odds with its purpose.

* *

81. As the Court has recalled on many occasions, "[i]nterpretation must be based above all upon the text of the treaty" (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 22, para. 41). The Court observes that the definition of racial discrimination in the Convention includes "national or ethnic origin". These references to "origin" denote, respectively, a person's bond to a national or ethnic group at birth, whereas nationality is a legal attribute which is within the discretionary power of the State and can change during a person's lifetime (*Nottebohm (Liechtenstein* v. *Guatemala), Second Phase, Judgment, I.C.J. Reports 1955*, pp. 20 and 23). The Court notes that the other elements of the definition of racial discrimination, as set out in Article 1, paragraph 1, of the Convention, namely race, colour and descent, are also characteristics that are inherent at birth.

82. The Court will next turn to the context in which the term "national origin" is used in the Convention, in particular paragraphs 2 and 3 of Article 1, which provide that:

> "2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
>
> 3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality."

83. The Court considers that these provisions support the interpretation of the ordinary meaning of the term "national origin" as not encompassing current nationality. While according to paragraph 3, the Convention in no way affects legislation concerning nationality, citizenship or naturalization, on the condition that such legislation does not discriminate against any particular nationality, paragraph 2 provides that any "distinctions, exclusions, restrictions or preferences" between citizens and non-citizens do not fall within the scope of the Convention. In the Court's view, such express exclusion from the scope of the Convention of differentiation between citizens and non-citizens indicates that the Convention does not prevent States parties from adopting measures that restrict the right of non-citizens to enter a State and their right to reside there — rights that are in dispute in this case — on the basis of their current nationality.

84. The Court will now examine the object and purpose of the Convention. The Court has frequently referred to the preamble of a convention to determine its object and purpose (*Certain Iranian Assets (Islamic*

Republic of Iran v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 28, para. 57, and p. 38, para. 91; *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014*, p. 251, para. 56; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 449, para. 68).

85. It is recalled in the Preamble of CERD that

> "the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end".

86. The Court notes that CERD was drafted against the backdrop of the 1960s decolonization movement, for which the adoption of resolution 1514 (XV) of 14 December 1960 was a defining moment (*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, p. 132 para. 150). By underlining that "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere", the Preamble to the Convention clearly sets out its object and purpose, which is to bring to an end all practices that seek to establish a hierarchy among social groups as defined by their inherent characteristics or to impose a system of racial discrimination or segregation. The aim of the Convention is thus to eliminate all forms and manifestations of racial discrimination against human beings on the basis of real or perceived characteristics as of their origin, namely at birth.

87. CERD, whose universal character is confirmed by the fact that 182 States are parties to it, thus condemns any attempt to legitimize racial discrimination by invoking the superiority of one social group over another. Therefore, it was clearly not intended to cover every instance of differentiation between persons based on their nationality. Differentiation on the basis of nationality is common and is reflected in the legislation of most States parties.

88. Consequently, the term "national origin" in Article 1, paragraph 1, of CERD, in accordance with its ordinary meaning, read in its context and in the light of the object and purpose of the Convention, does not encompass current nationality.

2. The term "national origin" in the light of the travaux préparatoires *as a supplementary means of interpretation*

89. In light of the conclusion above, the Court need not resort to supplementary means of interpretation. However, the Court notes that both Parties have carried out a detailed analysis of the *travaux préparatoires* of the Convention in support of their respective positions on the meaning and scope of the term "national origin" in Article 1, paragraph 1, of the Convention. Considering this fact and the Court's practice of confirming, when it deems it appropriate, its interpretation of the relevant texts by reference to the *travaux préparatoires* (see, for example, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 128, para. 142, and pp. 129-130, para. 147), the Court will examine the *travaux préparatoires* of CERD in the present case.

* *

90. According to the UAE, the various drafts of the definition of racial discrimination considered by the negotiators of the Convention did not refer to nationality in the political-legal sense of the term. The Respondent recalls that the amendment jointly proposed by the United States of America and France in the course of the work of the Third Committee of the United Nations General Assembly (hereinafter the "Third Committee"), according to which "the expression 'national origin' does not mean 'nationality' or 'citizenship'", was withdrawn in favour of an amendment adopted as the final text of Article 1. The Respondent adds that this withdrawal was justified by the insertion of paragraphs 2 and 3 into the text of Article 1, which the two countries considered "entirely acceptable".

91. Qatar, for its part, asserts that the drafters of the Convention sought a broad and comprehensive definition of racial discrimination, which would leave no vulnerable group without protection, and they did not intend to exclude nationality-based discrimination from its scope. According to the Applicant, the fact that the proposed amendments seeking to exclude nationality from the scope of the term "national origin" in the definition of racial discrimination were not adopted confirms that this term encompasses current nationality. As regards the joint amendment of the United States of America and France, which was withdrawn in favour of the current wording of Article 1, Qatar considers that it was in any event limited in scope, since it sought to prevent non-citizens from availing themselves of certain rights reserved for citizens and in no way sought to exclude differentiation based on current nationality from the scope of the Convention. Thus, in Qatar's view, the *travaux préparatoires* confirm that the scope of the Convention extends to discrimination based on cur-

rent nationality, in particular where, as in the present case, a State singles out an entire group of non-citizens for discriminatory treatment.

* *

92. The Court recalls that the Convention was drafted in three stages: first, as part of the work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter the "Sub-Commission"), then within the Commission on Human Rights (hereinafter the "Commission") and, finally, within the Third Committee.

93. In the view of the Court, the definition of racial discrimination contained in the various drafts demonstrates that the drafters did in fact have in mind the differences between national origin and nationality. The Sub-Commission discussed at length the question whether the definition should refer solely to national origin or should also include nationality. Although some members were in favour of including the term "nationality" in the first draft definition of racial discrimination, this was only for specific cases of States composed of different nationalities. Indeed, several members of the Sub-Commission were of the opinion that the Convention should not seek to eliminate all differentiation based on nationality in the political-legal sense of the term, since in all countries a distinction was made between nationals and aliens. As a result, the draft presented by the Sub-Commission to the Commission did not refer to current nationality as a basis of racial discrimination:

> "In this Convention the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, national or ethnic origin (and in the case of States composed of different nationalities discrimination based on such difference) which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in political, economic, social, cultural or any other field of public life set forth *inter alia* in the Universal Declaration of Human Rights." ("Draft International Convention on the Elimination of All Forms of Racial Discrimination", annexed to the *Report of the Sixteenth Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights*, 13-31 January 1964, UN doc. E/CN.4/873, E/CN.4/Sub.2/241, 11 February 1964, p. 46.)

94. The Court notes that the question of the scope of the term "national origin" arose again during the work of the Commission. The Court

observes that it is clear from the Commission's discussions that the expression "national origin" refers not to nationality but to country of origin (United Nations, *Commission on Human Rights, Report on the Twentieth Session, 17 February-18 March 1964*, doc. E/3878, E/CN.4/874, pp. 24-25, para. 85). Accordingly, the draft Convention presented by the Commission to the Third Committee contained the following definition of racial discrimination, which sought to exclude nationality from the scope of the term "national origin":

> "In this Convention the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, [national] or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public [life]. [In this paragraph the expression 'national origin' does not cover the status of any person as a citizen of a given State.]" (*Ibid.*, p. 111; see also United Nations, *Commission on Human Rights, Twentieth Session, Summary Record of the 810th Meeting*, 13 March 1964, doc. E/CN.4/SR.810, 15 May 1964, p. 5.)

95. It emerges from the discussions within the Third Committee that, although it was ultimately decided to retain the term "national origin" in the text of the Convention, this decision was made only in so far as the term refers to persons of foreign origin who are subject to racial discrimination in their country of residence on the grounds of that origin. Several delegations noted that national origin differs from current nationality.

96. In the Court's view, the fact that the amendment of the United States of America and France was not retained (see paragraph 90 above) cannot support the Applicant's position that the term "national origin" encompasses current nationality (see United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee*, "Draft International Convention on the Elimination of All Forms of Racial Discrimination", doc. A/6181, 18 December 1965, pp. 12-14, paras. 30-37). Although the amendment was withdrawn, this was done in order to arrive at a compromise formula that would enable the text of the Convention to be finalized, by adding paragraphs 2 and 3 to Article 1 (see the compromise amendment presented by Ghana, India, Kuwait, Lebanon, Mauritania, Morocco, Nigeria, Poland and Senegal, UN doc. A/C.3/L.1238). As the Court has noted (see paragraphs 82-83 above), paragraphs 2 and 3 of Article 1 provide that the Convention will not apply to differentiation between citizens and non-citizens and will not affect States' legislation on nationality, thus fully addressing the concerns expressed by certain delegations, including those of the United States of America and France, regarding the scope of the term "national origin" (see the explanations

provided by Lebanon in presenting the compromise amendment, United Nations, *Official Records of the General Assembly, Twentieth Session, Third Committee, Summary Record of the 1307th Meeting, held on 18 October 1965*, doc. A/C.3/SR.1307, p. 95, para. 1 (Lebanon)).

97. The Court concludes that the *travaux préparatoires* as a whole confirm that the term "national origin" in Article 1, paragraph 1, of the Convention does not include current nationality.

3. The practice of the CERD Committee

98. With regard to the practice of the CERD Committee, the UAE argues that the Committee's opinions and general recommendations do not constitute subsequent practice or agreement of States parties to CERD regarding the interpretation of the Convention. In particular, the Respondent considers that General Recommendation XXX concerning discrimination against non-citizens, adopted by the CERD Committee in 2004, does not constitute an interpretation based on the practice of States parties and that, in any event, it is not intended as a general prohibition of all differential treatment based on nationality. The Respondent further considers that, according to that text, any differential treatment between different groups of non-citizens must be assessed "in the light of the objectives and purposes of the Convention". Finally, as regards the decisions on jurisdiction and admissibility delivered by the CERD Committee in respect of the communication submitted by Qatar, the Respondent contends that these decisions are in no way binding on the Court and their reasoning with regard to the interpretation of the term "national origin" is insufficient. It adds that these decisions, whereby the Committee held that measures based on the current nationality of Qatari citizens fell within the scope of the Convention, are based on a single criterion, i.e. the Committee's "constant practice", which is inconsistent with the rules of treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention.

99. Qatar, for its part, requests that the Court ascribe great weight to the CERD Committee's interpretations of the Convention, in keeping with its jurisprudence relating to committees established under other human rights conventions. The Applicant asserts that the CERD Committee, as the guardian of the Convention, has developed a constant practice whereby differentiation based on nationality is capable of constituting racial discrimination within the meaning of the Convention. It notes, in particular, that the CERD Committee found that it was competent to entertain Qatar's communication concerning the same measures of which it complains in the present case, considering that they were capable of falling within the scope *ratione materiae* of the Convention. Thus, accord-

ing to Qatar, differentiation based on nationality can constitute racial discrimination within the meaning of the Convention, in so far as it does not pursue a legitimate aim and is not proportional to the achievement of that aim.

* *

100. The CERD Committee, in its General Recommendation XXX, considered that

> "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim".

The Committee, a body of independent experts established specifically to supervise the application of CERD, relied on this General Recommendation when it found that it was competent to examine Qatar's communication against the UAE and that this communication was admissible (Decision on the admissibility of the inter-State communication submitted by Qatar against the UAE dated 27 August 2019, UN doc. CERD/C/99/4, paras. 53-63).

101. The Court recalls that, in its Judgment on the merits in the *Diallo* case, to which reference is made in paragraph 77 above, it indicated that it should "ascribe great weight" to the interpretation of the International Covenant on Civil and Political Rights — which it was called upon to apply in that case — adopted by the Human Rights Committee (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 664, para. 66). In this regard, it also affirmed, however, that it was "in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee" *(ibid.)*. In the present case concerning the interpretation of CERD, the Court has carefully considered the position taken by the CERD Committee, which is specified in paragraph 100 above, on the issue of discrimination based on nationality. By applying, as it is required to do (see paragraph 75 above), the relevant customary rules on treaty interpretation, it came to the conclusion indicated in paragraph 88 above, on the basis of the reasons set out above.

4. The jurisprudence of regional human rights courts

102. Lastly, both Parties referred in their written and oral pleadings to the jurisprudence of regional human rights courts in their arguments on the meaning and scope of the term "national origin". In this respect, Qatar invokes the jurisprudence of the European Court of Human Rights, the Inter-American Court of Human Rights and the African Commission

on Human and Peoples' Rights, which, it contends, have interpreted the term national origin as including nationality. Moreover, the Applicant refers to this jurisprudence to reiterate that discrimination consists in a difference in treatment without legitimate justification and without a reasonable relationship of proportionality with the aim to be achieved, which in its view is true of the measures at issue in this case. The Applicant adds that the elements of the definition of discrimination adopted by the CERD Committee are exactly the same as those applied in regional human rights instruments and in general international law, and entail an examination of the legitimacy and proportionality of the measures.

103. The UAE disputes the relevance of the jurisprudence of regional human rights courts for the purpose of interpreting the Convention. In its view, the concept of discrimination that has prevailed in general international human rights law has no bearing on the interpretation of CERD, which is concerned solely with racial discrimination.

* *

104. It is for the Court, in the present case, to determine the scope of CERD, which exclusively concerns the prohibition of racial discrimination on the basis of race, colour, descent, or national or ethnic origin. The Court notes that the regional human rights instruments on which the jurisprudence of the regional courts is based concern respect for human rights without distinction of any kind among their beneficiaries. The relevant provisions of these conventions are modelled on Article 2 of the Universal Declaration of Human Rights of 10 December 1948, according to which

> "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (see also Article 14 of the European Convention on Human Rights, entitled "Prohibition of discrimination"; Article 1 of the American Convention on Human Rights; and Article 2 of the African Charter on Human and Peoples' Rights).

While these legal instruments all refer to "national origin", their purpose is to ensure a wide scope of protection of human rights and fundamental freedoms. The jurisprudence of regional human rights courts based on those legal instruments is therefore of little help for the interpretation of the term "national origin" in CERD.

5. Conclusion on the interpretation of the term "national origin"

105. In light of the above, the Court finds that the term "national origin" in Article 1, paragraph 1, of the Convention does not encompass current nationality. Consequently, the measures complained of by Qatar in the present case as part of its first claim, which are based on the current nationality of its citizens, do not fall within the scope of CERD.

B. The Question whether the Measures Imposed by the UAE on certain Qatari Media Corporations Come within the Scope of the Convention

106. In its second claim, Qatar complains that the measures imposed on certain media corporations in the UAE have infringed the right to freedom of opinion and expression of Qataris. According to the Applicant, the UAE has blocked access to news websites and television stations operated by Qatari corporations, including Al Jazeera. In particular, Qatar submits that the effect of closing down Qatari media channels has been to silence sources of independent information that might have mitigated the racially discriminatory messages disseminated as part of anti-Qatari hate speech and propaganda. The Applicant submits that the block on Qatari media has not only directly targeted Qatari corporations, but has also infringed the freedom of expression of Qatari ideas and culture and contributed to the climate of fear experienced by Qataris as a result of their Qatari identity being targeted.

107. The UAE considers that the Applicant's claims in respect of Qatari media corporations do not fall within the scope of the Convention. It submits that corporations are not covered by the Convention, which applies only to natural persons. The UAE further submits that while corporations may have a nationality, they do not have a national origin. In respect of the allegations made by Qatar, the UAE argues that it has a regulatory framework for media activities, which provides for certain content restrictions that allow the authorities to block the websites of media corporations. It is pursuant to this regulatory framework, which applies to all media corporations operating in the UAE, that the Respondent has blocked certain websites of Qatari media corporations.

* *

108. For the present purposes, the Court will examine only whether the measures concerning certain Qatari media corporations, which according to Qatar have been imposed in a racially discriminatory manner, fall

within the scope of the Convention. As to the alleged "indirect discrimination" resulting from the effect of the media block on persons of Qatari national origin, the Court will examine that aspect in its analysis of Qatar's third claim. The Court notes that the Convention concerns only individuals or groups of individuals. This is clear from the various substantive provisions of CERD, which refer to "certain racial or ethnic groups or individuals" (Article 1, paragraph 4), "race or group of persons" (Article 4 *(a)*), or "individuals or groups of individuals" (Article 14, paragraph 1), as well as its Preamble which refers to racial "discrimination between human beings". While under Article 2, paragraph 1 *(a)*, of the Convention, "[e]ach State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions", the Court considers that this reference to "institutions" does not include media corporations such as those in the present case. Read in its context and in the light of the object and purpose of the Convention, the term "institutions" refers to collective bodies or associations, which represent individuals or groups of individuals. Thus, the Court concludes that Qatar's second claim relating to Qatari media corporations does not fall within the scope of the Convention.

C. The Question whether the Measures that Qatar Characterizes as "Indirect Discrimination" against Persons of Qatari National Origin Fall within the Scope of the Convention

109. Qatar submits that the "expulsion order" and "travel bans", as well as other measures taken by the UAE, have had the purpose and effect of discriminating "indirectly" against persons of Qatari national origin in the historical-cultural sense, namely persons of Qatari birth and heritage, including their spouses, their children and persons otherwise linked to Qatar. According to Qatar, a measure may be considered as "based on" one of the grounds listed in Article 1 if, by its effect, it implicates a protected group. It adds that the Convention prohibits both direct discrimination, where a measure expressly distinguishes on the basis of one of the grounds of racial discrimination, and "indirect discrimination", where a measure results in such a distinction by its effect. As part of the latter claim, Qatar complains of official statements critical of Qatar, including the 6 June 2017 statement of the Attorney General of the UAE, which mentioned criminal penalties for any expression of sympathy towards Qatar. Qatar adds that the UAE has failed to comply with CERD by encouraging and failing to supress anti-Qatari hate speech and propaganda. The Applicant emphasizes that its complaints are based not on a minimal difference in the treatment of Qatari citizens in the area of immigration controls, but on comprehensive, serious and co-ordinated

discriminatory acts resulting in discrimination against persons of Qatari national origin in the historical-cultural sense, in particular on the basis of their traditions, culture, accent or dress.

110. According to the UAE, there is no question of "indirect" racial discrimination in the present case. It adds that this is not how Qatar presented its complaints in its Application instituting proceedings or in its offer to negotiate dated 25 April 2018, which concerned allegedly discriminatory policies directed at Qatari citizens and companies on the sole basis of their Qatari nationality in violation of CERD. It further states that the notion of "indirect discrimination", in the context of the present Convention, is more specific than in other human rights treaties, since it refers solely to measures which are not discriminatory at face value but are discriminatory in fact and effect. The UAE observes that the 6 June 2017 statement by its Attorney General was made in the context of existing legislation, i.e. Federal Decree-Law No. 5 on Combating Cybercrimes dated 13 August 2012, and that there was no criminalizing of sympathy for Qatar. The UAE submits that the various allegations relating to its failure to suppress statements critical of Qatar or the actions of its Government, even if they were true, do not fall within the scope *ratione materiae* of the Convention since it does not constitute racial discrimination on the grounds of race, colour, descent, or national or ethnic origin.

* *

111. The Court recalls that it has already found that the "expulsion order" and "travel bans" of which Qatar complains as part of its first claim do not fall within the scope of CERD, since these measures are based on the current nationality of Qatari citizens, and that such differentiation is not covered by the term "national origin" in Article 1, paragraph 1, of the Convention (see paragraph 105 above). The Court will now turn to the question whether these and any other measures as alleged by Qatar are capable of falling within the scope of the Convention, if, by their purpose or effect, they result in racial discrimination against certain persons on the basis of their Qatari national origin.

112. The Court first observes that, according to the definition of racial discrimination in Article 1, paragraph 1, of CERD, a restriction may con-

stitute racial discrimination if it "has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". Thus, the Convention prohibits all forms and manifestations of racial discrimination, whether arising from the purpose of a given restriction or from its effect. In the present case, while the measures based on current Qatari nationality may have collateral or secondary effects on persons born in Qatar or of Qatari parents, or on family members of Qatari citizens residing in the UAE, this does not constitute racial discrimination within the meaning of the Convention. In the Court's view, the various measures of which Qatar complains do not, either by their purpose or by their effect, give rise to racial discrimination against Qataris as a distinct social group on the basis of their national origin. The Court further observes that declarations criticizing a State or its policies cannot be characterized as racial discrimination within the meaning of CERD. Thus, the Court concludes that, even if the measures of which Qatar complains in support of its "indirect discrimination" claim were to be proven on the facts, they are not capable of constituting racial discrimination within the meaning of the Convention.

113. It follows from the above that the Court does not have jurisdiction *ratione materiae* to entertain Qatar's third claim, since the measures complained of therein by that State do not entail, either by their purpose or by their effect, racial discrimination within the meaning of Article 1, paragraph 1, of the Convention.

D. General Conclusion

114. In light of the above, the Court concludes that the first preliminary objection raised by the UAE must be upheld. Having found that it does not have jurisdiction *ratione materiae* in the present case under Article 22 of the Convention, the Court does not consider it necessary to examine the second preliminary objection raised by the UAE. In accordance with its jurisprudence, when its jurisdiction is challenged on diverse grounds, the Court is "free to base its decision on the ground which in its judgment is more direct and conclusive" (*Aerial Incident of 10 August 1999 (Pakistan* v. *India), Jurisdiction of the Court, Judgment, I.C.J. Reports 2000*, p. 24, para. 26; *Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 17, para. 40; *Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 25).

* * *

115. For these reasons,

THE COURT,

(1) By eleven votes to six,

Upholds the first preliminary objection raised by the United Arab Emirates;

IN FAVOUR: *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Donoghue, Gaja, Crawford, Gevorgian, Salam; *Judges* ad hoc Cot, Daudet;

AGAINST: *President* Yusuf; *Judges* Cançado Trindade, Sebutinde, Bhandari, Robinson, Iwasawa;

(2) By eleven votes to six,

Finds that it has no jurisdiction to entertain the Application filed by the State of Qatar on 11 June 2018.

IN FAVOUR: *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Donoghue, Gaja, Crawford, Gevorgian, Salam; *Judges* ad hoc Cot, Daudet;

AGAINST: *President* Yusuf; *Judges* Cançado Trindade, Sebutinde, Bhandari, Robinson, Iwasawa.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this fourth day of February, two thousand and twenty-one, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the State of Qatar and the Government of the United Arab Emirates, respectively.

(Signed) Abdulqawi Ahmed YUSUF,
President.

(Signed) Philippe GAUTIER,
Registrar.

President YUSUF appends a declaration to the Judgment of the Court; Judges SEBUTINDE, BHANDARI and ROBINSON append dissenting opinions to the Judgment of the Court; Judge IWASAWA appends a separate opinion to the Judgment of the Court; Judge *ad hoc* DAUDET appends a declaration to the Judgment of the Court.

(Initialled) A.A.Y.

(Initialled) Ph.G.

Annex 57

United Nations CEDAW/C/GC/37

Convention on the Elimination of All Forms of Discrimination against Women

Distr.: General
13 March 2018

Original: English

Committee on the Elimination of Discrimination against Women

General recommendation No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change

Contents

18-03824 (E) 110518

I. Introduction

1. Climate change is exacerbating both the risk and the impacts of disasters globally, by increasing the frequency and severity of weather and climate hazards, which heightens the vulnerability of communities to those hazards.[1] There is scientific evidence that a large proportion of extreme weather events around the world are a result of human-caused changes to the climate.[2] The human rights consequences of such disasters are apparent in the form of political and economic instability, growing inequality, declining food and water security and increased threats to health and livelihoods.[3] Although climate change affects everyone, those countries and populations that have contributed the least to climate change, including people living in poverty, young people and future generations, are the most vulnerable to its impacts.

2. Women, girls, men and boys are affected differently by climate change and disasters, with many women and girls experiencing greater risks, burdens and impacts.[4] Situations of crisis exacerbate pre-existing gender inequalities and compound the intersecting forms of discrimination against, among others, women living in poverty, indigenous women, women belonging to ethnic, racial, religious and sexual minority groups, women with disabilities, refugee and asylum-seeking women, internally displaced, stateless and migrant women, rural women, unmarried women, adolescents and older women, who are often disproportionately affected compared with men or other women.[5]

3. In many contexts, gender inequalities limit the control that women and girls have over decisions governing their lives, as well as their access to resources such as food, water, agricultural input, land, credit, energy, technology, education, health services, adequate housing, social protection and employment.[6] As a result of those inequalities, women and girls are more likely to be exposed to disaster-induced risks and losses relating to their livelihoods, and they are less able to adapt to changes in climatic conditions. Although climate change mitigation and adaptation programmes may provide new employment and livelihood opportunities in sectors such as agricultural production, sustainable urban development and clean energy, failure to address the structural barriers faced by women in gaining access to their rights will increase gender-based inequalities and intersecting forms of discrimination.

[1] Intergovernmental Panel on Climate Change, *Climate Change 2014: Synthesis Report — Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Geneva, 2013). The Panel notes that climate change "refers to a change in the state of the climate that can be identified (e.g. using statistical tests) by changes in the mean and/or the variability of its properties, and that persists for an extended period, typically decades or longer".

[2] Susan J. Hassol and others, "(Un)Natural disasters: communicating linkages between extreme events and climate change", *WMO Bulletin*, vol. 65, No. 2 (Geneva, World Meteorological Organization, 2016).

[3] United Nations Development Programme (UNDP), "Climate change and disaster risk reduction", 23 March 2016.

[4] See Commission on the Status of Women, resolutions 56/2 and 58/2 on gender equality and the empowerment of women in natural disasters, adopted by consensus in March 2012 and March 2014.

[5] See, for example, general recommendation No. 27 (2010) on older women and the protection of their human rights.

[6] For the purposes of the present general recommendation, all references to "women" should be read to include women and girls, unless otherwise noted.

4. Mortality and morbidity levels in situations of disaster are higher among women and girls.[7] Owing to gender-based economic inequalities, women, and women heads of household in particular, are at a higher risk of poverty and more likely to live in inadequate housing in urban and rural areas of low land value that are vulnerable to such impacts of climate-related events as floods, storms, avalanches, earthquakes, landslides and other hazards.[8] Women and girls in situations of conflict are particularly exposed to risks associated with disasters and climate change. The higher levels of mortality and morbidity among women during and following disasters are also a result of the inequalities that they face in gaining access to adequate health care, food and nutrition, water and sanitation, education, technology and information.[9] In addition, failure to engage in gender-responsive disaster planning and implementation often results in protective facilities and infrastructure, such as early warning mechanisms, shelters and relief programmes, that neglect the specific accessibility needs of diverse groups of women, including women with disabilities, older women and indigenous women.[10]

5. Women and girls also face a heightened risk of gender-based violence during and following disasters. In the absence of social protection schemes and in situations in which there is food insecurity combined with impunity for gender-based violence, women and girls are often exposed to sexual violence and exploitation as they attempt to gain access to food and other basic needs for family members and themselves. In camps and temporary settlements, the lack of physical security, as well as the lack of safe and accessible infrastructure and services, including drinking water and sanitation, also result in increased levels of gender-based violence against women and girls. Women and girls with disabilities are at particular risk of gender-based violence and sexual exploitation during and following disasters, owing to discrimination on the basis of physical limitations and barriers to communication and the inaccessibility of basic services and facilities. Domestic violence, early and/or forced marriage, trafficking in persons and forced prostitution are also more likely to occur during and following disasters.

6. As the higher vulnerability and exposure of women and girls to disaster risk and climate change are economically, socially and culturally constructed, they can be reduced. The level of vulnerability may vary according to the type of disaster and the geographical and sociocultural contexts.

7. The categorization of women and girls as passive "vulnerable groups" in need of protection from the impacts of disasters is a negative gender stereotype that fails to recognize the important contributions of women in the areas of disaster risk reduction, post-disaster management and climate change mitigation and adaptation strategies.[11] Well-designed disaster risk reduction and climate change initiatives that

[7] Eric Neumayer and Thomas Plümper, "The gendered nature of natural disasters: the impact of catastrophic events on the gender gap in life expectancy, 1981–2002", *Annals of the Association of American Geographers*, vol. 97, No. 3 (2007).

[8] United Nations, *Global Assessment Report on Disaster Risk Reduction 2015: Making Development Sustainable–The Future of Disaster Risk Management* (New York, 2015); *Disasters without Borders: Regional Resilience for Sustainable Development: Asia-Pacific Disaster Report 2015* (United Nations publication, Sales No. E.15.II.F.13).

[9] C. Bern and others, "Risk factors for mortality in the Bangladesh cyclone of 1991", *Bulletin of the World Health Organization*, vol. 71, No. 1 (1993).

[10] Tripartite Core Group, "Post-Nargis joint assessment", July 2008; Lorena Aguilar and others, "Training manual on gender and climate change" (San José, International Union for Conservation of Nature, UNDP and Gender and Water Alliance, 2009).

[11] United Nations, *Global Assessment Report on Disaster Risk Reduction 2015*; UNDP, "Clean development mechanism: exploring the gender dimensions of climate finance mechanisms", November 2010; UNDP, "Ensuring gender equity in climate change financing" (New York, 2011).

provide for the full and effective participation of women can advance substantive gender equality and the empowerment of women, while ensuring that sustainable development, disaster risk reduction and climate change objectives are achieved.[12] It should be underlined that gender equality is a precondition for the realization of the Sustainable Development Goals.

8. In the light of the significant challenges in, and opportunities for, the realization of women's human rights presented by climate change and disaster risk, the Committee on the Elimination of Discrimination against Women has provided specific guidance for States parties on the implementation of their obligations relating to disaster risk reduction and climate change under the Convention on the Elimination of All Forms of Discrimination against Women. In its concluding observations on the reports of States parties and in several of its general recommendations, the Committee has underlined that States parties and other stakeholders have obligations to take specific steps to address discrimination against women in the fields of disaster risk reduction and climate change, through the adoption of targeted laws, policies, mitigation and adaptation strategies, budgets and other measures.[13] In its statement on gender and climate change, the Committee outlined that all stakeholders should ensure that climate change and disaster risk reduction measures were gender responsive and sensitive to indigenous knowledge systems and that they respected human rights. The right of women to participate at all levels of decision-making must be guaranteed in climate change policies and programmes (A/65/38, part one, annex II).

9. The Committee notes that other United Nations human rights mechanisms, including the Human Rights Council and the special procedures mandate holders, the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of Persons with Disabilities and the Committee on the Rights of the Child, refer with increasing frequency to the negative consequences of climate change, environmental degradation and disasters. Those mechanisms have also affirmed the obligations of Governments and other stakeholders to take immediate, targeted steps to prevent and mitigate the negative human rights impacts of climate change and disasters and to provide technical and financial support for disaster risk reduction and climate change adaptation measures.

II. Objective and scope

10. Pursuant to article 21 (1) of the Convention, the present general recommendation provides guidance to States parties on the implementation of their obligations under the Convention in relation to disaster risk reduction and climate change. In their reports submitted to the Committee pursuant to article 18, States parties should address general obligations to ensure substantive equality between

[12] Senay Habtezion, "Gender and disaster risk reduction", Gender and Climate Change Asia and the Pacific Policy Brief, No. 3 (New York, UNDP, 2013); World Health Organization (WHO), "Gender, climate change and health" (Geneva, 2010).

[13] For concluding observations, see CEDAW/C/SLB/CO/1–3, paras. 40–41; CEDAW/C/PER/CO/7–8, paras. 37–38; CEDAW/C/GIN/CO/7–8, para. 53; CEDAW/C/GRD/CO/1–5, paras. 35–36; CEDAW/C/JAM/CO/6–7, paras. 31–32; CEDAW/C/SYC/CO/1–5, paras. 36–37; CEDAW/C/TGO/CO/6–7, para. 17; CEDAW/C/DZA/CO/3–4, paras. 42–43; CEDAW/C/NLZ/CO/7, paras. 9 and 36–37; CEDAW/C/CHI/CO/5–6, paras. 38–39; CEDAW/C/BLR/CO/7, paras. 37–38; CEDAW/C/LKA/CO/7, paras. 38–39; CEDAW/C/NPL/CO/4–5, para. 38; and CEDAW/C/TUV/CO/2, paras. 55–56. See also general recommendation No. 27 (2010) on older women and the protection of their human rights, para. 25, and general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, para. 11.

women and men in all areas of life, as well as the specific guarantees in relation to those rights under the Convention that may be particularly affected by climate change and disasters, including extreme weather events such as floods and hurricanes, as well as slow-onset phenomena, such as the melting of polar ice caps and glaciers, drought and sea-level rise.

11. The present general recommendation may also be used to inform the work of civil society organizations, international and regional intergovernmental organizations, educators, the scientific community, medical personnel, employers and any other stakeholders engaged in activities connected to disaster risk reduction and climate change.

12. The objective of the present general recommendation is to underscore the urgency of mitigating the adverse effects of climate change and to highlight the steps necessary to achieve gender equality, the realization of which will reinforce the resilience of individuals and communities globally in the context of climate change and disasters. It is also intended to contribute to coherence, accountability and the mutual reinforcement of international agendas on disaster risk reduction and climate change adaptation, by focusing on the impacts of climate change and disasters on women's human rights.

13. In the present general recommendation, the Committee does not exhaustively cover the gender-related dimensions of climate change mitigation and adaptation measures, nor does it differentiate between disasters relating to climate change and other disasters. It should be emphasized, however, that a large proportion of contemporary disasters may be attributed to human-induced climatic changes and that the recommendations provided herein are also applicable to hazards, risks and disasters that are not directly linked to climate change. For the purposes of the present general recommendation, disasters are defined as including all those events, small-scale and large-scale, frequent and infrequent, sudden- and slow-onset, caused by natural or human-made hazards, and related environmental, technological and biological hazards and risks, mentioned in the Sendai Framework for Disaster Risk Reduction 2015–2030, as well as any other chemical, nuclear and biological hazards and risks. Such hazards and risks include the testing and use of all types of weapons by State and non-State actors.

14. The obligations of States parties to effectively mitigate and adapt to the adverse effects of climate change, in order to reduce the increased disaster risk, have been recognized by international human rights mechanisms. Limiting fossil fuel use and greenhouse gas emissions and the harmful environmental effects of extractive industries such as mining and fracking, and the allocation of climate financing, are regarded as crucial steps in mitigating the negative human rights impacts of climate change and disasters. Any mitigation or adaptation measures should be designed and implemented in accordance with the human rights principles of substantive equality and non-discrimination, participation and empowerment, accountability and access to justice, transparency and the rule of law.

15. The present general recommendation is focused on the obligations of States parties and non-State actors to take effective measures to prevent, mitigate the adverse effects of and respond to disasters and climate change and, in that context, to ensure that the human rights of women and girls are respected, protected and fulfilled in accordance with international law. Three mutually reinforcing areas for action by stakeholders are identified, centring on the general principles of the Convention applicable to disaster risk and climate change, specific measures to address disaster risk reduction and climate change and specific areas of concern.

III. Convention on the Elimination of All Forms of Discrimination against Women and other relevant international frameworks

16. The Convention promotes and protects women's human rights, and this should be understood to apply at all stages of climate change and disaster prevention, mitigation, response, recovery and adaptation. In addition to the Convention, several specific international frameworks govern disaster risk reduction, climate change mitigation and adaptation, humanitarian assistance and sustainable development, and a number of them also address gender equality. Those instruments should be read together with the provisions of the Convention.

17. In the Rio Declaration on Environment and Development, of 1993, and reiterated in the outcome document of the United Nations Conference on Sustainable Development, entitled "The future we want", of 2012, the particularly vulnerable situation of small island developing States was acknowledged and the principle of gender equality and the need to ensure the effective participation of women and indigenous peoples in all initiatives relating to climate change were reaffirmed.

18. In the Sendai Framework, it was emphasized that women and their participation were critical to effectively managing disaster risk and designing, resourcing and implementing gender-sensitive disaster risk reduction policies, plans and programmes, and that adequate capacity-building measures needed to be taken to empower women for preparedness, as well as to build their capacity to secure alternate livelihood means in post-disaster situations. Empowering women to publicly lead and promote gender-equitable and universally accessible response, recovery, rehabilitation and reconstruction approaches was also emphasized.[14]

19. In the United Nations Framework Convention on Climate Change, States parties were called upon to take action on climate change on the basis of equity and in accordance with their common but differentiated responsibilities and capabilities. It was recognized that, although climate change affected everyone, countries who had contributed the least to greenhouse gas emissions, as well as people living in poverty, children and future generations, were the most affected. Climate equity required that, in global efforts to mitigate the adverse effects of and adapt to climate change, the needs of countries, groups and individuals, including women and girls, which were the most vulnerable to its adverse impacts, were prioritized.

20. In 2014, the Conference of the Parties to the United Nations Framework Convention on Climate Change adopted decision 18/CP.20, entitled "Lima work programme on gender", in which it established a plan for promoting gender balance and achieving gender-responsive climate policies developed for the purpose of guiding the effective participation of women in the bodies established under the Convention. In 2017, the Conference of the Parties adopted decision 3/CP.23, entitled "Establishment of a gender action plan", in which it agreed to advance the full, equal and meaningful participation of women and promote gender-responsive climate policy and the mainstreaming of a gender perspective into all elements of climate action.

21. In the Paris Agreement under the United Nations Framework Convention on Climate Change, the Conference of the Parties noted that Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable

[14] General Assembly resolution 69/283, annex II, paras. 36 (a) (i) and 32, respectively.

situations and the right to development, as well as gender equality, the empowerment of women and intergenerational equity. They also acknowledged that adaptation, including capacity-building for mitigation and adaptation action, should be gender-responsive, participatory and fully transparent, taking into consideration vulnerable groups, communities and ecosystems.

22. The Sustainable Development Goals contain important targets on gender equality, including those in Goals 3–6 and 10, and on climate change and disaster risk reduction, in Goals 11 and 13.

23. At the third International Conference on Financing for Development, held in Addis Ababa in 2015, participants adopted documents that link gender equality and women's rights with climate change adaptation and disaster risk reduction and called upon States to integrate those issues into development financing.

24. Participants in the World Humanitarian Summit, in 2016, called for gender equality, the empowerment of women and women's rights to become pillars of humanitarian action, including in disaster preparedness and response. Also in 2016, in the New Urban Agenda, the participants in the United Nations Conference on Housing and Sustainable Urban Development (Habitat III) recognized the need for gender-responsive measures to ensure that urban development was sustainable, resilient and contributed to climate change mitigation and adaptation.

IV. General principles of the Convention applicable to disaster risk reduction and climate change

25. Several cross-cutting principles and provisions of the Convention are of crucial importance and should serve as guidance in the drafting of legislation, policies, plans of action, programmes, budgets and other measures relating to disaster risk reduction and climate change.

26. **States parties should ensure that all policies, legislation, plans, programmes, budgets and other activities relating to disaster risk reduction and climate change are gender responsive and grounded in human rights-based principles, including the following:**

(a) **Equality and non-discrimination, with priority being accorded to the most marginalized groups of women and girls, such as those from indigenous, racial, ethnic and sexual minority groups, women and girls with disabilities, adolescents, older women, unmarried women, women heads of household, widows, women and girls living in poverty in both rural and urban settings, women in prostitution and internally displaced, stateless, refugee, asylum-seeking and migrant women;**

(b) **Participation and empowerment, through the adoption of effective processes and the allocation of the resources necessary to ensure that diverse groups of women have opportunities to participate in every stage of policy development, implementation and monitoring at each level of government, at the local, national, regional and international levels;**

(c) **Accountability and access to justice, which require the provision of appropriate and accurate information and mechanisms in order to ensure that all women and girls whose rights have been directly and indirectly affected by disasters and climate change are provided with adequate and timely remedies.**

27. Those three general principles — equality and non-discrimination, participation and empowerment, accountability and access to justice — are fundamental to

ensuring that all interventions relating to disaster risk reduction in the context of climate change are implemented in accordance with the Convention.

A. Substantive equality and non-discrimination

28. States parties have obligations under article 2 of the Convention to take targeted and specific measures to guarantee equality between women and men, including the adoption of participatory and gender-responsive policies, strategies and programmes relating to disaster risk reduction and climate change, across all sectors. Article 2 identifies the specific, core obligations of States parties to ensure substantive equality between women and men in all areas covered by the Convention and to take legislative, policy-based and other measures to that effect.[15] The obligation to take all appropriate measures, including with regard to legislation, in all fields, to guarantee the full development and advancement of women on a basis of equality with men, is further expanded in articles 3 and 24 of the Convention.

29. Intersecting forms of discrimination may limit the access of particular groups of women to the information, political power, resources and assets that would help them to mitigate the adverse effects of disasters and climate change. In its general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, as well as in general recommendation No. 32 (2014) on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, general recommendation No. 33 (2015) on women's access to justice, general recommendation No. 34 (2016) on the rights of rural women, general recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, and general recommendation No. 36 (2017) on the right of girls and women to education, the Committee reiterated that discrimination against women was inextricably linked to other factors that affected their lives.

30. The present general recommendation does not contain an exhaustive list of every group of right holders for which respect of their rights must be integrated into laws, policies, programmes and strategies on disaster risk reduction and climate change. The principles of non-discrimination and substantive equality, which form the foundation of the Convention, require that States parties take all measures necessary to ensure that direct and indirect discrimination, as well as intersecting forms of discrimination, are redressed. Specific measures, including temporary special measures, legislation that prohibits intersecting forms of discrimination and resource allocation, are necessary to ensure that all women and girls are able to participate in the development, implementation and monitoring of policies and plans relating to climate change and disasters.

31. **As outlined in general recommendation No. 28, States parties have obligations to respect, protect and fulfil the principle of non-discrimination towards all women, against all forms of discrimination, in all areas, even those not explicitly mentioned in the Convention, and to ensure the equal development and advancement of women in all areas. To ensure substantive equality between women and men in the context of disaster risk reduction and climate change, States parties should take specific, targeted and measurable steps:**

(a) **To identify and eliminate all forms of discrimination, including intersecting forms of discrimination, against women in legislation, policies, programmes, plans and other activities relating to disaster risk reduction and climate change. Priority should be accorded to addressing discrimination in**

[15] See general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention.

relation to the ownership, access, use, disposal, control, governance and inheritance of property, land and natural resources, as well as barriers that impede the exercise by women of their full legal capacity and autonomy in areas such as freedom of movement and equal access to economic, social and cultural rights, including to food, health, work and social protection. Women and girls should be empowered through specific policies, programmes and strategies so that they are able to exercise their right to seek, receive and impart information relating to climate change and disaster risk reduction;

(b) **To create effective mechanisms to guarantee that the rights of women and girls are a primary consideration in devising measures relating to disaster risk reduction and climate change at the local, national, regional and international levels. Measures must be taken to ensure that high-quality infrastructure and critical services are available, accessible and culturally acceptable for all women and girls on a basis of equality.**

B. Participation and empowerment

32. The participation of diverse groups of women and girls, and the development of their leadership capacity, at various levels of government and within local communities is essential to ensuring that the prevention of and response to disasters and the adverse effects of climate change are effective and incorporate perspectives from all sectors of society. Promoting the participation of girls and young women in the creation, development, implementation and monitoring of policies and plans relating to climate change and disaster risk reduction is essential, because those groups are often overlooked, even though they will experience the impacts of those phenomena throughout their lifetimes.

33. Women make significant contributions to household, local, national, regional and international economies and to environmental management, disaster risk reduction and climate change resilience at various levels. At the local level, the traditional knowledge held by women in agricultural regions is particularly important in that respect, because those women are well positioned to observe changes in the environment and respond to them through adaptive practices in crop selection, planting, harvesting, land conservation techniques and careful management of water resources.

34. The Intergovernmental Panel on Climate Change has noted that most local communities develop adaptation practices that could and should be identified and followed, in order to tailor effective adaptation and response strategies relating to disaster risk reduction and climate change.[16] In the Paris Agreement, the Conference of the Parties acknowledged that climate change adaptation should be guided by the best available science and, as appropriate, by traditional, indigenous and local knowledge systems, a view that aligns with the many provisions in the Convention, including articles 7, 8 and 14, that provide that States parties should ensure that all women are provided with meaningful opportunities to participate in political decision-making and development planning.

35. Articles 7 and 8 of the Convention provide that women should have equality in political and public life at the local, national and international levels, and article 14 reiterates that rural women have the right to participate in development planning and agricultural reform activities. That guarantee of political equality encompasses

[16] Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report–Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Geneva, 2007).

leadership by women and the representation and participation of women, which are components that are essential to the development and implementation of effective programmes and policies relating to disaster risk reduction and climate change that take into account the needs of the population, in particular those of women.

36. **To ensure that women and girls are provided with equal opportunities to lead and to participate and engage in decision-making in activities relating to disaster risk reduction and climate change, the Committee recommends that States parties:**

(a) **Adopt targeted policies, such as temporary special measures, including quotas, as provided for in article 4 of the Convention and in general recommendation No. 25 (2004) on temporary special measures, as one element of a coordinated and regularly monitored strategy to achieve the equal participation of women in all decision-making and development planning relating to disaster risk reduction and climate change;**[17]

(b) **Develop programmes to ensure the participation of and leadership by women in political life, including through civil society organizations, in particular women's organizations, at various levels, in particular in the context of local and community planning and climate change and disaster preparedness, response and recovery;**

(c) **Ensure the equal representation of women in forums and mechanisms on disaster risk reduction and climate change, at the community, local, national, regional and international levels, in order to enable them to participate in and influence the development of policies, legislation and plans relating to disaster risk reduction and climate change and their implementation. States parties should also take positive measures to ensure that girls, young women and women belonging to indigenous and other marginalized groups are provided with opportunities to be represented in those mechanisms;**

(d) **Strengthen national institutions concerned with gender-related issues and women's rights, civil society and women's organizations and provide them with adequate resources, skills and authority to lead, advise, monitor and carry out strategies to prevent and respond to disasters and mitigate the adverse effects of climate change;**

(e) **Allocate adequate resources to building the leadership capacity of women and creating an enabling environment for strengthening their active role in disaster risk reduction and response and climate change mitigation, at all levels and across all relevant sectors.**

C. Accountability and access to justice

37. In line with article 15 (1) of the Convention, women should be accorded equality before the law, which is extremely important in situations of disaster and in the context of climate change, given that women, who often face barriers to gaining access to justice, may encounter significant difficulties in claiming compensation and other forms of reparation to mitigate their losses and to adapt to climate change. The recognition of the legal capacity of women as identical to that of men and equal between groups of women, including women with disabilities and indigenous women, as well as their equal access to justice, are essential elements of disaster and climate change policies and strategies.[18]

[17] See CEDAW/C/TUV/CO/2, paras. 55–56.

[18] See also general recommendation No. 33 (2015) on women's access to justice.

38. **States parties should ensure that legal frameworks are non-discriminatory and that all women have effective access to justice, in line with general recommendation No. 33, including by:**

(a) **Conducting a gender impact analysis of current laws, incorporating those that are applied in plural legal systems, including customary, traditional and religious norms and practices, to assess their effect on women with regard to their vulnerability to disaster risk and climate change, and adopt, repeal or amend laws, norms and practices accordingly;**

(b) **Increasing awareness among women of the available legal remedies and dispute resolution mechanisms and their legal literacy, by providing them with information on their rights and on policies and programmes relating to disaster risk reduction and climate change and empowering them to exercise their right to information in that context;**

(c) **Ensuring affordable or, if necessary, free access to legal services, including legal aid, as well as to official documents such as birth, death and marriage certificates and land registration documents and deeds. Reliable and low-cost administrative systems should be implemented to make such documentation accessible and available to women in situations of disaster so that they are able to benefit from such services as relief payments and compensation;**

(d) **Dismantling barriers to women's access to justice by ensuring that formal and informal justice mechanisms, including alternative dispute resolution mechanisms, are in conformity with the Convention and made available and accessible, in order to enable women to claim their rights. Measures to protect women from reprisals when claiming their rights should also be developed;**

(e) **Minimizing disruptions to legal and justice systems that may result from disasters and climate change, by developing response plans that provide for the deployment of mobile or specialized reporting mechanisms, investigative teams and courts. Flexible and accessible legal and judicial mechanisms are of particular importance for women and girls wishing to report incidents of gender-based violence.**

V. Specific principles of the Convention relevant to disaster risk reduction and climate change

A. Assessment and data collection

39. The gender-related dimensions of disaster risk reduction and the impacts of climate change are often not well understood. Limited technical capacity at the national and local levels has resulted in a lack of data disaggregated by sex, age, disability, ethnicity and geographical location, which continues to impede the development of appropriate and targeted strategies for disaster risk reduction and climate change response.

40. **States parties should:**

(a) **Establish or identify existing national and local mechanisms to collect, analyse and manage, and for the application of, data disaggregated by sex, age, disability, ethnicity and region. Such data should be made publicly available and used to inform gender-responsive national and regional disaster risk reduction and climate resilience legislation, policies, programmes and budgets;**

(b) **Develop, on the basis of disaggregated data, specific and gender-responsive indicators and monitoring mechanisms to enable States parties to**

establish baselines and measure progress in areas such as the participation of women in initiatives relating to disaster risk reduction and climate change and in political, economic and social institutions. Integration with and coordination in the implementation of other existing frameworks, such as the United Nations Framework Convention on Climate Change, the 2030 Agenda for Sustainable Development and the Sendai Framework, are essential to ensuring a consistent and effective approach;

(c) **Empower, build the capacity of and provide resources to, if necessary through donor support, the national institutions responsible for collecting, consolidating and analysing disaggregated data, across all relevant sectors, such as economic planning, disaster risk management, planning and monitoring of implementation of the Sustainable Development Goals, including at the local level;**

(d) **Incorporate climate information into disaster planning and decision-making at the subnational and national levels by ensuring that diverse groups of women are consulted as valuable sources of community knowledge on climate change.**

B. Policy coherence

41. It is only recently that concerted efforts have been made to coordinate policies on gender equality, disaster risk reduction, climate change and sustainable development. While certain policy documents, such as the 2030 Agenda and the Sustainable Development Goals, integrate those objectives into their frameworks for implementation, much remains to be done at the national, regional and international levels to align policies. Programmes of action, budgets and strategies should be coordinated across sectors, including trade, development, energy, environment, water, climate science, agriculture, education, health and planning, and at levels of government, including local and subnational, national, regional and international, in order to ensure an effective and human rights-based approach to disaster risk reduction and climate change mitigation and adaptation.

42. **States parties should:**

(a) **Engage in a comprehensive audit of policies and programmes across sectors and areas, including climate, trade and investment, environment and planning, water, food, agriculture, technology, social protection, education and employment, in order to identify the degree of integration of a gender equality perspective and any inconsistencies, with a view to reinforcing efforts aimed at disaster risk reduction and climate change mitigation and adaptation;**

(b) **Improve coordination between sectors, including those involved in disaster risk management, climate change, gender equality, health care, education, social protection, agriculture, environmental protection and urban planning, through such measures as the adoption of integrated national strategies and plans relating to disaster risk reduction and climate change that explicitly integrate a gender equality perspective into their approaches;**

(c) **Undertake gender impact assessments during the design, implementation and monitoring phases of plans and policies relating to disaster risk reduction and climate change;**

(d) **Develop, compile and share practical tools, information and best practices and methodologies for the effective integration of a gender equality perspective into legislation, policies and programmes in all sectors relevant to disaster risk reduction and climate change;**

(e) **Promote and strengthen the vital role played by subnational governments in disaster risk reduction, service provision, emergency response, land-use planning and climate change. To that end, adequate budgets should be allocated and mechanisms developed to monitor the implementation of legislation and policies at the subnational level.**

C. Extraterritorial obligations, international cooperation and resource allocation

43. States parties have obligations both within and outside their territories to ensure the full implementation of the Convention, including in the areas of disaster risk reduction and climate change mitigation and adaptation. Measures such as limiting fossil fuel use, reducing transboundary pollution and greenhouse gas emissions and promoting the transition to renewable energy sources are regarded as crucial steps in mitigating climate change and the negative human rights impacts of the adverse effects of climate change and disasters globally. In its resolutions 26/27 and 29/15, the Human Rights Council noted that the global nature of climate change called for the widest possible cooperation by all countries and their participation in an effective and appropriate international response.[19]

44. There is currently an insufficient level of resources being dedicated to addressing the underlying structural causes of gender inequality that increase the exposure of women to disaster risk and the effects of climate change and to developing gender-responsive programmes in those areas. Low-income, climate-vulnerable countries face particular challenges in developing, implementing and monitoring gender-responsive disaster risk reduction and climate change prevention, mitigation and adaptation policies and programmes, as well as in promoting access to affordable technology, owing to the limited availability of national public financing and development assistance.

45. In accordance with the Convention and other international human rights instruments, an adequate and effective allocation of financial and technical resources for gender-responsive disaster and climate change prevention, mitigation and adaptation must be ensured through both national budgets and international cooperation. Any steps taken by States parties to prevent, mitigate and respond to climate change and disasters within their own jurisdictions or extraterritorially must be firmly grounded in the human rights principles of substantive equality and non-discrimination, participation and empowerment, accountability and access to justice, transparency and the rule of law.

46. **States parties, separately and in cooperation with others, should:**

(a) **Take effective steps to equitably manage shared natural resources, in particular water, and limit carbon emissions, fossil fuel use, deforestation, near-surface permafrost degradation, soil degradation and transboundary pollution, including the dumping of toxic waste, and all other environmental, technological and biological hazards and risks that contribute to climate change and disasters, which tend to disproportionately negatively affect women and girls;**

(b) **Increase dedicated budget allocations, at the international, regional, national and local levels, to respond to gender-specific disaster and climate**

[19] In his 2016 report (A/HRC/31/52, footnote 27), the Special Rapporteur on human rights and the environment noted that "the failure of States to effectively address climate change through international cooperation would prevent individual States from meeting their duties under human rights law to protect and fulfil the human rights of those within their own jurisdiction".

change prevention, preparedness, mitigation, recovery and adaptation needs in the infrastructure and service sectors;

(c) **Invest in adaptability by identifying and supporting livelihoods that are resilient to disasters and climate change, sustainable and empowering for women, and in gender-responsive services that enable women to gain access to and benefit from those livelihoods;**

(d) **Increase access for women to appropriate risk reduction schemes, such as social protection, livelihood diversification and insurance;**

(e) **Integrate a gender equality perspective into relevant international, regional, national, sectoral and local programmes and projects, including those financed with international climate and sustainable development funds;**

(f) **Share resources, knowledge and technology to build disaster risk reduction and climate change adaptation capacity among women and girls, including by providing adequate, effective and transparent financing administered through participatory, accountable and non-discriminatory processes;**

(g) **Ensure that States, international organizations and other entities that provide technical and financial resources for disaster risk reduction, sustainable development and climate change incorporate a gender equality and women's rights perspective into the design, implementation and monitoring of all programmes and establish appropriate and effective human rights accountability mechanisms.**

D. Non-State actors and extraterritorial obligations

47. The private sector and civil society organizations can play an important role in disaster risk reduction, climate resilience and the promotion of gender equality, at the national level and when operating transnationally. The development of public-private partnerships is promoted through a number of mechanisms, including in the context of the 2030 Agenda. Such partnerships may provide the financial and technical resources necessary to enable the creation of new infrastructure for disaster risk reduction and climate-resilient livelihoods.

48. In the United Nations Guiding Principles on Business and Human Rights, it is stipulated that businesses have a direct responsibility to respect and protect human rights, to act with due diligence to prevent human rights violations and to provide effective remedies for human rights violations connected to their operations. To ensure that private sector activities in the fields of disaster risk reduction and climate change respect and protect women's human rights, they must guarantee accountability and be participatory, gender-responsive and subject to regular human rights-based monitoring and evaluation.

49. States parties should regulate the activities of non-State actors within their jurisdiction, including when they operate extraterritorially. General recommendation No. 28 reaffirms the requirement under article 2 (e) to eliminate discrimination by any public or private actor, which extends to acts of national corporations operating extraterritorially.

50. Civil society organizations operating locally and internationally, sometimes in partnership with government authorities and the private sector, also have responsibilities to ensure that their activities in the fields of climate change and disaster risk reduction and management do no harm to local populations, and those

organizations should take steps to minimize the harm that they may inadvertently be causing simply by being present and providing assistance.[20]

51. **In relation to non-State actors, States parties should:**

(a) **Create environments conducive to gender-responsive investment in disaster and climate change prevention, mitigation and adaptation, including through sustainable urban and rural development, the promotion of renewable energy and social insurance schemes;**

(b) **Encourage entrepreneurship among women and create incentives for women to engage in businesses involved in sustainable development and climate-resilient livelihood activities in areas such as the clean energy sector and agroecological food systems. Businesses working in those areas should also be encouraged to increase the number of women whom they employ, in particular in leadership positions;**

(c) **Conduct gender impact analyses of any proposed public-private partnerships in the areas of disaster risk reduction and climate change and ensure that diverse groups of women are involved in their design, implementation and monitoring. Particular attention should be paid to guaranteeing that all groups of women have physical and economic access to any infrastructure and services provided through public-private partnerships;**

(d) **Adopt regulatory measures to protect women from human rights violations by private business actors and ensure that their own activities, including those conducted in partnership with the private sector and civil society, respect and protect human rights and that effective remedies are available in the event of human rights violations relating to the activities of non-State actors. Such measures should be applied to activities occurring both within and outside of the territory the State party concerned.**

E. Capacity development and access to technology

52. A lack of active participation by women in programmes relating to disaster risk reduction and climate change, in particular at the local level, impedes progress towards the implementation of gender equality commitments and the development of coordinated and effective policies and strategies for disaster risk reduction and climate resilience. Measures should be taken to build the capacity and capabilities of women, women's rights organizations and State entities to participate in gender-responsive disaster risk and climate assessments at the local, national, regional and international levels.

53. In its statement on gender and climate change, the Committee noted that policies that supported gender equality in access to and use and control of science and technology and formal and informal education and training would enhance a nation's capability in the areas of disaster reduction, mitigation and adaptation to climate change (A/65/38, part one, annex II). Too often, however, women have been unable to gain access to technology, training opportunities and information, owing to gender-based inequalities.

54. **States parties should:**

(a) **Increase the participation of women in the development of plans relating to disaster risk reduction and climate change, by supporting their technical capacity and providing adequate resources for that purpose;**

[20] See A/HRC/28/76, paras. 40 (g), 99 and 104.

(b) **Institutionalize leadership by women at all levels in disaster prevention, preparedness, including the development and dissemination of early warning systems, response and recovery and climate change mitigation and adaptation;**

(c) **Ensure that early warning information is provided using technology that is modern, culturally appropriate, accessible and inclusive, taking into account the needs of diverse groups of women. In particular, the extension of Internet and mobile telephone coverage, as well as other reliable and cost-effective communications technology such as radios, and the accessibility of that technology for all women, including women belonging to indigenous and minority groups, older women and women with disabilities, should be actively promoted within the context of programmes relating to disaster risk reduction and climate change;**

(d) **Ensure that women have access to technology for preventing and mitigating the adverse effects of disasters and climate change on crops, livestock, homes and businesses and that they can use and economically benefit from climate change adaptation and mitigation technology, including that relating to renewable energy and sustainable agricultural production;**

(e) **Promote the understanding, application and use of the traditional knowledge and skills of women in disaster risk reduction and response and climate change mitigation and adaptation;**

(f) **Promote and facilitate contributions by women to the conceptualization, development and use of disaster risk reduction and climate science technology.**

VI. Specific areas of concern

A. Right to live free from gender-based violence against women and girls

55. In its general recommendation No. 35, the Committee noted that gender-based violence against women was one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles were perpetuated. It also highlighted situations of disaster and the degradation and destruction of natural resources as factors that affected and exacerbated gender-based violence against women and girls.

56. The Committee has also observed that sexual violence is common in humanitarian crises and may become acute in the wake of a national disaster. In a time of heightened stress, lawlessness and homelessness, women face an increased threat of violence (A/65/38, part two, annex II, para. 6).[21]

57. **In accordance with the Convention and general recommendation No. 35, States parties should:**

(a) **Develop policies and programmes to address existing and new risk factors for gender-based violence against women, including domestic violence, sexual violence, economic violence, trafficking in persons and forced marriage,**

[21] See also general commendation No. 19 (1992) on violence against women and general recommendation No. 35 (2017) on gender-based violence against women, updating general commendation No. 19, para. 14.

in the context of disaster risk reduction and climate change, and promote the participation and leadership of women in their development;

(b) **Ensure that the minimum legal age of marriage is 18 years for both women and men. States parties should include training on the prevalence of early and forced marriage for all personnel involved in disaster response activities. In partnership with women's associations and other stakeholders, mechanisms should be established, within local and regional disaster management plans, to prevent, monitor and address early and forced marriages;**

(c) **Provide accessible, confidential, supportive and effective mechanisms for all women wishing to report gender-based violence;**

(d) **Develop, in partnership with a wide range of stakeholders, including women's associations, a system for the regular monitoring and evaluation of interventions designed to prevent and respond to gender-based violence against women, within programmes relating to disaster risk reduction and climate change;**

(e) **Provide training, sensitization and awareness-raising for the authorities, emergency services workers and other groups on the various forms of gender-based violence that are prevalent in situations of disaster and how to prevent and address them. The training should include information on the rights and needs of women and girls, including those from indigenous and minority groups, women and girls with disabilities, lesbian, bisexual and transgender women and girls and intersex persons, and the ways in which they may be exposed to and affected by gender-based violence;**

(f) **Adopt long-term policies and strategies to address the root causes of gender-based violence against women in situations of disaster, including by engaging with men and boys, the media, traditional and religious leaders and educational institutions, in order to identify and eliminate social and cultural stereotypes concerning the status of women.**

B. Rights to education and to information

58. Article 10 of the Convention concerns the elimination of discrimination in education.[22] Education improves the capacity of women to participate within their households, families, communities and businesses and to identify the means to reduce disaster risk, mitigate climate change, develop more effective recovery strategies and thus build more resilient communities. Education also increases access to opportunities, resources, technology and information that aids in disaster risk reduction and the development of effective policies relating to climate change. The prevention and mitigation of disasters and climate change require well-trained women and men in disciplines including economics, agriculture, water resources management, climatology, engineering, law, telecommunications and emergency services.

59. In the aftermath of disasters, girls and women, whose access to education is often already limited as a result of social, cultural and economic barriers, may face even greater obstacles to participation in education, owing to the destruction of infrastructure, lack of teachers and other resources, economic hardship and security concerns.

[22] See general recommendation No. 36 (2017) on the right of girls and women to education.

60. **In accordance with article 10 of the Convention and general recommendation No. 36, States parties should:**

(a) **Ensure, through regular inspections, that educational infrastructure is safe and resilient enough to withstand disasters and that adequate resources are dedicated to the protection of students and educators from the impacts of climate change and disasters;**

(b) **Allocate adequate resources and budgets so that schools and other educational facilities are built to withstand hazards, reconstructed on the basis of sound disaster risk assessment and building codes and rendered operational as expeditiously as possible following disasters. The reintegration of girls and other groups for which education has not traditionally been valued should be prioritized through specific outreach programmes, with a view to ensuring that girls and women are not excluded from education in the wake of disasters;**

(c) **Ensure that women and girls have equal access to information, including scientific research, and education regarding disasters and climate change. That information should form part of the core educational curricula at each level of instruction;**

(d) **Prioritize innovative and flexible gender-responsive educational programmes, including at the community level, to enable women to develop the skills required to adapt to the changing climate and engage in sustainable development initiatives. Specific programmes and scholarships should be established to support girls and women in undertaking education and training in all areas relating to disaster risk reduction and management and environmental and climate science.**

C. Rights to work and to social protection

61. Disasters and climate change directly affect women, in particular those living in poverty, by having an impact on their livelihoods. Economic inequalities between women and men are entrenched and reinforced through discrimination, including restrictions on ownership and control of land and property, unequal remuneration, the concentration of women in precarious, informal and unstable employment, sexual harassment and other forms of workplace violence, pregnancy-related discrimination in employment, gendered divisions of household labour and the undervaluing of the contributions of women in domestic, community and care work, as well as workplace discrimination including labour and sexual exploitation, land grabs and environmental destruction by abusive extractive industries and due to unregulated industrial and/or agro-industrial activities. All such gender-based discrimination limits the capacity of women to prevent and adapt to the harm generated by disasters and climate change.

62. The burden of caregiving and domestic work often increases for women following disasters. The destruction of food stocks, housing and infrastructure such as water and energy supplies and an absence of social protection systems and health-care services all have specific consequences for women and girls. The result of such gendered inequalities is the increased vulnerability and mortality levels among women and girls, and they are frequently left with less time to engage in economic activities or to gain access to the resources, including information and education, necessary for recovery and adaptation.[23]

[23] See, for example, A/55/38, para. 339.

63. Social and legal inequalities further restrict the ability of women to move to safer, less disaster-prone areas and may limit women's rights to access to financial services, credit, social security benefits and secure tenure of land and other productive resources.[24]

64. **States parties should:**

(a) **Invest in gender-responsive social protection systems and social services that reduce economic inequalities between women and men and enable women to mitigate disaster risk and adapt to the adverse effects of climate change. Eligibility criteria for social protection schemes should be closely monitored to ensure that they are accessible to all groups of women, including women heads of household, unmarried women, internally displaced, migrant and refugee women and women with disabilities;**

(b) **Ensure the resilience to disasters of workplaces and critical infrastructure, including nuclear reactors and plants, through regular inspections and the adoption of building safety codes and other systems to guarantee that such infrastructure, in particular that which is necessary for income-generating and domestic activities, is rendered operational as expeditiously as possible following disasters;**

(c) **Guarantee women's equal right to decent and sustainable employment opportunities, as provided for in article 11 of the Convention, and apply that right in the context of disaster prevention, management and recovery and in connection with climate change adaptation in both urban and rural areas;**

(d) **Facilitate equal access for women to markets, financial services, credit and insurance schemes and regulate the informal economy to ensure that women are able to claim pensions and other employment-related social security entitlements;**

(e) **Acknowledge and address the unequal burden of the unpaid and care work performed by women, including within disaster and climate policies. Policies and programmes should be developed to assess, reduce and redistribute the gendered burden of care tasks, such as awareness-raising programmes on the equal sharing of domestic work and unpaid care work, the introduction of time-saving measures and the inclusion of appropriate technology, services and infrastructure;**

(f) **Protect and promote women's right to access to training in non-traditional areas of work, including within the green economy, and sustainable livelihoods, which would enable them to design, participate in, manage and monitor disaster and climate change prevention, preparedness, mitigation and adaptation initiatives and better equip them to benefit from such interventions.**

D. Right to health

65. Under article 12 of the Convention, States parties are to guarantee substantive equality between women and men in the provision of health-care services, including sexual and reproductive health services and mental and psychological health services. The measures that States parties must take, under article 12, in order to respect, protect and fulfil the right to health for all women are detailed in the Committee's general recommendation No. 24 (1999) on women and health. Health services and

[24] See general recommendation No. 29 (2013) on the economic consequences of marriage, family relations and their dissolution and general recommendation No. 34 (2016) on the rights of rural women.

systems, including sexual and reproductive health services, should be available, accessible, acceptable and of good quality, even in the context of disasters.[25] To that end, measures should be taken to ensure that gender-responsive climate change and disaster resilience policies, budgets and monitoring activities are fully integrated into health services and systems.[26]

66. Climate change and disasters, including pandemics, influence the prevalence, distribution and severity of new and re-emerging diseases. The susceptibility of women and girls to disease is heightened as a result of inequalities in access to food, nutrition and health care and the social expectations that women will act as primary caregivers for children, older persons and the sick.

67. States parties should ensure that detailed policies and budget allocations are made to promote, protect and fulfil women's right to health, including sexual and reproductive health and comprehensive, age-appropriate sexuality education, mental and psychological health, hygiene and sanitation. Provisions for antenatal and postnatal care, such as emergency obstetric care and support for breastfeeding, should form part of strategies, plans and programmes relating to climate change and disasters.

68. **In particular, States parties should:**

(a) **Ensure participation, including in decision-making positions, by diverse groups of women and girls in the planning, implementation and monitoring of health policies and programmes and in the design and management of integrated health services for women in the context of disaster risk management and climate change;**

(b) **Invest in climate- and disaster-resilient health systems and services and allocate the maximum of their available resources to the underlying determinants of health, such as clean water, adequate nutrition and sanitation facilities and menstrual hygiene management. Those investments should be geared towards transforming health systems so that they are responsive to the changing health-care needs arising from climate change and disasters and sufficiently resilient to cope with those new demands;**

(c) **Ensure the removal of all barriers to access for women and girls to health services, education and information, including in the areas of mental and psychological health, oncological treatment and sexual and reproductive health, and, in particular, allocate resources for cancer screening, mental health and counselling programmes and programmes for the prevention and treatment of sexually transmitted infections, including HIV, and treatment for AIDS, before, during and after disasters;**

(d) **Accord priority to the provision of family-planning and sexual and reproductive health information and services, within disaster preparedness and response programmes, including access to emergency contraception, post-exposure prophylaxis for HIV, treatment for AIDS and safe abortion, and reduce maternal mortality rates through safe motherhood services, the provision of qualified midwives and prenatal assistance;**

(e) **Monitor the provision of health services to women by public, non-governmental and private organizations, to ensure equal access to and quality of**

[25] WHO, "Gender inequities in environmental health", EUR/5067874/151 (2008).

[26] Intergovernmental Panel on Climate Change, *Climate Change 2014: Impacts, Adaptation, and Vulnerability–Part A: Global and Sectoral Aspects*, *Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (New York, Cambridge University Press, 2014), p. 733.

care that responds to the specific health needs of diverse groups of women, in the context of disasters and climate change;

(f) **Require that all health services operating in situations of disaster function to promote the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent, non-discrimination and choice. Specific measures to ensure the promotion and protection of the rights of women and girls with disabilities, women and girls belonging to indigenous and minority groups, lesbian, bisexual and transgender women and girls, intersex persons, older women and women and girls belonging to other marginalized groups should be explicitly included in health-care policies and standards relating to situations of disaster;**

(g) **Ensure that training curricula for health workers, including in emergency services, incorporate comprehensive, mandatory, gender-responsive courses on women's health and human rights, in particular gender-based violence. Health-care providers should be made aware of the linkages between increased disaster risk, climate change and the growing potential for public health emergencies as a result of shifting disease patterns. The training should also include information on the rights of women with disabilities and women belonging to indigenous, minority and other marginalized groups;**

(h) **Collect and share data on gender-based differences in vulnerability to infectious and non-infectious diseases occurring in situations of disaster and as a result of climate change. That information should be used to develop integrated rights-based disaster and climate change action plans and strategies.**

E. Right to an adequate standard of living

Food, land, housing, water and sanitation

69. The impacts of climate change are already being experienced in many areas, in connection with decreased food security, land degradation and more limited availability of water and other natural resources. There is evidence that the effects of food, land and water insecurity are not gender-neutral and that women are more likely to suffer from undernourishment and malnutrition in times of food scarcity.[27] It has also been shown that women and girls, who are those with the primary responsibility for growing, gathering and preparing food and collecting fuel and water in many societies, are disproportionately affected by a lack of available, affordable, safe and accessible drinking water and fuel sources. The additional burden placed on women and girls by such climate-related resource scarcity drains time, causes physical hardship, increases exposure to the risk of violence and increases stress.[28]

70. Women, in particular rural and indigenous women, are directly affected by disasters and climate change, as food producers and as agricultural workers because they make up the majority of the world's smallholder and subsistence farmers and a significant proportion of farmworkers. As a result of discriminatory laws and social norms, women have limited access to secure land tenure, and the farmland that they are allotted tends to be of inferior quality and more prone to flooding, erosion or other adverse climatic events. Owing to the increasing rate of out-migration among men in climate change-affected areas, women are left with the sole responsibility for farming, yet they do not possess the legal and socially recognized land ownership necessary to

[27] See, for example, CEDAW/C/NPL/CO/4–5.
[28] WHO, "Gender, climate change and health".

adapt to the changing climatic conditions effectively. Women are also indirectly affected by the impacts of weather-related events on the price of foodstuffs.

71. Articles 12 and 14 of the Convention contain specific guarantees on nutrition and the equal participation of women in decision-making about food production and consumption. In addition, the core obligations of States parties to eliminate discrimination, outlined in article 2, to modify cultural patterns of behaviour based on discriminatory stereotypes, in article 5 (a), to ensure equality before the law, in article 15, and to guarantee equality within marriage and family relations, in article 16, are of central importance to addressing women's rights to land and productive resources, which are vital to ensuring the right to food and sustainable livelihoods.

72. **States parties should:**

(a) **Promote and protect women's equal rights to food, housing, sanitation, land and natural resources, including adequate drinking water, water for domestic use and for food production, and take positive measures to guarantee the availability and accessibility of those rights, even during times of scarcity. Particular attention should be paid to ensuring that women living in poverty, in particular those in informal settlements in both urban and rural areas, have access to adequate housing, drinking water, sanitation and food, especially in the context of disasters and climate change;**

(b) **Increase resilience to the impacts of disasters and climate change among women by identifying and supporting livelihoods that are sustainable and empowering, and develop gender-responsive services, including extension services to assist women farmers, that enable women to gain access to and benefit from those livelihoods;**

(c) **Develop participatory, gender-responsive development plans and policies that integrate a human rights-based approach, in order to guarantee sustainable access to adequate housing, food, water and sanitation. Priority should be given to ensuring the accessibility of services for all women;**

(d) **Adopt legislation, programmes and policies and allocate budgets to eliminate homelessness and to ensure that adequate and disaster resilient housing is available and accessible to all women, including those with disabilities. Measures must be taken to protect women against forced eviction and to ensure that public housing and rental assistance schemes accord priority and respond to the specific needs of groups of women.**

F. Right to freedom of movement

73. The increasing frequency and intensity of extreme weather events and environmental degradation resulting from climate change are likely to lead to significant population displacement both within countries and across borders.[29]

74. The Committee and many other international human rights bodies, including the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, have recognized that disasters and climate change are among the push

[29] United Nations Entity for Gender Equality and the Empowerment of Women, "Addressing gender dimensions in large-scale movements of refugees and migrants", joint statement by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Elimination of Discrimination against Women, the United Nations Entity for Gender Equality and the Empowerment of Women and the Office of the United Nations High Commissioner for Human Rights, 19 September 2016.

factors for migration, in particular among women.[30] In several regions, climate change and disasters are contributing to an increase in the migration of women, on their own, into sectors of work done predominantly by women, for the purposes of supporting family members who no longer have local livelihood opportunities.

75. Women migrants face a heightened risk of gender-based violence, including trafficking in persons, and other forms of discrimination in transit, in camps, at borders and in destination countries. Women may also face specific human rights violations during migration and at their destination, owing to a lack of adequate sexual, reproductive and mental health services and discrimination in gaining access to employment, social security, education, housing, legal documents such as birth or marriage certificates, and justice. Migrant women and girls are frequently subject to intersecting forms of discrimination. Women who migrate may also be vulnerable to the impacts of climate change in destination areas, in particular in urban centres in developing countries.

76. In many contexts, however, women are impeded from leaving regions that are at high risk of disaster or migrating to re-establish their lives in the wake of extreme climatic events.[31] Gender-based stereotypes, household responsibilities, discriminatory laws, lack of economic resources and limited access to social capital frequently restrict the ability of women to migrate.

77. Women who are left behind when male family members migrate may also find themselves having to take on non-traditional economic and community leadership tasks for which they have had little preparation or training, such as when disasters occur and women must assume primary responsibility for coordinating mitigation, recovery and adaptation efforts.

78. **In accordance with the Convention and general recommendation No. 26 (2008) on women migrant workers and general recommendation No. 32, States parties should:**

(a) **Ensure that migration and development policies are gender responsive and that they include sound disaster risk considerations and recognize disasters and climate change as important push factors for internal displacement and migration. That information should be incorporated into national and local plans for monitoring and supporting the rights of women and girls during migration and displacement;**

(b) **Facilitate the participation of migrant women, including those who have been displaced as a result of disasters and climate change, in the development, implementation and monitoring of policies designed to protect and promote their human rights at all phases of migration. Particular efforts must be made to involve migrant women in designing appropriate services in areas including mental health and psychosocial support, sexual and reproductive health, education and training, employment, housing and access to justice;**

(c) **Ensure gender balance among the border police, military personnel and government officials responsible for the reception of migrants and train those groups on the gender-specific harm that migrant women may face, including the increased risk of violence;**

(d) **Integrate human mobility-related considerations into disaster risk reduction and climate change mitigation and adaptation policies, taking into**

[30] Ibid. See also general recommendation No. 26 (2008) on women migrant workers.

[31] Asian Development Bank, *Gender Equality and Food Security: Women's Empowerment as a Tool against Hunger* (Mandaluyong City, Philippines, 2013), p. 12.

account the specific rights and needs of women and girls, including unmarried women and women heads of household, before, during and after disasters.

VII. Dissemination and reporting

79. To effectively prevent and mitigate the impacts of disasters and climate change, States parties and other stakeholders should take measurable and targeted steps to collect, analyse and disseminate information and data concerning the development of strategies, policies and programmes designed to address gender inequalities, reduce disaster risk and increase resilience to the adverse effects of climate change.

80. Cooperative networks between civil society organizations working in the field of gender equality and those working in humanitarian assistance, disaster risk reduction and climate change should be established and should include national human rights institutions, government agencies at all levels and international organizations.

81. **To ensure that effective monitoring and reporting systems are established, States parties should:**

(a) **Design and institutionalize reliable mechanisms to collect and analyse data and monitor and disseminate findings across all areas relevant to disaster risk reduction, climate change and gender equality;**

(b) **Ensure the participation of women at the subnational, national, regional and international levels in data collection and analysis and the monitoring and dissemination of findings;**

(c) **Include information in their periodic reports to the Committee on the legal frameworks, strategies, budgets and programmes that they have implemented to ensure that the human rights of women are promoted and protected within policies relating to climate change and disaster risk reduction;**

(d) **Translate the present general recommendation into national and local languages, including indigenous and minority languages, and disseminate it widely to all branches of government, civil society, the media, academic institutions and women's organizations.**

Annex 58

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

NORTH SEA CONTINENTAL SHELF CASES

(FEDERAL REPUBLIC OF GERMANY/DENMARK;
FEDERAL REPUBLIC OF GERMANY/NETHERLANDS)

JUDGMENT OF 20 FEBRUARY 1969

1969

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRES DU PLATEAU CONTINENTAL DE LA MER DU NORD

(RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/DANEMARK;
RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/PAYS-BAS)

ARRÊT DU 20 FÉVRIER 1969

Official citation:
North Sea Continental Shelf, *Judgment*, *I.C.J. Reports 1969*, p. 3.

Mode officiel de citation:
Plateau continental de la mer du Nord, arrêt, *C.I.J. Recueil 1969*, p. 3.

Sales number
No de vente: 327

20 FEBRUARY 1969

JUDGMENT

NORTH SEA CONTINENTAL SHELF CASES
(FEDERAL REPUBLIC OF GERMANY/DENMARK; FEDERAL REPUBLIC OF GERMANY/NETHERLANDS)

AFFAIRES DU PLATEAU CONTINENTAL DE LA MER DU NORD
(RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/DANEMARK; RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE/PAYS-BAS)

20 FÉVRIER 1969

ARRÊT

INTERNATIONAL COURT OF JUSTICE

YEAR 1969

1969
20 February
General List:
Nos. 51 & 52

20 February 1969

NORTH SEA CONTINENTAL SHELF CASES

(FEDERAL REPUBLIC OF GERMANY/DENMARK; FEDERAL REPUBLIC OF GERMANY/NETHERLANDS)

Continental shelf areas in the North Sea—Delimitation as between adjacent States—Advantages and disadvantages of the equidistance method—Theory of just and equitable apportionment—Incompatibility of this theory with the principle of the natural appurtenance of the shelf to the coastal State—Task of the Court relates to delimitation not apportionment.

The equidistance principle as embodied in Article 6 of the 1958 Geneva Continental Shelf Convention—Non-opposability of that provision to the Federal Republic of Germany, either contractually or on the basis of conduct or estoppel.

Equidistance and the principle of natural appurtenance—Notion of closest proximity—Critique of that notion as not being entailed by the principle of appurtenance—Fundamental character of the principle of the continental shelf as being the natural prolongation of the land territory.

Legal history of delimitation—Truman Proclamation—International Law Commission—1958 Geneva Conference—Acceptance of equidistance as a purely conventional rule not reflecting or crystallizing a rule of customary international law—Effect in this respect of reservations article of Geneva Convention—Subsequent State practice insufficient to convert the conventional rule into a rule of customary international law—The opinio juris sive necessitatis, *how manifested.*

Statement of what are the applicable principles and rules of law—Delimitation by agreement, in accordance with equitable principles, taking account of all relevant circumstances, and so as to give effect to the principle of natural prolongation—Freedom of the Parties as to choice of method—Various factors relevant to the negotiation.

JUDGMENT

Present: *President* BUSTAMANTE Y RIVERO; *Vice-President* KORETSKY; *Judges* Sir Gerald FITZMAURICE, TANAKA, JESSUP, MORELLI, Sir Muhammad ZAFRULLA KHAN, PADILLA NERVO, FORSTER, GROS, AMMOUN, BENGZON, PETRÉN, LACHS, ONYEAMA; *Judges* ad hoc MOSLER, SØRENSEN; *Registrar* AQUARONE.

In the North Sea Continental Shelf cases,

between

the Federal Republic of Germany,
represented by
Dr. G. Jaenicke, Professor of International Law in the University of Frankfurt am Main,
as Agent,
assisted by
Dr. S. Oda, Professor of International Law in the University of Sendai,
as Counsel,
Dr. U. Scheuner, Professor of International Law in the University of Bonn,
Dr. E. Menzel, Professor of International Law in the University of Kiel,
Dr. Henry Herrmann, of the Massachusetts Bar, associated with Messrs. Goodwin, Procter and Hoar, Counsellors-at-Law, Boston,
Dr. H. Blomeyer-Bartenstein, Counsellor 1st Class, Ministry of Foreign Affairs,
Dr. H. D. Treviranus, Counsellor, Ministry of Foreign Affairs,
as Advisers,

and by Mr. K. Witt, Ministry of Foreign Affairs,
as Expert,

and

the Kingdom of Denmark,
represented by
Mr. Bent Jacobsen, Barrister at the Supreme Court of Denmark,
as Agent and Advocate,
assisted by
Sir Humphrey Waldock, C.M.G., O.B.E., Q.C., Professor of International Law in the University of Oxford,
as Counsel and Advocate,
H.E. Mr. S. Sandager Jeppesen, Ambassador, Ministry of Foreign Affairs,

Mr. E. Krog-Meyer, Head of The Legal Department, Ministry of Foreign Affairs,
Dr. I. Foighel, Professor in the University of Copenhagen,
Mr. E. Lauterpacht, Member of the English Bar and Lecturer in the University of Cambridge,

Mr. M. Thamsborg, Head of Department, Hydrographic Institute,

as Advisers,

and by

Mr. P. Boeg, Head of Secretariat, Ministry of Foreign Affairs,
Mr. U. Engel, Head of Section, Ministry of Foreign Affairs,

as Secretaries,

and between

the Federal Republic of Germany,

represented as indicated above,

and

the Kingdom of the Netherlands,

represented by

Professor W. Riphagen, Legal Adviser to the Ministry of Foreign Affairs, Professor of International Law at the Rotterdam School of Economics,

as Agent,

assisted by

Sir Humphrey Waldock, C.M.G., O.B.E., Q.C., Professor of International Law in the University of Oxford,

as Counsel,

Rear-Admiral W. Langeraar, Chief of the Hydrographic Department, Royal Netherlands Navy,
Mr. G. W. Maas Geesteranus, Assistant Legal Adviser to the Ministry of Foreign Affairs,
Miss F. Y. van der Wal, Assistant Legal Adviser to the Ministry of Foreign Affairs,

as Advisers,

and by

Mr. H. Rombach, Divisional Head, Hydrographic Department, Royal Netherlands Navy,

as Deputy-Adviser,

THE COURT,

composed as above,

delivers the following Judgment:

By a letter of 16 February 1967, received in the Registry on 20 February 1967, the Minister for Foreign Affairs of the Netherlands transmitted to the Registrar:

(a) an original copy, signed at Bonn on 2 February 1967 for the Governments of Denmark and the Federal Republic of Germany, of a Special Agreement for the submission to the Court of a difference between those two States concerning the delimitation, as between them, of the continental shelf in the North Sea;

(b) an original copy, signed at Bonn on 2 February 1967 for the Governments of the Federal Republic of Germany and the Netherlands, of a Special Agreement for the submission to the Court of a difference between those

two States concerning the delimitation, as between them, of the continental shelf in the North Sea;

(c) an original copy, signed at Bonn on 2 February 1967 for the three Governments aforementioned, of a Protocol relating to certain procedural questions arising from the above-mentioned Special Agreements.

Articles 1 to 3 of the Special Agreement between the Governments of Denmark and the Federal Republic of Germany are as follows:

"*Article 1*

(1) The International Court of Justice is requested to decide the following question:

What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above-mentioned Convention of 9 June 1965?

(2) The Governments of the Kingdom of Denmark and of the Federal Republic of Germany shall delimit the continental shelf in the North Sea as between their countries by agreement in pursuance of the decision requested from the International Court of Justice.

Article 2

(1) The Parties shall present their written pleadings to the Court in the order stated below:

1. a Memorial of the Federal Republic of Germany to be submitted within six months from the notification of the present Agreement to the Court;
2. a Counter-Memorial of the Kingdom of Denmark to be submitted within six months from the delivery of the German Memorial;
3. a German Reply followed by a Danish Rejoinder to be delivered within such time-limits as the Court may order.

(2) Additional written pleadings may be presented if this is jointly proposed by the Parties and considered by the Court to be appropriate to the case and the circumstances.

(3) The foregoing order of presentation is without prejudice to any question of burden of proof which might arise.

Article 3

The present Agreement shall enter into force on the day of signature thereof."

Articles 1 to 3 of the Special Agreement between the Governments of the Federal Republic of Germany and the Netherlands are as follows:

"*Article 1*

(1) The International Court of Justice is requested to decide the following question:

What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above-mentioned Convention of 1 December 1964?

(2) The Governments of the Federal Republic of Germany and of the Kingdom of the Netherlands shall delimit the continental shelf of the North Sea as between their countries by agreement in pursuance of the decision requested from the International Court of Justice.

Article 2

(1) The Parties shall present their written pleadings to the Court in the order stated below:

1. a Memorial of the Federal Republic of Germany to be submitted within six months from the notification of the present Agreement to the Court;
2. a Counter-Memorial of the Kingdom of the Netherlands to be submitted within six months from the delivery of the German Memorial;
3. a German Reply followed by a Netherlands Rejoinder to be delivered within such time-limits as the Court may order.

(2) Additional written pleadings may be presented if this is jointly proposed by the Parties and considered by the Court to be appropriate to the case and the circumstances.

(3) The foregoing order of presentation is without prejudice to any question of burden of proof which might arise.

Article 3

The present Agreement shall enter into force on the day of signature thereof."

The Protocol between the three Governments reads as follows:

"Protocol

At the signature of the Special Agreement of today's date between the Government of the Federal Republic of Germany and the Governments of the Kingdom of Denmark and the Kingdom of the Netherlands respectively, on the submission to the International Court of Justice of the differences between the Parties concerning the delimitation of the continental shelf in the North Sea, the three Governments wish to state their agreement on the following:

1. The Government of the Kingdom of the Netherlands will, within a month from the signature, notify the two Special Agreements together with the present Protocol to the International Court of Justice in accordance with Article 40, paragraph 1, of the Statute of the Court.

2. After the notification in accordance with item 1 above the Parties will ask the Court to join the two cases.

3. The three Governments agree that, for the purpose of appointing a judge *ad hoc*, the Governments of the Kingdom of Denmark and the Kingdom of the Netherlands shall be considered parties in the same interest within the meaning of Article 31, paragraph 5, of the Statute of the Court."

Pursuant to Article 33, paragraph 2, of the Rules of Court, the Registrar at once informed the Governments of Denmark and the Federal Republic of Germany of the filing of the Special Agreements. In accordance with Article 34, paragraph 2, of the Rules of Court, copies of the Special Agreements were transmitted to the other Members of the United Nations and to other non-member States entitled to appear before the Court.

By Orders of 8 March 1967, taking into account the agreement reached between the Parties, 21 August 1967 and 20 February 1968 were fixed respectively as the time-limits for the filing of the Memorials and Counter-Memorials. These pleadings were filed within the time-limits prescribed. By Orders of 1 March 1968, 31 May and 30 August 1968 were fixed respectively as the time-limits for the filing of the Replies and Rejoinders.

Pursuant to Article 31, paragraph 3, of the Statute of the Court, the Government of the Federal Republic of Germany chose Dr. Hermann Mosler, Professor of International Law in the University of Heidelberg, to sit as Judge *ad hoc* in both cases. Referring to the agreement concluded between them according to which they should be considered parties in the same interest within the meaning of Article 31, paragraph 5, of the Statute, the Governments of Denmark and the Netherlands chose Dr. Max Sørensen, Professor of International Law in the University of Aarhus, to sit as Judge *ad hoc* in both cases.

By an Order of 26 April 1968, considering that the Governments of Denmark and the Netherlands were, so far as the choice of a Judge *ad hoc* was concerned, to be reckoned as one Party only, the Court found that those two Governments were in the same interest, joined the proceedings in the two cases and, in modification of the directions given in the Orders of 1 March 1968, fixed 30 August 1968 as the time-limit for the filing of a Common Rejoinder for Denmark and the Netherlands.

The Replies and the Common Rejoinder having been filed within the time-limits prescribed, the cases were ready for hearing on 30 August 1968.

Pursuant to Article 44, paragraph 2, of the Rules of Court, the pleadings and annexed documents were, after consultation of the Parties, made available to the Governments of Brazil, Canada, Chile, Colombia, Ecuador, Finland, France, Honduras, Iran, Norway, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela. Pursuant to paragraph 3 of the same Article, those pleadings and annexed documents were, with the consent of the Parties, made accessible to the public as from the date of the opening of the oral proceedings.

Hearings were held from 23 to 25 October, from 28 October to 1 November, and on 4, 5, 7, 8 and 11 November 1968, in the course of which the Court heard, in the order agreed between the Parties and accepted by the Court, the oral arguments and replies of Professor Jaenicke, Agent, and Professor Oda, Counsel, on behalf of the Government of the Federal Republic of Germany; and of Mr. Jacobsen and Professor Riphagen, Agents, and Sir Humphrey Waldock, Counsel, on behalf of the Governments of Denmark and the Netherlands.

In the course of the written proceedings, the following Submissions were presented by the Parties:

On behalf of the Government of the Federal Republic of Germany,

in the Memorials:

"May it please the Court to recognize and declare:

1. The delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable share.

2. The method of determining boundaries of the continental shelf in such a way that every point of the boundary is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured (equidistance method), is not a rule of customary international law and is therefore not applicable as such between the Parties.

3. The equidistance method cannot be employed for the delimitation of the continental shelf unless it is established by agreement, arbitration, or otherwise, that it will achieve a just and equitable apportionment of the continental shelf among the States concerned.

4. As to the delimitation of the continental shelf between the Parties in the North Sea, the equidistance method cannot find application, since it would not apportion a just and equitable share to the Federal Republic of Germany";

in the Replies:

"May it please the Court to recognize and declare:

1. The delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable share.

2. *(a)* The method of determining boundaries of the continental shelf in such a way that every point of the boundary is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured (equidistance method) is not a rule of customary international law.

(b) The rule contained in the second sentence of paragraph 2 of Article 6 of the Continental Shelf Convention, prescribing that in the absence of agreement, and unless another boundary is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance, has not become customary international law.

(c) Even if the rule under *(b)* would be applicable between the Parties, special circumstances within the meaning of that rule would exclude the application of the equidistance method in the present case.

3. *(a)* The equidistance method cannot be used for the delimitation of the continental shelf unless it is established by agreement, arbitration, or otherwise, that it will achieve a just and equitable apportionment of the continental shelf among the States concerned.

(b) As to the delimitation of the continental shelf between the Parties in the North Sea, the Kingdom of Denmark and the Kingdom of the Netherlands cannot rely on the application of the equidistance method, since it would not lead to an equitable apportionment.

4. Consequently, the delimitation of the continental shelf in the North Sea between the Parties is a matter which has to be settled by agreement. This agreement should apportion a just and equitable share to each of the Parties in the light of all factors relevant in this respect."

On behalf of the Government of Denmark,

in its Counter-Memorial:

"Considering that, as noted in the Compromis, disagreement exists

between the Parties which could not be settled by detailed negotiations, regarding the further course of the boundary beyond the partial boundary determined by the Convention of 9 June 1965;

Considering that under the terms of Article 1, paragraph 1, of the Compromis the task entrusted to the Court is not to formulate a basis for the delimitation of the continental shelf in the North Sea as between the Parties *ex aequo et bono*, but to decide what principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary, determined by the above-mentioned Convention of 9 June 1965;

In view of the facts and arguments presented in Parts I and II of this Counter-Memorial,

May it please the Court to adjudge and declare:

1. The delimitation as between the Parties of the said areas of the continental shelf in the North Sea is governed by the principles and rules of international law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf.

2. The Parties being in disagreement, unless another boundary is justified by special circumstances, the boundary between them is to be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

3. Special circumstances which justify another boundary line not having been established, the boundary between the Parties is to be determined by application of the principle of equidistance indicated in the preceding Submission."

On behalf of the Government of the Netherlands,

in its Counter-Memorial:

"Considering that, as noted in the Compromis, disagreement exists between the Parties which could not be settled by detailed negotiations, regarding the further course of the boundary beyond the partial boundary determined by the Treaty of 1 December 1964;

Considering that under the terms of Article 1, paragraph 1, of the Compromis the task entrusted to the Court is not to formulate a basis for the delimitation of the continental shelf in the North Sea as between the Parties *ex aequo et bono*, but to decide what principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above-mentioned Treaty of 1 December 1964;

In view of the facts and arguments presented in Parts I and II of this Counter-Memorial,

May it please the Court to adjudge and declare:

1. The delimitation as between the Parties of the said areas of the continental shelf in the North Sea is governed by the principles and rules of international law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf.

2. The Parties being in disagreement, unless another boundary is justified by special circumstances, the boundary between them is to be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

3. Special circumstances which justify another boundary line not having been established, the boundary between the Parties is to be determined by application of the principle of equidistance indicated in the preceding Submission."

On behalf of the Governments of Denmark and the Netherlands,

in the Common Rejoinder:

"May it further please the Court to adjudge and declare:

4. If the principles and rules of international law mentioned in Submission 1 of the respective Counter-Memorials are not applicable as between the Parties, the boundary is to be determined between the Parties on the basis of the exclusive rights of each Party over the continental shelf adjacent to its coast and of the principle that the boundary is to leave to each Party every point of the continental shelf which lies nearer to its coast than to the coast of the other Party."

In the course of the oral proceedings, the following Submissions were presented by the Parties:

On behalf of the Government of the Federal Republic of Germany,

at the hearing on 5 November 1968:

"1. The delimitation of the continental shelf between the Parties in the North Sea is governed by the principle that each coastal State is entitled to a just and equitable share.

2. *(a)* The method of determining boundaries of the continental shelf in such a way that every point of the boundary is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured (equidistance method) is not a rule of customary international law.

(b) The rule contained in the second sentence of paragraph 2 of Article 6 of the Continental Shelf Convention, prescribing that in the absence of agreement, and unless another boundary is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance, has not become customary international law.

(c) Even if the rule under *(b)* would be applicable between the Parties, special circumstances within the meaning of that rule would exclude the application of the equidistance method in the present case.

3. *(a)* The equidistance method cannot be used for the delimitation of the continental shelf unless it is established by agreement, arbitration, or otherwise, that it will achieve a just and equitable apportionment of the continental shelf among the States concerned.

(b) As to the delimitation of the continental shelf between the Parties in the North Sea, the Kingdom of Denmark and the Kingdom of the Netherlands cannot rely on the application of the equidistance method, since it would not lead to an equitable apportionment.

4. Consequently, the delimitation of the continental shelf, on which the Parties must agree pursuant to paragraph 2 of Article 1 of the Special Agreement, is determined by the principle of the just and equitable share, based on criteria relevant to the particular geographical situation in the North Sea."

On behalf of the Government of Denmark,

at the hearing on 11 November 1968, Counsel for that Government stated that it confirmed the Submissions presented in its Counter-Memorial and in the Common Rejoinder and that those Submissions were identical *mutatis mutandis* with those of the Government of the Netherlands.

On behalf of the Government of the Netherlands,

at the hearing on 11 November 1968:

"With regard to the delimitation as between the Federal Republic of Germany and the Kingdom of the Netherlands of the boundary of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the Convention of 1 December 1964.

May it please the Court to adjudge and declare:

1. The delimitation as between the Parties of the said areas of the continental shelf in the North Sea is governed by the principles and rules of international law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Continental Shelf.

2. The Parties being in disagreement, unless another boundary is justified by special circumstances, the boundary between them is to be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

3. Special circumstances which justify another boundary line not having been established, the boundary between the Parties is to be determined by application of the principle of equidistance indicated in the preceding Submission.

4. If the principles and rules of international law mentioned in Submission 1 are not applicable as between the Parties, the boundary is to be determined between the Parties on the basis of the exclusive rights of each Party over the continental shelf adjacent to its coast and of the principle that the boundary is to leave to each Party every point of the continental shelf which lies nearer to its coast than to the coast of the other Party."

* * * * *

1. By the two Special Agreements respectively concluded between the Kingdom of Denmark and the Federal Republic of Germany, and between the Federal Republic and the Kingdom of the Netherlands, the Parties have submitted to the Court certain differences concerning "the delimita-

tion as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them"—with the exception of those areas, situated in the immediate vicinity of the coast, which have already been the subject of delimitation by two agreements dated 1 December 1964, and 9 June 1965, concluded in the one case between the Federal Republic and the Kingdom of the Netherlands, and in the other between the Federal Republic and the Kingdom of Denmark.

2. It is in respect of the delimitation of the continental shelf areas lying beyond and to seaward of those affected by the partial boundaries thus established, that the Court is requested by each of the two Special Agreements to decide what are the applicable "principles and rules of international law". The Court is not asked actually to delimit the further boundaries which will be involved, this task being reserved by the Special Agreements to the Parties, which undertake to effect such a delimitation "by agreement in pursuance of the decision requested from the ... Court"—that is to say on the basis of, and in accordance with, the principles and rules of international law found by the Court to be applicable.

*

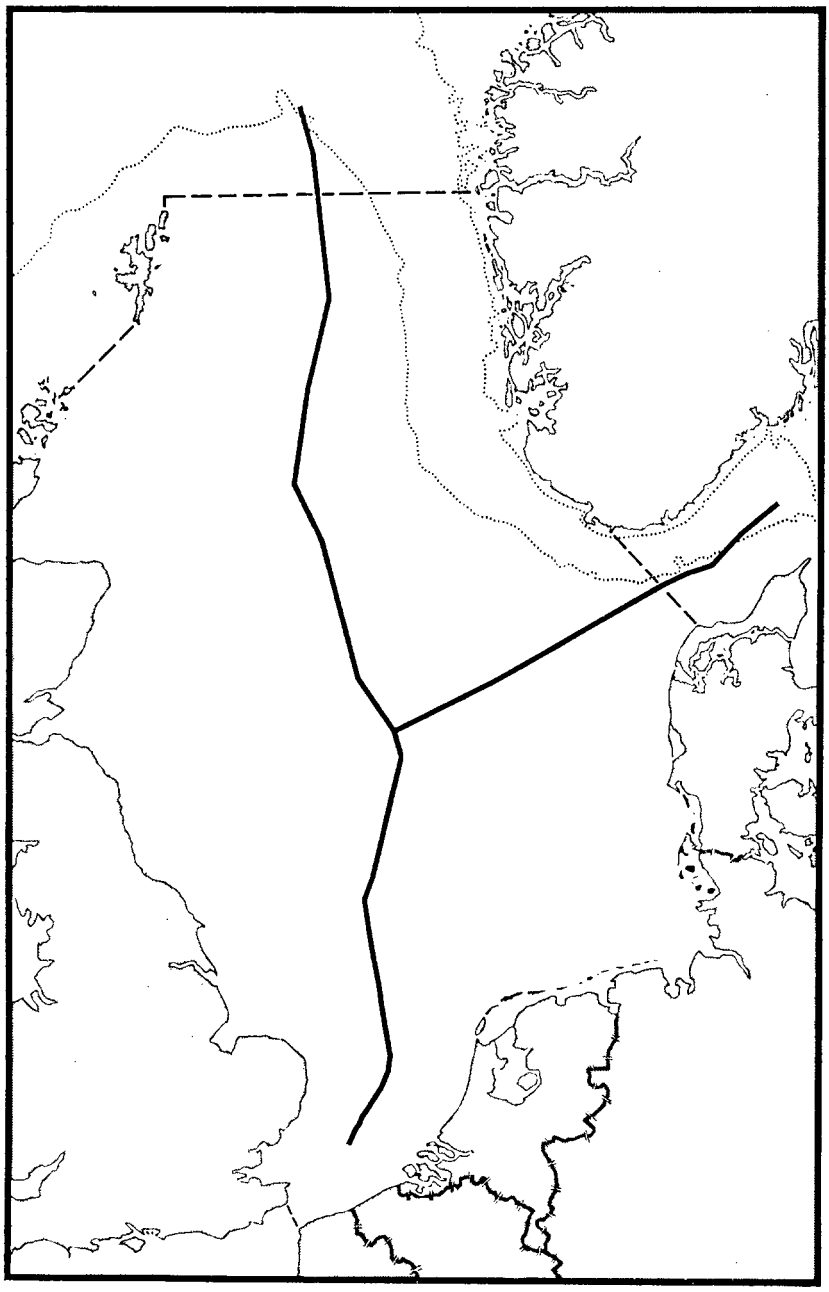
3. As described in Article 4 of the North Sea Policing of Fisheries Convention of 6 May 1882, the North Sea, which lies between continental Europe and Great Britain in the east-west direction, is roughly oval in shape and stretches from the straits of Dover northwards to a parallel drawn between a point immediately north of the Shetland Islands and the mouth of the Sogne Fiord in Norway, about 75 kilometres above Bergen, beyond which is the North Atlantic Ocean. In the extreme north-west, it is bounded by a line connecting the Orkney and Shetland island groups; while on its north-eastern side, the line separating it from the entrances to the Baltic Sea lies between Hanstholm at the north-west point of Denmark, and Lindesnes at the southern tip of Norway. Eastward of this line the Skagerrak begins. Thus, the North Sea has to some extent the general look of an enclosed sea without actually being one. Round its shores are situated, on its eastern side and starting from the north, Norway, Denmark, the Federal Republic of Germany, the Netherlands, Belgium and France; while the whole western side is taken up by Great Britain, together with the island groups of the Orkneys and Shetlands. From this it will be seen that the continental shelf of the Federal Republic is situated between those of Denmark and the Netherlands.

4. The waters of the North Sea are shallow, and the whole seabed consists of continental shelf at a depth of less than 200 metres, except for the formation known as the Norwegian Trough, a belt of water 200-650 metres deep, fringing the southern and south-western coasts of Norway to a width averaging about 80-100 kilometres. Much the greater part of this continental shelf has already been the subject of delimitation

by a series of agreements concluded between the United Kingdom (which, as stated, lies along the whole western side of it) and certain of the States on the eastern side, namely Norway, Denmark and the Netherlands. These three delimitations were carried out by the drawing of what are known as "median lines" which, for immediate present purposes, may be described as boundaries drawn between the continental shelf areas of "opposite" States, dividing the intervening spaces equally between them. These lines are shown on Map 1 on page 15, together with a similar line, also established by agreement, drawn between the shelf areas of Norway and Denmark. Theoretically it would be possible also to draw the following median lines in the North Sea, namely United Kingdom/Federal Republic (which would lie east of the present line United Kingdom/Norway-Denmark-Netherlands); Norway/Federal Republic (which would lie south of the present line Norway/Denmark); and Norway/Netherlands (which would lie north of whatever line is eventually determined to be the continental shelf boundary between the Federal Republic and the Netherlands). Even if these median lines were drawn however, the question would arise whether the United Kingdom, Norway and the Netherlands could take advantage of them as against the parties to the existing delimitations, since these lines would, it seems, in each case lie beyond (i.e., respectively to the east, south and north of) the boundaries already effective under the existing agreements at present in force. This is illustrated by Map 2 on page 15.

5. In addition to the partial boundary lines Federal Republic/Denmark and Federal Republic/Netherlands, which, as mentioned in paragraph 1 above, were respectively established by the agreements of 9 June 1965 and 1 December 1964, and which are shown as lines A-B and C-D on Map 3 on page 16, another line has been drawn in this area, namely that represented by the line E-F on that map. This line, which divides areas respectively claimed (to the north of it) by Denmark, and (to the south of it) by the Netherlands, is the outcome of an agreement between those two countries dated 31 March 1966, reflecting the view taken by them as to what are the correct boundary lines between their respective continental shelf areas and that of the Federal Republic, beyond the partial boundaries A-B and C-D already drawn. These further and unagreed boundaries to seaward, are shown on Map 3 by means of the dotted lines B-E and D-E. They are the lines, the correctness of which in law the Court is in effect, though indirectly, called upon to determine. Also shown on Map 3 are the two pecked lines B-F and D-F, representing approximately the boundaries which the Federal Republic would have wished to obtain in the course of the negotiations that took place between the Federal Republic and the other two Parties prior to the submission of the matter to the Court. The nature of these negotiations must now be described.

*



Map 1

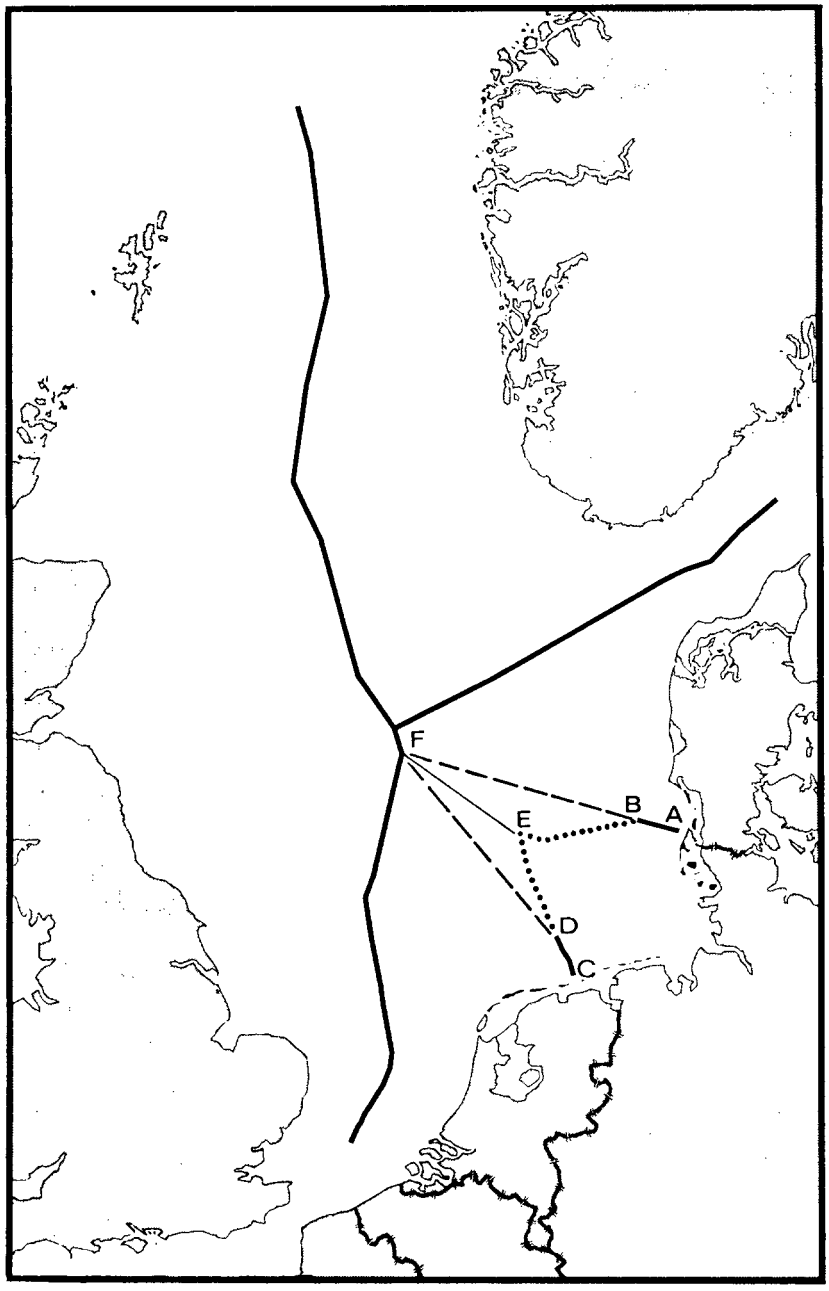
(See paragraphs 3 and 4)

200 metres line	.....
Limits fixed by the 1882 Convention	— — — — — — — —
Median lines	———

Carte 1

(Voir paragraphes 3 et 4)

Isobathe des 200 mètres	
Limites définies par la convention de 1882	
Lignes médianes	



Map 3
(See paragraphs 5-9)

The maps in the present Judgment were prepared on the basis of documents submitted to the Court by the Parties, and their sole purpose is to provide a visual illustration of the paragraphs of the Judgment which refer to them.

Carte 3
(Voir paragraphes 5-9)

Les cartes jointes au présent arrêt ont été établies d'après les documents soumis à la Cour par les Parties et ont pour seul objet d'illustrer graphiquement les paragraphes de l'arrêt qui s'y réfèrent.

6. Under the agreements of December 1964 and June 1965, already mentioned, the partial boundaries represented by the map lines A-B and C-D had, according to the information furnished to the Court by the Parties, been drawn mainly by application of the principle of equidistance, using that term as denoting the abstract concept of equidistance. A line so drawn, known as an "equidistance line", may be described as one which leaves to each of the parties concerned all those portions of the continental shelf that are nearer to a point on its own coast than they are to any point on the coast of the other party. An equidistance line may consist either of a "median" line between "opposite" States, or of a "lateral" line between "adjacent" States. In certain geographical configurations of which the Parties furnished examples, a given equidistance line may partake in varying degree of the nature both of a median and of a lateral line. There exists nevertheless a distinction to be drawn between the two, which will be mentioned in its place.

7. The further negotiations between the Parties for the prolongation of the partial boundaries broke down mainly because Denmark and the Netherlands respectively wished this prolongation also to be effected on the basis of the equidistance principle,—and this would have resulted in the dotted lines B-E and D-E, shown on Map 3; whereas the Federal Republic considered that such an outcome would be inequitable because it would unduly curtail what the Republic believed should be its proper share of continental shelf area, on the basis of proportionality to the length of its North Sea coastline. It will be observed that neither of the lines in question, taken by itself, would produce this effect, but only both of them together—an element regarded by Denmark and the Netherlands as irrelevant to what they viewed as being two separate and self-contained delimitations, each of which should be carried out without reference to the other.

8. The reason for the result that would be produced by the two lines B-E and D-E, taken conjointly, is that in the case of a concave or recessing coast such as that of the Federal Republic on the North Sea, the effect of the use of the equidistance method is to pull the line of the boundary inwards, in the direction of the concavity. Consequently, where two such lines are drawn at different points on a concave coast, they will, if the curvature is pronounced, inevitably meet at a relatively short distance from the coast, thus causing the continental shelf area they enclose, to take the form approximately of a triangle with its apex to seaward and, as it was put on behalf of the Federal Republic, "cutting off" the coastal State from the further areas of the continental shelf outside of and beyond this triangle. The effect of concavity could of course equally be produced for a country with a straight coastline if the coasts of adjacent countries protruded immediately on either side of it. In contrast to this, the effect of coastal projections, or of convex or outwardly curving coasts such as are, to a moderate extent, those of Denmark and the Netherlands, is to cause boundary lines drawn on an equidistance basis to leave the

coast on divergent courses, thus having a widening tendency on the area of continental shelf off that coast. These two distinct effects, which are shown in sketches I-III to be found on page 16, are directly attributable to the use of the equidistance method of delimiting continental shelf boundaries off recessing or projecting coasts. It goes without saying that on these types of coasts the equidistance method produces exactly similar effects in the delimitation of the lateral boundaries of the territorial sea of the States concerned. However, owing to the very close proximity of such waters to the coasts concerned, these effects are much less marked and may be very slight,—and there are other aspects involved, which will be considered in their place. It will suffice to mention here that, for instance, a deviation from a line drawn perpendicular to the general direction of the coast, of only 5 kilometres, at a distance of about 5 kilometres from that coast, will grow into one of over 30 at a distance of over 100 kilometres.

9. After the negotiations, separately held between the Federal Republic and the other two Parties respectively, had in each case, for the reasons given in the two preceding paragraphs, failed to result in any agreement about the delimitation of the boundary extending beyond the partial one already agreed, tripartite talks between all the Parties took place in The Hague in February-March 1966, in Bonn in May and again in Copenhagen in August. These also proving fruitless, it was then decided to submit the matter to the Court. In the meantime the Governments of Denmark and the Netherlands had, by means of the agreement of 31 March 1966, already referred to (paragraph 5), proceeded to a delimitation as between themselves of the continental shelf areas lying between the apex of the triangle notionally ascribed by them to the Federal Republic (point E on Map 3) and the median line already drawn in the North Sea, by means of a boundary drawn on equidistance principles, meeting that line at the point marked F on Map 3. On 25 May 1966, the Government of the Federal Republic, taking the view that this delimitation was *res inter alios acta*, notified the Governments of Denmark and the Netherlands, by means of an aide-mémoire, that the agreement thus concluded could not "have any effect on the question of the delimitation of the German-Netherlands or the German-Danish parts of the continental shelf in the North Sea".

10. In pursuance of the tripartite arrangements that had been made at Bonn and Copenhagen, as described in the preceding paragraph, Special Agreements for the submission to the Court of the differences involved were initialled in August 1966 and signed on 2 February 1967. By a tripartite Protocol signed the same day it was provided *(a)* that the Government of the Kingdom of the Netherlands would notify the two Special Agreements to the Court, in accordance with Article 40, paragraph 1, of the Court's Statute, together with the text of the Protocol itself; *(b)* that after such notification, the Parties would ask the Court to join the two cases; and *(c)* that for the purpose of the appointment

of a judge *ad hoc*, the Kingdoms of Denmark and the Netherlands should be considered as being in the same interest within the meaning of Article 31, paragraph 5, of the Court's Statute. Following upon these communications, duly made to it in the implementation of the Protocol, the Court, by an Order dated 26 April 1968, declared Denmark and the Netherlands to be in the same interest, and joined the proceedings in the two cases.

11. Although the proceedings have thus been joined, the cases themselves remain separate, at least in the sense that they relate to different areas of the North Sea continental shelf, and that there is no *a priori* reason why the Court must reach identical conclusions in regard to them,—if for instance geographical features present in the one case were not present in the other. At the same time, the legal arguments presented on behalf of Denmark and the Netherlands, both before and since the joinder, have been substantially identical, apart from certain matters of detail, and have been presented either in common or in close co-operation. To this extent therefore, the two cases may be treated as one; and it must be noted that although two separate delimitations are in question, they involve—indeed actually give rise to—a single situation. The fact that the question of either of these delimitations might have arisen and called for settlement separately in point of time, does not alter the character of the problem with which the Court is actually faced, having regard to the manner in which the Parties themselves have brought the matter before it, as described in the two preceding paragraphs.

12. In conclusion as to the facts, it should be noted that the Federal Republic has formally reserved its position, not only in regard to the Danish-Netherlands delimitation of the line E-F (Map 3), as noted in paragraph 9, but also in regard to the delimitations United Kingdom/Denmark and United Kingdom/Netherlands mentioned in paragraph 4. In both the latter cases the Government of the Federal Republic pointed out to all the Governments concerned that the question of the lateral delimitation of the continental shelf in the North Sea between the Federal Republic and the Kingdoms of Denmark and the Netherlands was still outstanding and could not be prejudiced by the agreements concluded between those two countries and the United Kingdom.

* * *

13. Such are the events and geographical facts in the light of which the Court has to determine what principles and rules of international law are applicable to the delimitation of the areas of continental shelf involved. On this question the Parties have taken up fundamentally different positions. On behalf of the Kingdoms of Denmark and the Netherlands it is contended that the whole matter is governed by a

mandatory rule of law which, reflecting the language of Article 6 of the Convention on the Continental Shelf concluded at Geneva on 29 April 1958, was designated by them as the "equidistance-special circumstances" rule. According to this contention, "equidistance" is not merely a method of the cartographical construction of a boundary line, but the essential element in a rule of law which may be stated as follows,—namely that in the absence of agreement by the Parties to employ another method or to proceed to a delimitation on an *ad hoc* basis, all continental shelf boundaries must be drawn by means of an equidistance line, unless, or except to the extent to which, "special circumstances" are recognized to exist,—an equidistance line being, it will be recalled, a line every point on which is the same distance away from whatever point is nearest to it on the coast of each of the countries concerned—or rather, strictly, on the baseline of the territorial sea along that coast. As regards what constitutes "special circumstances", all that need be said at this stage is that according to the view put forward on behalf of Denmark and the Netherlands, the configuration of the German North Sea coast, its recessive character, and the fact that it makes nearly a right-angled bend in mid-course, would not of itself constitute, for either of the two boundary lines concerned, a special circumstance calling for or warranting a departure from the equidistance method of delimitation: only the presence of some special feature, minor in itself—such as an islet or small protuberance—but so placed as to produce a disproportionately distorting effect on an otherwise acceptable boundary line would, so it was claimed, possess this character.

14. These various contentions, together with the view that a rule of equidistance-special circumstances is binding on the Federal Republic, are founded by Denmark and the Netherlands partly on the 1958 Geneva Convention on the Continental Shelf already mentioned (preceding paragraph), and partly on general considerations of law relating to the continental shelf, lying outside this Convention. Similar considerations are equally put forward to found the contention that the delimitation on an equidistance basis of the line E-F (Map 3) by the Netherlands-Danish agreement of 31 March 1966 (paragraph 5 above) is valid *erga omnes*, and must be respected by the Federal Republic unless it can demonstrate the existence of juridically relevant "special circumstances".

15. The Federal Republic, for its part, while recognizing the utility of equidistance as a method of delimitation, and that this method can in many cases be employed appropriately and with advantage, denies its obligatory character for States not parties to the Geneva Convention, and contends that the correct rule to be applied, at any rate in such circumstances as those of the North Sea, is one according to which each of the States concerned should have a "just and equitable share" of the available continental shelf, in proportion to the length of its coastline or sea-frontage. It was also contended on behalf of the Federal Republic

that in a sea shaped as is the North Sea, the whole bed of which, except for the Norwegian Trough, consists of continental shelf at a depth of less than 200 metres, and where the situation of the circumjacent States causes a natural convergence of their respective continental shelf areas, towards a central point situated on the median line of the whole seabed —or at any rate in those localities where this is the case—each of the States concerned is entitled to a continental shelf area extending up to this central point (in effect a sector), or at least extending to the median line at some point or other. In this way the "cut-off" effect, of which the Federal Republic complains, caused, as explained in paragraph 8, by the drawing of equidistance lines at the two ends of an inward curving or recessed coast, would be avoided. As a means of giving effect to these ideas, the Federal Republic proposed the method of the "coastal front", or façade, constituted by a straight baseline joining these ends, upon which the necessary geometrical constructions would be erected.

16. Alternatively, the Federal Republic claimed that if, contrary to its main contention, the equidistance method was held to be applicable, then the configuration of the German North Sea coast constituted a "special circumstance" such as to justify a departure from that method of delimitation in this particular case.

17. In putting forward these contentions, it was stressed on behalf of the Federal Republic that the claim for a just and equitable share did not in any way involve asking the Court to give a decision *ex aequo et bono* (which, having regard to the terms of paragraph 2 of Article 38 of the Court's Statute, would not be possible without the consent of the Parties),—for the principle of the just and equitable share was one of the recognized general principles of law which, by virtue of paragraph 1 *(c)* of the same Article, the Court was entitled to apply as a matter of the *justitia distributiva* which entered into all legal systems. It appeared, moreover, that whatever its underlying motivation, the claim of the Federal Republic was, at least ostensibly, to a just and equitable share of the space involved, rather than to a share of the natural resources as such, mineral or other, to be found in it, the location of which could not in any case be fully ascertained at present. On the subject of location the Court has in fact received some, though not complete information, but has not thought it necessary to pursue the matter, since the question of natural resources is less one of delimitation than of eventual exploitation.

*

18. It will be convenient to consider first the contentions put forward on behalf of the Federal Republic. The Court does not feel able to accept them—at least in the particular form they have taken. It considers

that, having regard both to the language of the Special Agreements and to more general considerations of law relating to the régime of the continental shelf, its task in the present proceedings relates essentially to the delimitation and not the apportionment of the areas concerned, or their division into converging sectors. Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.

19. More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it,—namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabe ' and exploiting its natural resources. In short, there is here an inhere t right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is "exclusive" in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent.

20. It follows that even in such a situation as that of the North Sea, the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected. The delimitation itself must indeed be equitably effected, but it cannot have as its object the awarding of an equitable share, or indeed of a share, as such, at all,—for the fundamental concept involved does not admit of there being anything undivided to share out. Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made.

But this does not mean that there has been an apportionment of something that previously consisted of an integral, still less an undivided whole.

* * *

21. The Court will now turn to the contentions advanced on behalf of Denmark and the Netherlands. Their general character has already been indicated in paragraphs 13 and 14: the most convenient way of dealing with them will be on the basis of the following question—namely, does the equidistance-special circumstances principle constitute a mandatory rule, either on a conventional or on a customary international law basis, in such a way as to govern any delimitation of the North Sea continental shelf areas between the Federal Republic and the Kingdoms of Denmark and the Netherlands respectively? Another and shorter way of formulating the question would be to ask whether, in any delimitation of these areas, the Federal Republic is under a legal obligation to accept the application of the equidistance-special circumstances principle.

22. Particular attention is directed to the use, in the foregoing formulations, of the terms "mandatory" and "obligation". It has never been doubted that the equidistance method of delimitation is a very convenient one, the use of which is indicated in a considerable number of cases. It constitutes a method capable of being employed in almost all circumstances, however singular the results might sometimes be, and has the virtue that if necessary,—if for instance, the Parties are unable to enter into negotiations,—any cartographer can *de facto* trace such a boundary on the appropriate maps and charts, and those traced by competent cartographers will for all practical purposes agree.

23. In short, it would probably be true to say that no other method of delimitation has the same combination of practical convenience and certainty of application. Yet these factors do not suffice of themselves to convert what is a method into a rule of law, making the acceptance of the results of using that method obligatory in all cases in which the parties do not agree otherwise, or in which "special circumstances" cannot be shown to exist. Juridically, if there is such a rule, it must draw its legal force from other factors than the existence of these advantages, important though they may be. It should also be noticed that the counterpart of this conclusion is no less valid, and that the practical advantages of the equidistance method would continue to exist whether its employment were obligatory or not.

24. It would however be ignoring realities if it were not noted at the same time that the use of this method, partly for the reasons given in paragraph 8 above and partly for reasons that are best appreciated by reference to the many maps and diagrams furnished by both sides in the course of the written and oral proceedings, can under certain circumstances produce results that appear on the face of them to be extraordinary, unnatural or unreasonable. It is basically this fact which un-

derlies the present proceedings. The plea that, however this may be, the results can never be inequitable, because the equidistance principle is by definition an equitable principle of delimitation, involves a postulate that clearly begs the whole question at issue.

* * *

25. The Court now turns to the legal position regarding the equidistance method. The first question to be considered is whether the 1958 Geneva Convention on the Continental Shelf is binding for all the Parties in this case—that is to say whether, as contended by Denmark and the Netherlands, the use of this method is rendered obligatory for the present delimitations by virtue of the delimitations provision (Article 6) of that instrument, according to the conditions laid down in it. Clearly, if this is so, then the provisions of the Convention will prevail in the relations between the Parties, and would take precedence of any rules having a more general character, or derived from another source. On that basis the Court's reply to the question put to it in the Special Agreements would necessarily be to the effect that as between the Parties the relevant provisions of the Convention represented the applicable rules of law—that is to say constituted the law for the Parties—and its sole remaining task would be to interpret those provisions, in so far as their meaning was disputed or appeared to be uncertain, and to apply them to the particular circumstances involved.

26. The relevant provisions of Article 6 of the Geneva Convention, paragraph 2 of which Denmark and the Netherlands contend not only to be applicable as a conventional rule, but also to represent the accepted rule of general international law on the subject of continental shelf delimitation. as it exists independently of the Convention, read as follows:

> "1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each State is measured.
>
> 2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."

The Convention received 46 signatures and, up-to-date, there have been 39 ratifications or accessions. It came into force on 10 June 1964, having received the 22 ratifications or accessions required for that purpose (Article 11), and was therefore in force at the time when the various delimitations of continental shelf boundaries described earlier (paragraphs 1 and 5) took place between the Parties. But, under the formal provisions of the Convention, it is in force for any individual State only in so far as, having signed it within the time-limit provided for that purpose, that State has also subsequently ratified it; or, not having signed within that time-limit, has subsequently acceded to the Convention. Denmark and the Netherlands have both signed and ratified the Convention, and are parties to it, the former since 10 June 1964, the latter since 20 March 1966. The Federal Republic was one of the signatories of the Convention, but has never ratified it, and is consequently not a party.

27. It is admitted on behalf of Denmark and the Netherlands that in these circumstances the Convention cannot, as such, be binding on the Federal Republic, in the sense of the Republic being contractually bound by it. But it is contended that the Convention, or the régime of the Convention, and in particular of Article 6, has become binding on the Federal Republic in another way,—namely because, by conduct, by public statements and proclamations, and in other ways, the Republic has unilaterally assumed the obligations of the Convention; or has manifested its acceptance of the conventional régime; or has recognized it as being generally applicable to the delimitation of continental shelf areas. It has also been suggested that the Federal Republic had held itself out as so assuming, accepting or recognizing, in such a manner as to cause other States, and in particular Denmark and the Netherlands, to rely on the attitude thus taken up.

28. As regards these contentions, it is clear that only a very definite, very consistent course of conduct on the part of a State in the situation of the Federal Republic could justify the Court in upholding them; and, if this had existed—that is to say if there had been a real intention to manifest acceptance or recognition of the applicability of the conventional régime—then it must be asked why it was that the Federal Republic did not take the obvious step of giving expression to this readiness by simply ratifying the Convention. In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the régime of the convention is to be manifested—namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way. Indeed if it were a question not of obligation but of rights,—if, that is to say, a State which, though entitled

to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional régime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form.

29. A further point, not in itself conclusive, but to be noted, is that if the Federal Republic had ratified the Geneva Convention, it could have entered—and could, if it ratified now, enter—a reservation to Article 6, by reason of the faculty to do so conferred by Article 12 of the Convention. This faculty would remain, whatever the previous conduct of the Federal Republic might have been—a fact which at least adds to the difficulties involved by the Danish-Netherlands contention.

30. Having regard to these considerations of principle, it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention,—that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever in the present case.

31. In these circumstances it seems to the Court that little useful purpose would be served by passing in review and subjecting to detailed scrutiny the various acts relied on by Denmark and the Netherlands as being indicative of the Federal Republic's acceptance of the régime of Article 6;—for instance that at the Geneva Conference the Federal Republic did not take formal objection to Article 6 and eventually signed the Convention without entering any reservation in respect of that provision; that it at one time announced its intention to ratify the Convention; that in its public declarations concerning its continental shelf rights it appeared to rely on, or at least cited, certain provisions of the Geneva Convention. In this last connection a good deal has been made of the joint Minute signed in Bonn, on 4 August 1964, between the then-negotiating delegations of the Federal Republic and the Netherlands. But this minute made it clear that what the Federal Republic was seeking was an agreed division, rather than a delimitation of the central North Sea continental shelf areas, and the reference it made to Article 6 was specifically to the first sentence of paragraphs 1 and 2 of that Article, which speaks exclusively of delimitation by agreement and not at all of the use of the equidistance method.

32. In the result it appears to the Court that none of the elements invoked is decisive; each is ultimately negative or inconclusive; all are capable of varying interpretations or explanations. It would be one

thing to infer from the declarations of the Federal Republic an admission accepting the fundamental concept of coastal State rights in respect of the continental shelf: it would be quite another matter to see in this an acceptance of the rules of delimitation contained in the Convention. The declarations of the Federal Republic, taken in the aggregate, might at most justify the view that to begin with, and before becoming fully aware of what the probable effects in the North Sea would be, the Federal Republic was not specifically opposed to the equidistance principle as embodied in Article 6 of the Convention. But from a purely negative conclusion such as this, it would certainly not be possible to draw the positive inference that the Federal Republic, though not a party to the Convention, had accepted the régime of Article 6 in a manner binding upon itself.

33. The dangers of the doctrine here advanced by Denmark and the Netherlands, if it had to be given general application in the international law field, hardly need stressing. Moreover, in the present case, any such inference would immediately be nullified by the fact that, as soon as concrete delimitations of North Sea continental shelf areas began to be carried out, the Federal Republic, as described earlier (paragraphs 9 and 12), at once reserved its position with regard to those delimitations which (effected on an equidistance basis) might be prejudicial to the delimitation of its own continental shelf areas.

*

34. Since, accordingly, the foregoing considerations must lead the Court to hold that Article 6 of the Geneva Convention is not, as such, applicable to the delimitations involved in the present proceedings, it becomes unnecessary for it to go into certain questions relating to the interpretation or application of that provision which would otherwise arise. One should be mentioned however, namely what is the relationship between the requirement of Article 6 for delimitation by agreement, and the requirements relating to equidistance and special circumstances that are to be applied in "the absence of" such agreement,—i.e., in the absence of agreement on the matter, is there a presumption that the continental shelf boundary between any two adjacent States consists automatically of an equidistance line,—or must negotiations for an agreed boundary prove finally abortive before the acceptance of a boundary drawn on an equidistance basis becomes obligatory in terms of Article 6, if no special circumstances exist?

35. Without attempting to resolve this question, the determination of which is not necessary for the purposes of the present case, the Court draws attention to the fact that the delimitation of the line E-F, as shown on Map 3, which was effected by Denmark and the Netherlands under the agreement of 31 March 1966 already mentioned (paragraphs 5 and 9), to which the Federal Republic was not a party, must have been based on

the tacit assumption that, no agreement to the contrary having been reached in the negotiations between the Federal Republic and Denmark and the Netherlands respectively (paragraph 7), the boundary between the continental shelf areas of the Republic and those of the other two countries must be deemed to be an equidistance one;—or in other words the delimitation of the line E-F, and its validity *erga omnes* including the Federal Republic, as contended for by Denmark and the Netherlands, presupposes both the delimitation and the validity on an equidistance basis, of the lines B-E and D-E on Map 3, considered by Denmark and the Netherlands to represent the boundaries between their continental shelf areas and those of the Federal Republic.

36. Since, however, Article 6 of the Geneva Convention provides only for delimitation between "adjacent" States, which Denmark and the Netherlands clearly are not, or between "opposite" States which, despite suggestions to the contrary, the Court thinks they equally are not, the delimitation of the line E-F on Map 3 could not in any case find its validity in Article 6, even if that provision were opposable to the Federal Republic. The validity of this delimitation must therefore be sought in some other source of law. It is a main contention of Denmark and the Netherlands that there does in fact exist such another source, furnishing a rule that validates not only this particular delimitation, but all delimitations effected on an equidistance basis,—and indeed requiring delimitation on that basis unless the States concerned otherwise agree, and whether or not the Geneva Convention is applicable. This contention must now be examined.

* * *

37. It is maintained by Denmark and the Netherlands that the Federal Republic, whatever its position may be in relation to the Geneva Convention, considered as such, is in any event bound to accept delimitation on an equidistance-special circumstances basis, because the use of this method is not in the nature of a merely conventional obligation, but is, or must now be regarded as involving, a rule that is part of the *corpus* of general international law;—and, like other rules of general or customary international law, is binding on the Federal Republic automatically and independently of any specific assent, direct or indirect, given by the latter. This contention has both a positive law and a more fundamentalist aspect. As a matter of positive law, it is based on the work done in this field by international legal bodies, on State practice and on the influence attributed to the Geneva Convention itself,—the claim being that these various factors have cumulatively evidenced or been creative of the *opinio juris sive necessitatis*, requisite for the formation of new rules of customary international law. In its fundamentalist aspect, the view put forward derives from what might be called the natural law of the con-

tinental shelf, in the sense that the equidistance principle is seen as a necessary expression in the field of delimitation of the accepted doctrine of the exclusive appurtenance of the continental shelf to the nearby coastal State, and therefore as having an *a priori* character of so to speak juristic inevitability.

38. The Court will begin by examining this latter aspect, both because it is the more fundamental, and was so presented on behalf of Denmark and the Netherlands—i.e., as something governing the whole case; and because, if it is correct that the equidistance principle is, as the point was put in the course of the argument, to be regarded as inherent in the whole basic concept of continental shelf rights, then equidistance should constitute the rule according to positive law tests also. On the other hand, if equidistance should not possess any *a priori* character of necessity or inherency, this would not be any bar to its having become a rule of positive law through influences such as those of the Geneva Convention and State practice,—and that aspect of the matter would remain for later examination.

*

39. The *a priori* argument starts from the position described in paragraph 19, according to which the right of the coastal State to its continental shelf areas is based on its sovereignty over the land domain, of which the shelf area is the natural prolongation into and under the sea. From this notion of appurtenance is derived the view which, as has already been indicated, the Court accepts, that the coastal State's rights exist *ipso facto* and *ab initio* without there being any question of having to make good a claim to the areas concerned, or of any apportionment of the continental shelf between different States. This was one reason why the Court felt bound to reject the claim of the Federal Republic (in the particular form which it took) to be awarded a "just and equitable share" of the shelf areas involved in the present proceedings. Denmark and the Netherlands, for their part, claim that the test of appurtenance must be "proximity", or more accurately "closer proximity": all those parts of the shelf being considered as appurtenant to a particular coastal State which are (but only if they are) closer to it than they are to any point on the coast of another State. Hence delimitation must be effected by a method which will leave to each one of the States concerned all those areas that are nearest to its own coast. Only a line drawn on equidistance principles will do this. Therefore, it is contended, only such a line can be valid (unless the Parties, for reasons of their own, agree on another), because only such a line can be thus consistent with basic continental shelf doctrine.

40. This view clearly has much force; for there can be no doubt that as a matter of normal topography, the greater part of a State's continental

shelf areas will in fact, and without the necessity for any delimitation at all, be nearer to its coasts than to any other. It could not well be otherwise; but *post hoc* is not *propter hoc*, and this situation may only serve to obscure the real issue, which is whether it follows that every part of the area concerned must be placed in this way, and that it should be as it were prohibited that any part should not be so placed. The Court does not consider that it does follow, either from the notion of proximity itself, or from the more fundamental concept of the continental shelf as being the natural prolongation of the land domain—a concept repeatedly appealed to by both sides throughout the case, although quite differently interpreted by them.

41. As regards the notion of proximity, the idea of absolute proximity is certainly not implied by the rather vague and general terminology employed in the literature of the subject, and in most State proclamations and international conventions and other instruments—terms such as "near", "close to its shores", "off its coast", "opposite", "in front of the coast", "in the vicinity of", "neighbouring the coast", "adjacent to", "contiguous", etc.,—all of them terms of a somewhat imprecise character which, although they convey a reasonably clear general idea, are capable of a considerable fluidity of meaning. To take what is perhaps the most frequently employed of these terms, namely "adjacent to", it is evident that by no stretch of imagination can a point on the continental shelf situated say a hundred miles, or even much less, from a given coast, be regarded as "adjacent" to it, or to any coast at all, in the normal sense of adjacency, even if the point concerned is nearer to some one coast than to any other. This would be even truer of localities where, physically, the continental shelf begins to merge with the ocean depths. Equally, a point inshore situated near the meeting place of the coasts of two States can often properly be said to be adjacent to both coasts, even though it may be fractionally closer to the one than the other. Indeed, local geographical configuration may sometimes cause it to have a closer physical connection with the coast to which it is not in fact closest.

42. There seems in consequence to be no necessary, and certainly no complete, identity between the notions of adjacency and proximity; and therefore the question of which parts of the continental shelf "adjacent to" a coastline bordering more than one State fall within the appurtenance of which of them, remains to this extent an open one, not to be determined on a basis exclusively of proximity. Even if proximity may afford one of the tests to be applied and an important one in the right conditions, it may not necessarily be the only, nor in all circumstances, the most appropriate one. Hence it would seem that the notion of adjacency, so constantly employed in continental shelf doctrine from the start, only implies proximity in a general sense, and does not imply any fundamental or inherent rule the ultimate effect of which would be to

prohibit any State (otherwise than by agreement) from exercising continental shelf rights in respect of areas closer to the coast of another State.

43. More fundamental than the notion of proximity appears to be the principle—constantly relied upon by all the Parties—of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State. There are various ways of formulating this principle, but the underlying idea, namely of an extension of something already possessed, is the same, and it is this idea of extension which is, in the Court's opinion, determinant. Submarine areas do not really appertain to the coastal State because—or not only because—they are near it. They are near it of course; but this would not suffice to confer title, any more than, according to a well-established principle of law recognized by both sides in the present case, mere proximity confers *per se* title to land territory. What confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion,—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea. From this it would follow that whenever a given submarine area does not constitute a natural—or the most natural—extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State;—or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.

44. In the present case, although both sides relied on the prolongation principle and regarded it as fundamental, they interpreted it quite differently. Both interpretations appear to the Court to be incorrect. Denmark and the Netherlands identified natural prolongation with closest proximity and therefrom argued that it called for an equidistance line: the Federal Republic seemed to think it implied the notion of the just and equitable share, although the connection is distinctly remote. (The Federal Republic did however invoke another idea, namely that of the proportionality of a State's continental shelf area to the length of its coastline, which obviously does have an intimate connection with the prolongation principle, and will be considered in its place.) As regards equidistance, it clearly cannot be identified with the notion of natural prolongation or extension, since, as has already been stated (paragraph 8), the use of the equidistance method would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another, when the configuration of the latter's coast makes the equidistance line swing out laterally across the former's

coastal front, cutting it off from areas situated directly before that front.

45. The fluidity of all these notions is well illustrated by the case of the Norwegian Trough (paragraph 4 above). Without attempting to pronounce on the status of that feature, the Court notes that the shelf areas in the North Sea separated from the Norwegian coast by the 80-100 kilometres of the Trough cannot in any physical sense be said to be adjacent to it, nor to be its natural prolongation. They are nevertheless considered by the States parties to the relevant delimitations, as described in paragraph 4, to appertain to Norway up to the median lines shown on Map 1. True these median lines are themselves drawn on equidistance principles; but it was only by first ignoring the existence of the Trough that these median lines fell to be drawn at all.

*

46. The conclusion drawn by the Court from the foregoing analysis is that the notion of equidistance as being logically necessary, in the sense of being an inescapable *a priori* accompaniment of basic continental shelf doctrine, is incorrect. It is said not to be possible to maintain that there is a rule of law ascribing certain areas to a State as a matter of inherent and original right (see paragraphs 19 and 20), without also admitting the existence of some rule by which those areas can be obligatorily delimited. The Court cannot accept the logic of this view. The problem arises only where there is a dispute and only in respect of the marginal areas involved. The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations (*Monastery of Saint Naoum, Advisory Opinion, 1924, P.C.I.J., Series B, No. 9*, at p. 10).

* * *

47. A review of the genesis and development of the equidistance method of delimitation can only serve to confirm the foregoing conclusion. Such a review may appropriately start with the instrument, generally known as the "Truman Proclamation", issued by the Government of the United States on 28 September 1945. Although this instrument was not the first or only one to have appeared, it has in the opinion of the Court a special status. Previously, various theories as to the nature and extent of the rights relative to or exercisable over the continental shelf had been advanced by jurists, publicists and technicians. The Truman Proclamation however, soon came to be regarded as the starting point of the posi-

tive law on the subject, and the chief doctrine it enunciated, namely that of the coastal State as having an original, natural, and exclusive (in short a vested) right to the continental shelf off its shores, came to prevail over all others, being now reflected in Article 2 of the 1958 Geneva Convention on the Continental Shelf. With regard to the delimitation of lateral boundaries between the continental shelves of adjacent States, a matter which had given rise to some consideration on the technical, but very little on the juristic level, the Truman Proclamation stated that such boundaries "shall be determined by the United States and the State concerned in accordance with equitable principles". These two concepts, of delimitation by mutual agreement and delimitation in accordance with equitable principles, have underlain all the subsequent history of the subject. They were reflected in various other State proclamations of the period, and after, and in the later work on the subject.

48. It was in the International Law Commission of the United Nations that the question of delimitation as between adjacent States was first taken up seriously as part of a general juridical project; for outside the ranks of the hydrographers and cartographers, questions of delimitation were not much thought about in earlier continental shelf doctrine. Juridical interest and speculation was focussed mainly on such questions as what was the legal basis on which any rights at all in respect of the continental shelf could be claimed, and what was the nature of those rights. As regards boundaries, the main issue was not that of boundaries between States but of the seaward limit of the area in respect of which the coastal State could claim exclusive rights of exploitation. As was pointed out in the course of the written proceedings, States in most cases had not found it necessary to conclude treaties or legislate about their lateral sea boundaries with adjacent States before the question of exploiting the natural resources of the seabed and subsoil arose;—practice was therefore sparse.

49. In the records of the International Law Commission, which had the matter under consideration from 1950 to 1956, there is no indication at all that any of its members supposed that it was incumbent on the Commission to adopt a rule of equidistance because this gave expression to, and translated into linear terms, a principle of proximity inherent in the basic concept of the continental shelf, causing every part of the shelf to appertain to the nearest coastal State and to no other, and because such a rule must therefore be mandatory as a matter of customary international law. Such an idea does not seem ever to have been propounded. Had it been, and had it had the self-evident character contended for by Denmark and the Netherlands, the Commission would have had no alternative but to adopt it, and its long continued hesitations over this matter would be incomprehensible.

50. It is moreover, in the present context, a striking feature of the Commission's discussions that during the early and middle stages, not only was the notion of equidistance never considered from the standpoint of its having *a priori* a character of inherent necessity: it was never given any special prominence at all, and certainly no priority. The Commission discussed various other possibilities as having equal if not superior status such as delimitation by agreement, by reference to arbitration, by drawing lines perpendicular to the coast, by prolonging the dividing line of adjacent territorial waters (the principle of which was itself not as yet settled), and on occasion the Commission seriously considered adopting one or other of these solutions. It was not in fact until after the matter had been referred to a committee of hydrographical experts, which reported in 1953, that the equidistance principle began to take precedence over other possibilities: the Report of the Commission for that year (its principal report on the topic of delimitation as such) makes it clear that before this reference to the experts the Commission had felt unable to formulate any definite rule at all, the previous trend of opinion having been mainly in favour of delimitation by agreement or by reference to arbitration.

51. It was largely because of these difficulties that it was decided to consult the Committee of Experts. It is therefore instructive in the context (i.e., of an alleged inherent necessity for the equidistance principle) to see on what basis the matter was put to the experts, and how they dealt with it. Equidistance was in fact only one of four methods suggested to them, the other three being the continuation in the seaward direction of the land frontier between the two adjacent States concerned; the drawing of a perpendicular to the coast at the point of its intersection with this land frontier; and the drawing of a line perpendicular to the line of the "general direction" of the coast. Furthermore the matter was not even put to the experts directly as a question of continental shelf delimitation, but in the context of the delimitation of the lateral boundary between adjacent territorial waters, no account being taken of the possibility that the situation respecting territorial waters might be different.

52. The Committee of Experts simply reported that after a thorough discussion of the different methods—(there are no official records of this discussion)—they had decided that "the (lateral) boundary through the territorial sea—if not already fixed otherwise—should be drawn according to the principle of equidistance from the respective coastlines". They added, however, significantly, that in "a number of cases this may not lead to an equitable solution, which should be then arrived at by negotiation". Only after that did they add, as a rider to this conclusion, that they had considered it "important to find a formula for drawing the international boundaries in the territorial waters of States, which could also be used for the delimitation of the respective continental shelves of two States bordering the same continental shelf".

53. In this almost impromptu, and certainly contingent manner was the principle of equidistance for the delimitation of continental shelf boundaries propounded. It is clear from the Report of the Commission for 1953 already referred to (paragraph 50) that the latter adopted it largely on the basis of the recommendation of the Committee of Experts, and even so in a text that gave priority to delimitation by agreement and also introduced an exception in favour of "special circumstances" which the Committee had not formally proposed. The Court moreover thinks it to be a legitimate supposition that the experts were actuated by considerations not of legal theory but of practical convenience and cartography of the kind mentioned in paragraph 22 above. Although there are no official records of their discussions, there is warrant for this view in correspondence passing between certain of them and the Commission's Special Rapporteur on the subject, which was deposited by one of the Parties during the oral hearing at the request of the Court. Nor, even after this, when a decision in principle had been taken in favour of an equidistance rule, was there an end to the Commission's hesitations, for as late as three years after the adoption of the report of the Committee of Experts, when the Commission was finalizing the whole complex of drafts comprised under the topic of the Law of the Sea, various doubts about the equidistance principle were still being voiced in the Commission, on such grounds for instance as that its strict application would be open, in certain cases, to the objection that the geographical configuration of the coast would render a boundary drawn on this basis inequitable.

54. A further point of some significance is that neither in the Committee of Experts, nor in the Commission itself, nor subsequently at the Geneva Conference, does there appear to have been any discussion of delimitation in the context, not merely of two adjacent States, but of three or more States on the same coast, or in the same vicinity,—from which it can reasonably be inferred that the possible resulting situations, some of which have been described in paragraph 8 above, were never really envisaged or taken into account. This view finds some confirmation in the fact that the relevant part of paragraph 2 of Article 6 of the Geneva Convention speaks of delimiting the continental shelf of "two" adjacent States (although a reference simply to "adjacent States" would have sufficed), whereas in respect of median lines the reference in paragraph 1 of that Article is to "two or more" opposite States.

55. In the light of this history, and of the record generally, it is clear that at no time was the notion of equidistance as an inherent necessity of continental shelf doctrine entertained. Quite a different outlook was indeed manifested from the start in current legal thinking. It was, and

it really remained to the end, governed by two beliefs;—namely, first, that no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and secondly, that it should be effected on equitable principles. It was in pursuance of the first of these beliefs that in the draft that emerged as Article 6 of the Geneva Convention, the Commission gave priority to delimitation by agreement,—and in pursuance of the second that it introduced the exception in favour of "special circumstances". Yet the record shows that, even with these mitigations, doubts persisted, particularly as to whether the equidistance principle would in all cases prove equitable.

56. In these circumstances, it seems to the Court that the inherency contention as now put forward by Denmark and the Netherlands inverts the true order of things in point of time and that, so far from an equidistance rule having been generated by an antecedent principle of proximity inherent in the whole concept of continental shelf appurtenance, the latter is rather a rationalization of the former—an *ex post facto* construct directed to providing a logical juristic basis for a method of delimitation propounded largely for different reasons, cartographical and other. Given also that for the reasons already set out (paragraphs 40-46) the theory cannot be said to be endowed with any quality of logical necessity either, the Court is unable to accept it.

*

57. Before going further it will be convenient to deal briefly with two subsidiary matters. Most of the difficulties felt in the International Law Commission related, as here, to the case of the lateral boundary between adjacent States. Less difficulty was felt over that of the median line boundary between opposite States, although it too is an equidistance line. For this there seems to the Court to be good reason. The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved. If there is a third State on one of the coasts concerned, the area of mutual natural prolongation with that of the same or another opposite State will be a separate and distinct one, to be treated in the same way. This type of case is therefore different from that of laterally adjacent States on the same coast with no immediately opposite coast in front of it, and does not give rise to the same kind of problem—a conclusion which also finds some confirmation in the dif-

ference of language to be observed in the two paragraphs of Article 6 of the Geneva Convention (reproduced in paragraph 26 above) as respects recourse in the one case to median lines and in the other to lateral equidistance lines, in the event of absence of agreement.

58. If on the other hand, contrary to the view expressed in the preceding paragraph, it were correct to say that there is no essential difference in the process of delimiting the continental shelf areas between opposite States and that of delimitations between adjacent States, then the results ought in principle to be the same or at least comparable. But in fact, whereas a median line divides equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them, a lateral equidistance line often leaves to one of the States concerned areas that are a natural prolongation of the territory of the other.

59. Equally distinct in the opinion of the Court is the case of the lateral boundary between adjacent territorial waters to be drawn on an equidistance basis. As was convincingly demonstrated in the maps and diagrams furnished by the Parties, and as has been noted in paragraph 8, the distorting effects of lateral equidistance lines under certain conditions of coastal configuration are nevertheless comparatively small within the limits of territorial waters, but produce their maximum effect in the localities where the main continental shelf areas lie further out. There is also a direct correlation between the notion of closest proximity to the coast and the sovereign jurisdiction which the coastal State is entitled to exercise and must exercise, not only over the seabed underneath the territorial waters but over the waters themselves, which does not exist in respect of continental shelf areas where there is no jurisdiction over the superjacent waters, and over the seabed only for purposes of exploration and exploitation.

* * *

60. The conclusions so far reached leave open, and still to be considered, the question whether on some basis other than that of an *a priori* logical necessity, i.e., through positive law processes, the equidistance principle has come to be regarded as a rule of customary international law, so that it would be obligatory for the Federal Republic in that way, even though Article 6 of the Geneva Convention is not, as such, opposable to it. For this purpose it is necessary to examine the status of the principle as it stood when the Convention was drawn up, as it resulted from the effect of the Convention, and in the light of State practice subsequent to the Convention; but it should be clearly understood that in the pronouncements the Court makes on these matters it has in view solely the delimitation provisions (Article 6) of the Convention, not other parts of it, nor the Convention as such.

61. The first of these questions can conveniently be considered in the form suggested on behalf of Denmark and the Netherlands themselves in the course of the oral hearing, when it was stated that they had not in fact contended that the delimitation article (Article 6) of the Convention "embodied already received rules of customary law in the sense that the Convention was merely declaratory of existing rules". Their contention was, rather, that although prior to the Conference, continental shelf law was only in the formative stage, and State practice lacked uniformity, yet "the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference"; and this emerging customary law became "crystallized in the adoption of the Continental Shelf Convention by the Conference".

62. Whatever validity this contention may have in respect of at least certain parts of the Convention, the Court cannot accept it as regards the delimitation provision (Article 6), the relevant parts of which were adopted almost unchanged from the draft of the International Law Commission that formed the basis of discussion at the Conference. The status of the rule in the Convention therefore depends mainly on the processes that led the Commission to propose it. These processes have already been reviewed in connection with the Danish-Netherlands contention of an *a priori* necessity for equidistance, and the Court considers this review sufficient for present purposes also, in order to show that the principle of equidistance, as it now figures in Article 6 of the Convention, was proposed by the Commission with considerable hesitation, somewhat on an experimental basis, at most *de lege ferenda*, and not at all *de lege lata* or as an emerging rule of customary international law. This is clearly not the sort of foundation on which Article 6 of the Convention could be said to have reflected or crystallized such a rule.

*

63. The foregoing conclusion receives significant confirmation from the fact that Article 6 is one of those in respect of which, under the reservations article of the Convention (Article 12) reservations may be made by any State on signing, ratifying or acceding,—for, speaking generally, it is a characteristic of purely conventional rules and obligations that, in regard to them, some faculty of making unilateral reservations may, within certain limits, be admitted;—whereas this cannot be so in the case of general or customary law rules and obligations which, by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own

favour. Consequently, it is to be expected that when, for whatever reason, rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a convention, such provisions will figure amongst those in respect of which a right of unilateral reservation is not conferred, or is excluded. This expectation is, in principle, fulfilled by Article 12 of the Geneva Continental Shelf Convention, which permits reservations to be made to all the articles of the Convention "other than to Articles 1 to 3 inclusive"—these three Articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf; the juridical character of the coastal State's entitlement; the nature of the rights exercisable; the kind of natural resources to which these relate; and the preservation intact of the legal status as high seas of the waters over the shelf, and the legal status of the superjacent air-space.

64. The normal inference would therefore be that any articles that do not figure among those excluded from the faculty of reservation under Article 12, were not regarded as declaratory of previously existing or emergent rules of law; and this is the inference the Court in fact draws in respect of Article 6 (delimitation), having regard also to the attitude of the International Law Commission to this provision, as already described in general terms. Naturally this would not of itself prevent this provision from eventually passing into the general *corpus* of customary international law by one of the processes considered in paragraphs 70-81 below. But that is not here the issue. What is now under consideration is whether it originally figured in the Convention as such a rule.

65. It has however been suggested that the inference drawn at the beginning of the preceding paragraph is not necessarily warranted, seeing that there are certain other provisions of the Convention, also not excluded from the faculty of reservation, but which do undoubtedly in principle relate to matters that lie within the field of received customary law, such as the obligation not to impede the laying or maintenance of submarine cables or pipelines on the continental shelf seabed (Article 4), and the general obligation not unjustifiably to interfere with freedom of navigation, fishing, and so on (Article 5, paragraphs 1 and 6). These matters however, all relate to or are consequential upon principles or rules of general maritime law, very considerably ante-dating the Convention, and not directly connected with but only incidental to continental shelf rights as such. They were mentioned in the Convention, not in order to declare or confirm their existence, which was not necessary, but simply to ensure that they were not prejudiced by the exercise of continental shelf rights as provided for in the Convention. Another method of

drafting might have clarified the point, but this cannot alter the fact that no reservation could release the reserving party from obligations of general maritime law existing outside and independently of the Convention, and especially obligations formalized in Article 2 of the contemporaneous Convention on the High Seas, expressed by its preamble to be declaratory of established principles of international law.

66. Article 6 (delimitation) appears to the Court to be in a different position. It does directly relate to continental shelf rights as such, rather than to matters incidental to these; and since it was not, as were Articles 1 to 3, excluded from the faculty of reservation, it is a legitimate inference that it was considered to have a different and less fundamental status and not, like those Articles, to reflect pre-existing or emergent customary law. It was however contended on behalf of Denmark and the Netherlands that the right of reservation given in respect of Article 6 was not intended to be an unfettered right, and that in particular it does not extend to effecting a total exclusion of the equidistance principle of delimitation,—for, so it was claimed, delimitation on the basis of that principle is implicit in Articles 1 and 2 of the Convention, in respect of which no reservations are permitted. Hence the right of reservation under Article 6 could only be exercised in a manner consistent with the preservation of at least the basic principle of equidistance. In this connection it was pointed out that, of the no more than four reservations so far entered in respect of Article 6, one at least of which was somewhat far-reaching, none has purported to effect such a total exclusion or denial.

67. The Court finds this argument unconvincing for a number of reasons. In the first place, Articles 1 and 2 of the Geneva Convention do not appear to have any direct connection with inter-State delimitation as such. Article 1 is concerned only with the outer, seaward, limit of the shelf generally, not with boundaries between the shelf areas of opposite or adjacent States. Article 2 is equally not concerned with such boundaries. The suggestion seems to be that the notion of equidistance is implicit in the reference in paragraph 2 of Article 2 to the rights of the coastal State over its continental shelf being "exclusive". So far as actual language is concerned this interpretation is clearly incorrect. The true sense of the passage is that in whatever areas of the continental shelf a coastal State has rights, those rights are exclusive rights, not exercisable by any other State. But this says nothing as to what in fact are the precise areas in respect of which each coastal State possesses these exclusive rights. This question, which can arise only as regards the fringes of a coastal State's shelf area is, as explained at the end of paragraph 20 above, exactly what falls to be settled through the process of delimitation, and this is the sphere of Article 6, not Article 2.

68. Secondly, it must be observed that no valid conclusions can be drawn from the fact that the faculty of entering reservations to Article 6 has been exercised only sparingly and within certain limits. This is the affair exclusively of those States which have not wished to exercise the faculty, or which have been content to do so only to a limited extent. Their action or inaction cannot affect the right of other States to enter reservations to whatever is the legitimate extent of the right.

*

69. In the light of these various considerations, the Court reaches the conclusion that the Geneva Convention did not embody or crystallize any pre-existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance-special circumstances basis. A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule. Whether it has since acquired a broader basis remains to be seen: *qua* conventional rule however, as has already been concluded, it is not opposable to the Federal Republic.

* * *

70. The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice,—and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

71. In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

72. It would in the first place be necessary that the provision con-

cerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law. Considered *in abstracto* the equidistance principle might be said to fulfil this requirement. Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties,—but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm-creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, and is not the subject of any revision brought about in consequence of a request made under Article 13 of the Convention—of which there is at present no official indication—it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.

73. With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. In the present case however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain.

74. As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;— and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

*

75. The Court must now consider whether State practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement. Leaving aside cases which, for various reasons, the Court does not consider to be reliable guides as precedents, such as delimitations effected between the present Parties themselves, or not relating to international boundaries, some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle—in the majority of the cases by agreement, in a few others unilaterally—or else the delimitation was foreshadowed but has not yet been carried out. Amongst these fifteen are the four North Sea delimitations United Kingdom/Norway-Denmark-Netherlands, and Norway/Denmark already mentioned in paragraph 4 of this Judgment. But even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, *a priori*, several grounds which deprive them of weight as precedents in the present context.

76. To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle. As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of

their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen (paragraphs 22 and 23), there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

77. The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*;—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

78. In this respect the Court follows the view adopted by the Permanent Court of International Justice in the *Lotus* case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, *mutatis mutandis*, to the present case (*P.C.I.J., Series A, No. 10*, 1927, at p. 28):

> "Even if the rarity of the judicial decisions to be found . . . were sufficient to prove . . . the circumstance alleged . . ., it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, . . . there are other circumstances calculated to show that the contrary is true."

Applying this dictum to the present case, the position is simply that in certain cases—not a great number—the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt

legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so—especially considering that they might have been motivated by other obvious factors.

79. Finally, it appears that in almost all of the cases cited, the delimitations concerned were median-line delimitations between opposite States, not lateral delimitations between adjacent States. For reasons which have already been given (paragraph 57) the Court regards the case of median-line delimitations between opposite States as different in various respects, and as being sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries. In only one situation discussed by the Parties does there appear to have been a geographical configuration which to some extent resembles the present one, in the sense that a number of States on the same coastline are grouped around a sharp curve or bend of it. No complete delimitation in this area has however yet been carried out. But the Court is not concerned to deny to this case, or any other of those cited, all evidential value in favour of the thesis of Denmark and the Netherlands. It simply considers that they are inconclusive, and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law,—more particularly where lateral delimitations are concerned.

80. There are of course plenty of cases (and a considerable number were cited) of delimitations of waters, as opposed to seabed, being carried out on the basis of equidistance—mostly of internal waters (lakes, rivers, etc.), and mostly median-line cases. The nearest analogy is that of adjacent territorial waters, but as already explained (paragraph 59) the Court does not consider this case to be analogous to that of the continental shelf.

*

81. The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose.

*

82. The immediately foregoing conclusion, coupled with that reached earlier (paragraph 56) to the effect that the equidistance principle could not be regarded as being a rule of law on any *a priori* basis of logical

necessity deriving from the fundamental theory of the continental shelf, leads to the final conclusion on this part of the case that the use of the equidistance method is not obligatory for the delimitation of the areas concerned in the present proceedings. In these circumstances, it becomes unnecessary for the Court to determine whether or not the configuration of the German North Sea coast constitutes a "special circumstance" for the purposes either of Article 6 of the Geneva Convention or of any rule of customary international law,—since once the use of the equidistance method of delimitation is determined not to be obligatory in any event, it ceases to be legally necessary to prove the existence of special circumstances in order to justify not using that method.

* * * * *

83. The legal situation therefore is that the Parties are under no obligation to apply either the 1958 Convention, which is not opposable to the Federal Republic, or the equidistance method as a mandatory rule of customary law, which it is not. But as between States faced with an issue concerning the lateral delimitation of adjacent continental shelves, there are still rules and principles of law to be applied; and in the present case it is not the fact either that rules are lacking, or that the situation is one for the unfettered appreciation of the Parties. Equally, it is not the case that if the equidistance principle is not a rule of law, there has to be as an alternative some other single equivalent rule.

84. As already indicated, the Court is not called upon itself to delimit the areas of continental shelf appertaining respectively to each Party, and in consequence is not bound to prescribe the methods to be employed for the purposes of such a delimitation. The Court has to indicate to the Parties the principles and rules of law in the light of which the methods for eventually effecting the delimitation will have to be chosen. The Court will discharge this task in such a way as to provide the Parties with the requisite directions, without substituting itself for them by means of a detailed indication of the methods to be followed and the factors to be taken into account for the purposes of a delimitation the carrying out of which the Parties have expressly reserved to themselves.

85. It emerges from the history of the development of the legal régime of the continental shelf, which has been reviewed earlier, that the essential reason why the equidistance method is not to be regarded as a rule of law is that, if it were to be compulsorily applied in all situations, this would not be consonant with certain basic legal notions which, as has been observed in paragraphs 48 and 55, have from the beginning reflected the *opinio juris* in the matter of delimitation; those principles being that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles. On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the

delimitation of adjacent continental shelves—that is to say, rules binding upon States for all delimitations;—in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field, namely:

(a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it;

(b) the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied,—for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved;

(c) for the reasons given in paragraphs 43 and 44, the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.

* * *

86. It is now necessary to examine these rules more closely, as also certain problems relative to their application. So far as the first rule is concerned, the Court would recall not only that the obligation to negotiate which the Parties assumed by Article 1, paragraph 2, of the Special Agreements arises out of the Truman Proclamation, which, for the reasons given in paragraph 47, must be considered as having propounded the rules of law in this field, but also that this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes. There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted.

87. As the Permanent Court of International Justice said in its Order of 19 August 1929 in the case of the *Free Zones of Upper Savoy and the District of Gex*, the judicial settlement of international disputes "is simply an alternative to the direct and friendly settlement of such disputes between the parties" (*P.C.I.J., Series A, No. 22*, at p. 13). Defining the content of the obligation to negotiate, the Permanent Court, in its

Advisory Opinion in the case of *Railway Traffic between Lithuania and Poland*, said that the obligation was "not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements", even if an obligation to negotiate did not imply an obligation to reach agreement (*P.C.I.J., Series A/B, No. 42*, 1931, at p. 116). In the present case, it needs to be observed that whatever the details of the negotiations carried on in 1965 and 1966, they failed of their purpose because the Kingdoms of Denmark and the Netherlands, convinced that the equidistance principle alone was applicable, in consequence of a rule binding upon the Federal Republic, saw no reason to depart from that rule; and equally, given the geographical considerations stated in the last sentence of paragraph 7 above, the Federal Republic could not accept the situation resulting from the application of that rule. So far therefore the negotiations have not satisfied the conditions indicated in paragraph 85 *(a)*, but fresh negotiations are to take place on the basis of the present Judgment.

* * *

88. The Court comes next to the rule of equity. The legal basis of that rule in the particular case of the delimitation of the continental shelf as between adjoining States has already been stated. It must however be noted that the rule rests also on a broader basis. Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision *ex aequo et bono*, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute. Nor would this be the first time that the Court has adopted such an attitude, as is shown by the following passage from the Advisory Opinion given in the case of *Judgments of the Administrative Tribunal of the I.L.O. upon Complaints Made against Unesco* (*I.C.J. Reports 1956*, at p. 100):

> "In view of this the Court need not examine the allegation that the validity of the judgments of the Tribunal is vitiated by excess of jurisdiction on the ground that it awarded compensation *ex aequo et bono*. It will confine itself to stating that, in the reasons given by the Tribunal in support of its decision on the merits, the Tribunal said: 'That redress will be ensured *ex aequo et bono* by the granting to the complainant of the sum set forth below.' It does not appear from the context of the judgment that the Tribunal thereby intended to depart from principles of law. The apparent intention was to say

that, as the precise determination of the actual amount to be awarded could not be based on any specific rule of law, the Tribunal fixed what the Court, in other circumstances, has described as the true measure of compensation and the reasonable figure of such compensation (*Corfu Channel* case, Judgment of December 15th, 1949, *I.C.J. Reports 1949*, p. 249)."

89. It must next be observed that, in certain geographical circumstances which are quite frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity, in the following sense:

(a) The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity.

(b) In the case of the North Sea in particular, where there is no outer boundary to the continental shelf, it happens that the claims of several States converge, meet and intercross in localities where, despite their distance from the coast, the bed of the sea still unquestionably consists of continental shelf. A study of these convergences, as revealed by the maps, shows how inequitable would be the apparent simplification brought about by a delimitation which, ignoring such geographical circumstances, was based solely on the equidistance method.

90. If for the above reasons equity excludes the use of the equidistance method in the present instance, as the sole method of delimitation, the question arises whether there is any necessity to employ only one method for the purposes of a given delimitation. There is no logical basis for this, and no objection need be felt to the idea of effecting a delimitation of adjoining continental shelf areas by the concurrent use of various methods. The Court has already stated why it considers that the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at.

91. Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a

State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy. But in the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.

92. It has however been maintained that no one method of delimitation can prevent such results and that all can lead to relative injustices. This argument has in effect already been dealt with. It can only strengthen the view that it is necessary to seek not one method of delimitation but one goal. It is in this spirit that the Court must examine the question of how the continental shelf can be delimited when it is in fact the case that the equidistance principle does not provide an equitable solution. As the operation of delimiting is a matter of determining areas appertaining to different jurisdictions, it is a truism to say that the determination must be equitable; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable. Although the Parties have made it known that they intend to reserve for themselves the application of the principles and rules laid down by the Court, it would, even so, be insufficient simply to rely on the rule of equity without giving some degree of indication as to the possible ways in which it might be applied in the present case, it being understood that the Parties will be free to agree upon one method rather than another, or different methods if they so prefer.

93. In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.

94. In balancing the factors in question it would appear that various aspects must be taken into account. Some are related to the geological, others to the geographical aspect of the situation, others again to the

idea of the unity of any deposits. These criteria, though not entirely precise, can provide adequate bases for decision adapted to the factual situation.

95. The institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal régime. The continental shelf is, by definition, an area physically extending the territory of most coastal States into a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists. The importance of the geological aspect is emphasized by the care which, at the beginning of its investigation, the International Law Commission took to acquire exact information as to its characteristics, as can be seen in particular from the definitions to be found on page 131 of Volume I of the *Yearbook of the International Law Commission* for 1956. The appurtenance of the shelf to the countries in front of whose coastlines it lies, is therefore a fact, and it can be useful to consider the geology of that shelf in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point-up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong.

96. The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored; for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions. Above all is this the case when what is involved is no longer areas of sea, such as the contiguous zone, but stretches of submerged land; for the legal régime of the continental shelf is that of a soil and a subsoil, two words evocative of the land and not of the sea.

97. Another factor to be taken into consideration in the delimitation of areas of continental shelf as between adjacent States is the unity of any deposits. The natural resources of the subsoil of the sea in those parts which consist of continental shelf are the very object of the legal régime established subsequent to the Truman Proclamation. Yet it frequently occurs that the same deposit lies on both sides of the line dividing a continental shelf between two States, and since it is possible to exploit such a deposit from either side, a problem immediately arises on account of the risk of prejudicial or wasteful exploitation by one or other of the States concerned. To look no farther than the North Sea, the practice

of States shows how this problem has been dealt with, and all that is needed is to refer to the undertakings entered into by the coastal States of that sea with a view to ensuring the most efficient exploitation or the apportionment of the products extracted—(see in particular the agreement of 10 March 1965 between the United Kingdom and Norway, Article 4; the agreement of 6 October 1965 between the Netherlands and the United Kingdom relating to "the exploitation of single geological structures extending across the dividing line on the continental shelf under the North Sea"; and the agreement of 14 May 1962 between the Federal Republic and the Netherlands concerning a joint plan for exploiting the natural resources underlying the area of the Ems Estuary where the frontier between the two States has not been finally delimited.) The Court does not consider that unity of deposit constitutes anything more than a factual element which it is reasonable to take into consideration in the course of the negotiations for a delimitation. The Parties are fully aware of the existence of the problem as also of the possible ways of solving it.

98. A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines,—these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions. The choice and application of the appropriate technical methods would be a matter for the parties. One method discussed in the course of the proceedings, under the name of the principle of the coastal front, consists in drawing a straight baseline between the extreme points at either end of the coast concerned, or in some cases a series of such lines. Where the parties wish to employ in particular the equidistance method of delimitation, the establishment of one or more baselines of this kind can play a useful part in eliminating or diminishing the distortions that might result from the use of that method.

99. In a sea with the particular configuration of the North Sea, and in view of the particular geographical situation of the Parties' coastlines upon that sea, the methods chosen by them for the purpose of fixing the delimitation of their respective areas may happen in certain localities to lead to an overlapping of the areas appertaining to them. The Court considers that such a situation must be accepted as a given fact and resolved either by an agreed, or failing that by an equal division of the overlapping areas, or by agreements for joint exploitation, the latter solution appearing particularly appropriate when it is a question of preserving the unity of a deposit.

* * *

100. The Court has examined the problems raised by the present case in its own context, which is strictly that of delimitation. Other questions relating to the general legal régime of the continental shelf, have been examined for that purpose only. This régime furnishes an example of a legal theory derived from a particular source that has secured a general following. As the Court has recalled in the first part of its Judgment, it was the Truman Proclamation of 28 September 1945 which was at the origin of the theory, whose special features reflect that origin. It would therefore not be in harmony with this history to over-systematize a pragmatic construct the developments of which have occurred within a relatively short space of time.

* * * * *

101. For these reasons,

THE COURT,

by eleven votes to six,

finds that, in each case,

(A) the use of the equidistance method of delimitation not being obligatory as between the Parties; and

(B) there being no other single method of delimitation the use of which is in all circumstances obligatory;

(C) the principles and rules of international law applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the agreements of 1 December 1964 and 9 June 1965, respectively, are as follows:

(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;

(2) if, in the application of the preceding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them;

(D) in the course of the negotiations, the factors to be taken into account are to include:

(1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
(2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;
(3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.

Done in English and in French, the English text being authoritative at the Peace Palace, The Hague, this twentieth day of February, one thousand nine hundred and sixty-nine, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany, to the Government of the Kingdom of Denmark and to the Government of the Kingdom of the Netherlands, respectively.

(Signed) J. L. BUSTAMANTE R.,
President.

(Signed) S. AQUARONE,
Registrar.

Judge Sir Muhammad ZAFRULLA KHAN makes the following declaration:

I am in agreement with the Judgment throughout but would wish to add the following observations.

The essence of the dispute between the Parties is that the two Kingdoms claim that the delimitation effected between them under the Agreement of 31 March 1966 is binding upon the Federal Republic and that the Federal Republic is bound to accept the situation resulting therefrom, which would confine its continental shelf to the triangle formed by lines A-B-E and C-D-E in Map 3. The Federal Republic stoutly resists that claim.

Not only is Article 6 of the Geneva Convention of 1958 not opposable to the Federal Republic but the delimitation effected under the Agreement of 31 March 1966 does not derive from the provisions of that Article as Denmark and the Netherlands are neither States "whose coasts are opposite each other" within the meaning of the first paragraph of that Article nor are they "two adjacent States" within the meaning of the

second paragraph of that Article. The situation resulting from that delimitation, so far as it affects the Federal Republic is not, therefore, brought about by the application of the principle set out in either of the paragraphs of Article 6 of the Convention.

Had paragraph 2 of Article 6 been applicable to the delimitation of the continental shelf between the Parties to the dispute, a boundary line, determined by the application of the principle of equidistance, would have had to allow for the configuration of the coastline of the Federal Republic as a "special circumstance".

In the course of the oral pleadings the contention that the principle of equidistance *cum* special circumstances had crystallized into a rule of customary international law was not advanced on behalf of the two Kingdoms as an alternative to the claim that that principle was inherent in the very concept of the continental shelf. The Judgment has, in fairness, dealt with these two contentions as if they had been put forward in the alternative and were thus consistent with each other, and has rejected each of them on the merits. I am in agreement with the reasoning of the Judgment on both these points. But, I consider, it is worth mentioning that Counsel for the two Kingdoms summed up their position in regard to the effect of the 1958 Convention as follows:

> ". . . They have not maintained that the Convention embodied already received rules of customary law in the sense that the Convention was merely declaratory of existing rules. Their position is rather that the doctrine of the coastal State's exclusive rights over the adjacent continental shelf was in process of formation between 1945 and 1958; that the State practice prior to 1958 showed fundamental variations in the nature and scope of the rights claimed; that, in consequence, in State practice the emerging doctrine was wholly lacking in any definition of these crucial elements as it was also of the legal régime applicable to the coastal State with respect to the continental shelf; that the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference; that the emerging customary law, now become more defined, both as to the rights of the coastal State and the applicable régime, crystallized in the adoption of the Continental Shelf Convention by the Conference; and that the numerous signatures and ratifications of the Convention and the other State practice based on the principles set out in the Convention had the effect of consolidating those principles as customary law."

If it were correct that the doctrine of the coastal State's exclusive rights over the adjacent continental shelf was in process of formation

between 1945 and 1958 and that in State practice prior to 1958 it was wholly lacking in any definition of crucial elements as it was also of the legal régime applicable to the coastal State with respect to the continental shelf, then it would seem to follow conclusively that the principle of equidistance was not inherent in the concept of the continental shelf.

Judge BENGZON makes the following declaration:

I regret my inability to concur with the main conclusions of the majority of the Court. I agree with my colleagues who maintain the view that Article 6 of the Geneva Convention is the applicable international law and that as between these Parties equidistance is the rule for delimitation, which rule may even be derived from the general principles of law.

President BUSTAMANTE Y RIVERO, Judges JESSUP, PADILLA NERVO and AMMOUN append Separate Opinions to the Judgment of the Court.

Vice-President KORETSKY, Judges TANAKA, MORELLI, LACHS and Judge *ad hoc* SØRENSEN append Dissenting Opinions to the Judgment of the Court.

(Initialled) J. L. B.-R.
(Initialled) S. A.

Annex 59

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

FISHERIES JURISDICTION CASE

(FEDERAL REPUBLIC OF GERMANY *v.* ICELAND)

MERITS

JUDGMENT OF 25 JULY 1974

1974

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DE LA COMPÉTENCE EN MATIÈRE DE PÊCHERIES

(RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE c. ISLANDE)

FOND

ARRÊT DU 25 JUILLET 1974

Official citation:

Fisheries Jurisdiction (Federal Republic of Germany v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 175.

Mode officiel de citation:

Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), fond, arrêt, C.I.J. Recueil 1974, p. 175.

Sales number
N° de vente: 396

25 JULY 1974

JUDGMENT

FISHERIES JURISDICTION CASE
(FEDERAL REPUBLIC OF GERMANY *v.* ICELAND)
MERITS

AFFAIRE DE LA COMPÉTENCE EN MATIÈRE DE PÊCHERIES
(RÉPUBLIQUE FÉDÉRALE D'ALLEMAGNE c. ISLANDE)
FOND

25 JUILLET 1974

ARRÊT

INTERNATIONAL COURT OF JUSTICE

YEAR 1974

1974
25 July
General List
No. 56

25 July 1974

FISHERIES JURISDICTION CASE

(FEDERAL REPUBLIC OF GERMANY *v.* ICELAND)

MERITS

Failure of Party to appear—Statute, Article 53.

History of the dispute—Jurisdiction of the Court—Effect of previous finding of jurisdiction—Interpretation of compromissory clause.

Icelandic Regulations of 14 July 1972—Extension by coastal State of fisheries jurisdiction to 50 miles from baselines round coast—Extension challenged as contrary to international law—Law of the sea—Geneva Conferences of 1958 and 1960—Concepts of fishery zone and preferential rights of coastal State in situation of special dependence on coastal fisheries—State practice—Exceptional dependence of Iceland on fisheries—Conservation needs—Preferential rights no justification for claim to extinguish concurrent rights of other fishing States—Historic rights of Federal Republic of Germany—Regulations of 14 July 1972 not opposable to Federal Republic—Reconciliation of preferential rights of coastal State and rights of other fishing States—Obligation to keep conservation measures of fishery resources under review—Negotiation required for equitable solution—Obligation to negotiate flowing from nature of Parties' respective rights—Various factors relevant to the negotiation—Position of Parties pending conclusion of negotiations.

Claim for compensation for interference with fishing vessels—Jurisdiction of Court—Submission presented in abstract form—Need for concrete submission as to existence and amount of damage—Impossibility of all-embracing finding of liability in this case.

JUDGMENT

Present: *President* LACHS; *Judges* FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, Sir Humphrey WALDOCK, NAGENDRA SINGH, RUDA; *Registrar* AQUARONE.

In the Fisheries Jurisdiction case,

between

the Federal Republic of Germany,

represented by

Dr. G. Jaenicke, Professor of International Law in the University of Frankfurt am Main,

as Agent and Counsel,

assisted by

Dr. D. von Schenck, Head of the Legal Department, Ministry of Foreign Affairs,
Mr. G. Möcklinghoff, Ministry of Food, Agriculture and Forestry,

Dr. C. A. Fleischhauer, Ministry of Foreign Affairs,
Dr. D. Booss, Ministry of Food, Agriculture and Forestry,
Dr. Kaufmann-Bühler, Ministry of Foreign Affairs,

as Counsel and Advisers,

and by

Dr. Arno Meyer, Federal Institute for Fisheries Research,

as Counsel and Expert,

and

the Republic of Iceland,

THE COURT,

composed as above,

delivers the following Judgment:

1. By a letter of 26 May 1972, received in the Registry of the Court on 5 June 1972, the State Secretary of the Foreign Office of the Federal Republic of Germany transmitted to the Registrar an Application instituting proceedings against the Republic of Iceland in respect of a dispute concerning the then proposed extension by the Government of Iceland of its fisheries jurisdiction.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the Government of Iceland. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. By a letter dated 27 June 1972 from the Minister for Foreign Affairs of Iceland, received in the Registry on 4 July 1972, the Court was informed *(inter alia)* that the Government of Iceland was not willing to confer jurisdiction on the Court, and would not appoint an Agent.

4. On 21 July 1972, the Agent of the Federal Republic of Germany filed in the Registry of the Court a request for the indication of interim measures of protection under Article 41 of the Statute and Article 61 of the Rules of Court adopted on 6 May 1946. By an Order dated 17 August 1972, the Court indicated certain interim measures of protection in the case; and by a further

Order dated 12 July 1973, the Court confirmed that those measures should, subject as therein mentioned, remain operative until the Court has given final judgment in the case.

5. By an Order dated 18 August 1972, the Court, considering that it was necessary to resolve first of all the question of its jurisdiction in the case, decided that the first pleadings should be addressed to the question of the jurisdiction of the Court to entertain the dispute, and fixed time-limits for the filing of a Memorial by the Government of the Federal Republic of Germany and a Counter-Memorial by the Government of Iceland. The Memorial of the Government of the Federal Republic was filed within the time-limit prescribed, and was communicated to the Government of Iceland; no Counter-Memorial was filed by the Government of Iceland. On 8 January 1973, after due notice to the Parties, a public hearing was held in the course of which the Court heard the oral argument on the question of the Court's jurisdiction advanced on behalf of the Government of the Federal Republic of Germany. The Government of Iceland was not represented at the hearing.

6. By a Judgment dated 2 February 1973, the Court found that it had jurisdiction to entertain the Application filed by the Federal Republic of Germany and to deal with the merits of the dispute.

7. By an Order dated 15 February 1973 the Court fixed time-limits for the written proceedings on the merits, namely 1 August 1973 for the Memorial of the Government of the Federal Republic and 15 January 1974 for the Counter-Memorial of the Government of Iceland. The Memorial of the Government of the Federal Republic of Germany was filed within the time-limit prescribed, and was communicated to the Government of Iceland; no Counter-Memorial was filed by the Government of Iceland.

8. By a letter from the Registrar dated 17 August 1973 the Agent of the Federal Republic of Germany was invited to submit to the Court any observations which the Government of the Federal Republic might wish to present on the question of the possible joinder of this case with the case instituted on 14 April 1972 by the United Kingdom against the Republic of Iceland (General List No. 55) and the Agent was informed that the Court had fixed 30 September 1973 as the time-limit within which any such observations should be filed. By a letter dated 25 September 1973, the Agent of the Federal Republic submitted the observations of his Government on the question of the possible joinder of the two *Fisheries Jurisdiction* cases. The Government of Iceland was informed that the observations of the Federal Republic on possible joinder had been invited, but did not make any comments to the Court. On 17 January 1974 the Court decided by nine votes to five not to join the present proceedings to those instituted by the United Kingdom against the Republic of Iceland. In reaching this decision the Court took into account the fact that while the basic legal issues in each case appeared to be identical, there were differences between the positions of the two Applicants, and between their respective submissions, and that joinder would be contrary to the wishes of the two Applicants. The Court decided to hold the public hearings in the two cases immediately following each other.

9. On 28 March and 2 April 1974, after due notice to the Parties, public hearings were held in the course of which the Court was addressed by the Agent and counsel and by a counsel and expert on behalf of the Federal Republic of Germany on the merits of the case; the Government of Iceland

was not represented at the hearings. Various Members of the Court addressed questions to the Agent of the Federal Republic during the course of the hearings, and replies were given either orally at the hearings or in writing. Copies of the verbatim record of the hearings and of the written replies to questions were transmitted to the Government of Iceland.

10. The Court does not include upon the bench any judge of the nationality of either of the Parties. However, the Government of Iceland did not indicate any intention to avail itself of the right conferred upon it by Article 31, paragraph 3, of the Statute of the Court; and in the present phase of the proceedings the Agent for the Federal Republic of Germany informed the Court in the above-mentioned letter dated 25 September 1973 that, taking account of the fact that the Government of Iceland was declining to take part in the proceedings and to avail itself of the right to have a judge *ad hoc* on the bench, the Government of the Federal Republic, as long as that situation persisted, did not feel it necessary to insist on the appointment of a judge *ad hoc*.

11. The Governments of Argentina, Australia, India, New Zealand, Senegal and the United Kingdom requested that the pleadings and annexed documents in this case should be made available to them in accordance with Article 44, paragraph 2, of the Rules of Court. The Parties having indicated that they had no objection, it was decided to accede to these requests. Pursuant to Article 44, paragraph 3, of the Rules of Court the pleadings and annexed documents were, with the consent of the Parties, made accessible to the public as from the date of the opening of the oral proceedings.

12. In the course of the written proceedings, the following submissions were presented on behalf of the Government of the Federal Republic of Germany:

in the Application:

> "The Federal Republic of Germany asks the Court to adjudge and declare:
>
> *(a)* That the unilateral extension by Iceland of its zone of exclusive fisheries jurisdiction to 50 nautical miles from the present baselines, to be effective from 1 September 1972, which has been decided upon by the Parliament (Althing) and the Government of Iceland and communicated by the Minister for Foreign Affairs of Iceland to the Federal Republic of Germany by aide-mémoire handed to its Ambassador in Reykjavik on 24 February 1972, would have no basis in international law and could therefore not be opposed to the Federal Republic of Germany and to its fishing vessels.
>
> *(b)* That if Iceland, as a coastal State specially dependent on coastal fisheries, establishes a need for special fisheries conservation measures in the waters adjacent to its coast but beyond the exclusive fisheries zone provided for by the Exchange of Notes of 1961, such conservation measures, as far as they would affect fisheries of the Federal Republic of Germany, may not be taken, under international law, on the basis of a unilateral extension by Iceland of its fisheries jurisdiction, but only on the basis of an agreement between the Federal Republic of Germany and Iceland concluded either bilaterally or within a multilateral framework."

in the Memorial on the merits:

"May it please the Court to adjudge and declare:

1. That the unilateral extension by Iceland of its zone of exclusive fisheries jurisdiction to 50 nautical miles from the present baselines, put into effect by the Regulations No. 189/1972 issued by the Icelandic Minister for Fisheries on 14 July 1972, has, as against the Federal Republic of Germany, no basis in international law and can therefore not be opposed to the Federal Republic of Germany and the fishing vessels registered in the Federal Republic of Germany.
2. That the Icelandic Regulations No. 189/1972 issued by the Icelandic Minister for Fisheries on 14 July 1972, and any other regulations which might be issued by Iceland for the purpose of implementing Iceland's claim to a 50-mile exclusive fisheries zone, shall not be enforced against the Federal Republic of Germany, vessels registered in the Federal Republic of Germany, their crews and other persons connected with fishing activities of such vessels.
3. That if Iceland, as a coastal State specially dependent on its fisheries, establishes a need for conservation measures in respect to fish stocks in the waters adjacent to its coast beyond the limits of Icelandic jurisdiction agreed to by the Exchange of Notes of 19 July 1961, such conservation measures, as far as they would affect fishing activities by vessels registered in the Federal Republic of Germany, may not be taken on the basis of a unilateral extension by Iceland of its fisheries jurisdiction but only on the basis of an agreement between the Parties, concluded either bilaterally or within a multilateral framework, with due regard to the special dependence of Iceland on its fisheries and to the traditional fisheries of the Federal Republic of Germany in the waters concerned.
4. That the acts of interference by Icelandic coastal patrol boats with fishing vessels registered in the Federal Republic of Germany or with their fishing operations by the threat or use of force are unlawful under international law, and that Iceland is under an obligation to make compensation therefor to the Federal Republic of Germany."

13. At the public hearing of 28 March 1974 the Agent of the Federal Republic of Germany read the final submissions of his Government in this case; these submissions were identical to those contained in the Memorial, and set out above.

14. No pleadings were filed by the Government of Iceland, which was also not represented at the oral proceedings, and no submissions were therefore presented on its behalf. The attitude of that Government was however defined in the above-mentioned letter of 27 June 1972 from the Minister for Foreign Affairs of Iceland, namely that there was on 5 June 1972 (the date on which the Application was filed) no basis under the Statute for the Court to exercise jurisdiction in the case, and that the Government of Iceland was not willing to confer jurisdiction on the Court. After the Court had decided, by its Judgment of 2 February 1973, that it had jurisdiction to deal with the merits of the dispute, the Minister for Foreign Affairs of Iceland, by letter dated 11 January 1974, informed the Court that:

"With reference to the time-limit fixed by the Court for the submission of Counter-Memorials by the Government of Iceland, I have the honour

> to inform you that the position of the Government of Iceland with regard to the proceedings in question remains unchanged and, consequently, no Counter-Memorials will be submitted. At the same time, the Government of Iceland does not accept or acquiesce in any of the statements of facts or allegations or contentions of law contained in the Memorials filed by the Parties concerned."

*
* *

15. Iceland has not taken part in any phase of the present proceedings. By the above-mentioned letter of 27 June 1972, the Government of Iceland informed the Court that it regarded the Exchange of Notes between the Government of Iceland and the Government of the Federal Republic of Germany dated 19 July 1961 as terminated; that in its view there was no basis for the Court under its Statute to exercise jurisdiction in the case; that, as it considered the vital interests of the people of Iceland to be involved, it was not willing to confer jurisdiction on the Court in any case involving the extent of the fishery limits of Iceland; and that an agent would not be appointed to represent the Government of Iceland. Thereafter, the Government of Iceland did not appear before the Court at the public hearing held on 2 August 1972 concerning the request by the Federal Republic of Germany for the indication of interim measures of protection; nor did it file any pleadings or appear before the Court in the subsequent proceedings concerning the Court's jurisdiction to entertain the dispute. Notwithstanding the Court's Judgment of 2 February 1973, in which the Court decided that it has jurisdiction to entertain the Application of the Federal Republic of Germany and to deal with the merits of the dispute, the Government of Iceland maintained the same position with regard to the subsequent proceedings. By a letter dated 11 January 1974, it informed the Court that no Counter-Memorial would be submitted. Nor did it in fact file any pleading or appear before the Court at the public hearings on the merits of the dispute. The Agent of the Federal Republic stated in a letter dated 14 July 1972, with reference to the above-mentioned letter of 27 June 1972 from the Minister for Foreign Affairs of Iceland, that:

> "the Government of the Federal Republic of Germany for its part avails itself of the right under Article 53 of the Statute of the Court to request the Court to continue with the consideration of this case and in due course to decide in favour of its claim".

At the public hearings on the merits, the Agent of the Federal Republic drew attention to the non-appearance in Court of any representative of the Respondent; he concluded his argument by presenting the final submissions of the Federal Republic of Germany on the merits of the dispute for adjudication by the Court.

16. The Court is thus confronted with the situation contemplated by Article 53, paragraph 1, of the Statute, that "Whenever one of the parties does not appear before the Court, or fails to defend its case, the other

party may call upon the Court to decide in favour of its claim". Paragraph 2 of that Article, however, also provides: "The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

17. The present case turns essentially on questions of international law, and the facts requiring the Court's consideration in adjudicating upon the Applicant's claim are, except in respect of one particular issue, to be dealt with separately below (paragraphs 71 to 76), either not in dispute or attested by documentary evidence. Such evidence emanates in part from the Government of Iceland, and has not been specifically contested, and there does not appear to be any reason to doubt its accuracy. The Government of Iceland, it is true, declared in its above-mentioned letter of 11 January 1974 that "it did not accept or acquiesce in any of the *statements of fact* or allegations or contentions of law contained in the Memorials of the Parties concerned" (emphasis added). But such a general declaration of non-acceptance and non-acquiescence cannot suffice to bring into question facts which appear to be established by documentary evidence, nor can it change the position of the applicant Party, or of the Court, which remains bound to apply the provisions of Article 53 of the Statute.

18. It is to be regretted that the Government of Iceland has failed to appear in order to plead its objections or to make its observations against the Applicant's arguments and contentions in law. The Court however, as an international judicial organ, is deemed to take judicial notice of international law and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court. In ascertaining the law applicable in the present case the Court has had cognizance not only of the legal arguments submitted to it by the Applicant but also of those contained in various communications addressed to it by the Government of Iceland, and in documents presented to the Court. The Court has thus taken account of the legal position of each Party. Moreover, the Court has been assisted by the answers given by the Applicant, both orally and in writing, to questions asked by Members of the Court during the oral proceedings. It should be stressed that in applying Article 53 of the Statute in this case, the Court has acted with particular circumspection and has taken special care, being faced with the absence of the respondent State.

19. Accordingly, for the purposes of Article 53 of the Statute, and subject to the matters mentioned in paragraphs 71 to 76 below, the Court considers that it has before it the elements necessary to enable it to

determine whether the Applicant's claim is, or is not, well founded in fact and law, and it is now called upon to do so. However, before proceeding further the Court considers it necessary to recapitulate briefly the history of the present dispute.

*
* *

20. In 1948 the Althing (the Parliament of Iceland) passed a law entitled "Law concerning the Scientific Conservation of the Continental Shelf Fisheries" containing, *inter alia*, the following provisions:

> "*Article 1*
>
> The Ministry of Fisheries shall issue regulations establishing explicitly bounded conservation zones within the limits of the continental shelf of Iceland; wherein all fisheries shall be subject to Icelandic rules and control; Provided that the conservation measures now in effect shall in no way be reduced. The Ministry shall further issue the necessary regulations for the protection of the fishing grounds within the said zones . . .
>
> *Article 2*
>
> The regulations promulgated under Article 1 of the present law shall be enforced only to the extent compatible with agreements with other countries to which Iceland is or may become a party."

21. The 1948 Law was explained by the Icelandic Government in its *exposé des motifs* submitting the Law to the Althing, in which, *inter alia*, it stated:

> "It is well known that the economy of Iceland depends almost entirely on fishing in the vicinity of its coasts. For this reason, the population of Iceland has followed the progressive impoverishment of fishing grounds with anxiety. Formerly, when fishing equipment was far less efficient than it is today, the question appeared in a different light, and the right of providing for exclusive rights of fishing by Iceland itself in the vicinity of her coasts extended much further than is admitted by the practice generally adopted since 1900. It seems obvious, however, that measures to protect fisheries ought to be extended in proportion to the growing efficiency of fishing equipment.
>
> . . . . . .
>
> In so far as the jurisdiction of States over fishing grounds is concerned, two methods have been adopted. Certain States have proceeded to a determination of their territorial waters, especially for fishing purposes. Others, on the other hand, have left the question of

the territorial waters in abeyance and have contented themselves with asserting their exclusive right over fisheries, independently of territorial waters. Of these two methods, the second seems to be the more natural, having regard to the fact that certain considerations arising from the concept of 'territorial waters' have no bearing upon the question of an exclusive right to fishing, and that there are therefore serious drawbacks in considering the two questions together."

22. No action was taken by Iceland to implement the 1948 Law outside the existing 3-mile limit of her fisheries jurisdiction until after this Court had in 1951 handed down its Judgment in the *Fisheries* case between the United Kingdom and Norway, in which it endorsed the validity of the system of straight baselines applied by Norway off the Norwegian coast (*I.C.J. Reports 1951*, p. 116). On 19 March 1952, Iceland issued Regulations providing for a fishery zone whose outer limit was to be a line drawn 4 miles to seaward of straight baselines traced along the outermost points of the coasts, islands and rocks and across the opening of bays, and prohibiting all foreign fishing activities within that zone. No protest against these Regulations, which came into effect on 15 May 1952, was made by the Federal Republic of Germany.

23. In 1958, as a result of the discussion by the United Nations General Assembly of the Report of the International Law Commission on the Law of the Sea, the First United Nations Conference on the Law of the Sea was convened at Geneva. This Conference however failed to reach agreement either on the limit of the territorial sea or on the zone of exclusive fisheries; it adopted a resolution requesting the General Assembly to study the advisability of convening a second Law of the Sea Conference specifically to deal with these questions. After the conclusion of the 1958 Conference, Iceland made on 1 June 1958 a preliminary announcement of its intention to reserve the right of fishing within an area of 12 miles from the baselines exclusively to Icelandic fishermen, and to extend the fishing zone also by modification of the baselines, and then on 30 June 1958 issued new "Regulations concerning the Fisheries Limits off Iceland". Article 1 of these proclaimed a new 12-mile fishery limit around Iceland drawn from new baselines defined in that Article, and Article 2 prohibited all fishing activities by foreign vessels within the new fishery limit. Article 7 of the Regulations expressly stated that they were promulgated in accordance with the Law of 1948 concerning Scientific Conservation of the Continental Shelf Fisheries.

24. The Federal Republic of Germany did not accept the validity of the new Regulations, and made its position known to the Government of Iceland by a note-verbale dated 9 June 1958. However, it issued a recommendation to the German Trawler Owners' Association that fishing vessels should abstain from fishing inside the 12-mile limit, in order to prevent incidents occurring on the fishing grounds, and this recom-

mendation was in fact followed by the vessels of the Federal Republic. Various attempts were made to settle the dispute by negotiation but the dispute remained unresolved. On 5 May 1959 the Althing passed a Resolution on the matter in which, *inter alia*, it said:

> "... the Althing declares that it considers that Iceland has an indisputable right to a 12-mile fishery limit, that a *recognition should be obtained of Iceland's right to the entire continental shelf area in conformity with the policy adopted by the Law of 1948, concerning the Scientific Conservation of the Continental Shelf Fisheries* and that fishery limits of less than 12 miles from base-lines around the country are out of the question" (emphasis added).

The Resolution thus stressed that the 12-mile limit asserted in the 1958 Regulations was merely a further step in Iceland's progress towards its objective of a fishery zone extending over the whole of the continental shelf area.

25. In the same year, the Federal Republic of Germany and Iceland embarked on a series of negotiations with a view to the settlement of their dispute regarding the 1958 Regulations. These negotiations were preceded by a Note from the Government of Iceland of 5 August 1959 in which, after explaining in some detail the position it had taken at the 1958 Conference on the Law of the Sea, it stated that it would greatly appreciate it "if the Government of the Federal Republic of Germany would consider the special situation and wishes of Iceland". The Icelandic Government added that "where a nation is overwhelmingly dependent upon fisheries it should be lawful to take special measures, and decide a further extension of the fishing zone for meeting the needs of such a nation". The Note referred to the Resolution adopted at the 1958 Conference on Special Situations relating to Coastal Fisheries. In its reply of 7 October 1959 the Government of the Federal Republic of Germany pointed out that it was prepared to recognize the special dependence of Iceland on its fisheries, but could not accept the view that the coastal State had a right to include an adjacent area in its fishing zone unilaterally. The Government of the Federal Republic of Germany pointed out that the 1958 Resolution would not justify unilateral Icelandic measures since it merely provided for the elaboration of agreed measures, and explicitly laid down that consideration must be given to the interests of other States. The negotiations came to a halt pending the Second United Nations Conference on the Law of the Sea in 1960, and did not re-open thereafter. On 13 March 1961, the Government of Iceland notified the Federal Republic of the conclusion of an Exchange of Notes with the United Kingdom settling the dispute with that country regarding the 12-mile fishery limits and baselines claimed by Iceland in its 1958 Regulations. Thereupon further negotiations were commenced, and on 19 July 1961 an agreement in the form of an Exchange of

Notes was concluded for the settlement of the dispute.

26. The substantive provisions of the settlement, which were set out in the principal Note addressed by the Government of Iceland to the Government of the Federal Republic, were as follows:

(1) The Federal Republic would no longer object to a 12-mile fishery zone around Iceland measured from the baselines accepted solely for the purpose of the delimitation of that zone.
(2) The Federal Republic accepted for that purpose the baselines set out in the 1958 Regulations subject to the modification of four specified points.
(3) For a period expiring on 10 March 1964, Iceland would not object to fishing by vessels of the Federal Republic within certain specified areas and during certain stated months of the year.
(4) During the same period, however, vessels of the Federal Republic would not fish within the outer 6 miles of the 12-mile zone in seven specified areas.
(5) Iceland would "continue to work for the implementation of the Althing Resolution of 5 May 1959, regarding the extension of the fishery jurisdiction of Iceland. However it shall give the Government of the Federal Republic of Germany six months' notice of any such extension; in case of a dispute relating to such an extension, the matter shall, at the request of either Party, be referred to the International Court of Justice".

In its Note in reply the Federal Republic of Germany emphasized that, being "mindful of the exceptional importance of coastal fisheries to the Icelandic economy", it "agrees to the arrangement set forth in your note, and that your note and this reply thereto constitute an agreement between our two Governments which shall enter into force immediately, subject to the stipulation by the Government of the Federal Republic of Germany that this agreement is without prejudice to its rights under international law towards third States".

27. On 14 July 1971 the Government of Iceland issued a policy statement in which, *inter alia*, it was said:

> "That the agreements on fisheries jurisdiction with the British and the West Germans be terminated and that a decision be taken on the extension of fisheries jurisdiction to 50 nautical miles from base-lines, and that this extension become effective not later than September 1st, 1972."

This led the Government of the Federal Republic, during talks in Bonn in August 1971, to remind the Government of Iceland of the terms of the 1961 Exchange of Notes, and to express the view that the Icelandic

fisheries zone could not be extended unilaterally, that the Exchange of Notes was not open to unilateral denunciation or termination, and to state that the Government of the Federal Republic would have to reserve their rights thereunder. No agreement was reached during these talks, and in an aide-mémoire of 31 August 1971 Iceland stated that it considered the object and purpose of the provision for recourse to judicial settlement to have been fully achieved; and that it now found it essential to extend further the zone of exclusive fisheries jurisdiction around its coasts to include the areas of the sea covering the continental shelf. Iceland further added that the new limits, the precise boundaries of which would be furnished at a later date, would enter into force not later than 1 September 1972; and that it was prepared to hold further meetings "for the purpose of achieving a practical solution of the problems involved".

28. The Federal Republic replied on 27 September 1971 and reaffirmed its view that "the unilateral assumption of sovereign power by a coastal State over zones of the high seas is inadmissible under international law". It then controverted Iceland's proposition that the object and purpose of the provision for recourse to judicial settlement of disputes relating to an extension of fisheries jurisdiction had been fully achieved, and again reserved all its rights under that provision. At the same time, however, the Federal Republic expressed its willingness, without prejudice to its legal position, to enter into further exploratory discussions. In November 1971 the Federal Republic and Iceland held discussions in which the Federal Republic of Germany expressed its understanding for the concern of the Government of Iceland about the possibility of injury to fish stocks in the area in question if fishing remained unregulated, and therefore proposed practical measures to meet the Icelandic concern. In their proposal the delegation of the Federal Republic of Germany expressed the conviction that, taking into account the special situation of Iceland as far as fisheries are concerned, it should be possible, within the framework of the North-East Atlantic Fisheries Commission, to come to an arrangement whereby all nations engaged in fishing around Iceland would limit their catches. The Federal Republic of Germany further made the offer that pending the elaboration of a multilateral arrangement within the North-East Atlantic Fisheries Commission the total catch of demersal species by vessels of the Federal Republic of Germany would be limited to the average taken by such vessels during the years 1960 to 1969. These proposals did not lead to any result, and the negotiations which took place in February 1972 also failed to resolve the dispute.

29. On 15 February 1972 the Althing adopted a Resolution reiterating the fundamental policy of the Icelandic people that the continental shelf of Iceland and the superjacent waters were within the jurisdiction of Iceland. While reiterating that the Exchange of Notes of 1961 no

longer constituted an obligation for Iceland, it resolved, *inter alia*:

> "1. That the fishery limits will be extended to 50 miles from baselines around the country, to become effective not later than 1 September 1972.
>
> . . . . . .
>
> 3. That efforts to reach a solution of the problems connected with the extension be continued through discussions with the Government of the United Kingdom and the Federal Republic of Germany.
> 4. That effective supervision of the fish stocks in the Iceland area be continued in consultation with marine biologists and that the necessary measures be taken for the protection of the fish stocks and specified areas in order to prevent over-fishing . . ."

In an aide-mémoire of 24 February 1972 Iceland's Minister for Foreign Affairs formally notified the Ambassador of the Federal Republic in Reykjavik of his Government's intention to proceed in accordance with this Resolution.

30. On 4 March 1972 the Ambassador of the Federal Republic informed the Prime Minister of Iceland of his Government's decision to bring the question before the Court. On 14 March 1972, the Federal Republic in an aide-mémoire formally took note of the decision of Iceland to issue new Regulations, and reaffirmed its position that "a unilateral extension of the fishery zone of Iceland to 50 miles is incompatible with the general rules of international law", and that "the Exchange of Notes of 1961 continues to be in force and cannot be denounced unilaterally". Moreover, formal notice was also given by the Federal Republic that it would submit the dispute to the Court in accordance with the Exchange of Notes; the Government of the Federal Republic was however willing to continue discussions with Iceland "in order to agree upon satisfactory practical arrangements at least for the period while the case is before the International Court of Justice". On 5 June 1972, the Federal Republic of Germany filed in the Registry its Application bringing the present case before the Court.

31. A series of negotiations between representatives of the two countries soon followed and continued throughout May, June and July 1972, at which various proposals for catch-limitation, fishing-effort limitation, area or seasonal restrictions for vessels of the Federal Republic were discussed, in the hope of arriving at practical arrangements for an interim régime pending the settlement of the dispute. At the meeting of 15 May, the representative of the Federal Republic of Germany explained his Government's concept of an interim arrangement on the basis of limiting the annual catches of fishing vessels from the Federal Republic of Germany to the average of the years 1960 to 1969. On 2 June 1972 the Icelandic Foreign Minister presented counter-proposals for an interim

agreement. In presenting these the Icelandic Foreign Minister, according to the Applicant, stated:

> "The British and German proposals for catch limitation and the closure of certain areas for all trawling (Icelandic and foreign) although they are helpful as far as they go, do not take the basic principle of preferential treatment sufficiently into account because if you continue to fish up to the 12-mile limit more or less as you have done, our preferential position is not recognized. It would rather mean the freezing of the status-quo . . . What we are really talking about is the reduction of your fishing in Icelandic waters in a tangible, visible manner."

Thus, while Iceland invoked preferential rights and the Applicant was prepared to recognize them, basic differences remained as to the extent and scope of those rights and as to the methods for their implementation and their enforcement. There can be little doubt that these divergences of views were some of the "problems connected with the extension" in respect of which the Althing Resolution of 15 February 1972 had instructed the Icelandic Government to make "efforts to reach a solution". By 14 July there was still no agreement on an interim régime, and on that date new Regulations were issued extending Iceland's fishery limits to 50 miles as from 1 September 1972 and, by Article 2, prohibiting all fishing activities by foreign vessels inside those limits. Consequently, on 21 July 1972, the Federal Republic filed in the Registry of the Court its request for the indication of interim measures of protection.

32. On 17 August 1972 the Court made an Order for provisional measures in which, *inter alia*, it indicated that, pending the Court's final decision in the proceedings, Iceland should refrain from taking any measures to enforce the Regulations of 14 July 1972 against vessels registered in the Federal Republic and engaging in fishing outside the 12-mile fishery zone; and that the Federal Republic should limit the annual catch of its vessels in the "Sea Area of Iceland" to 119,000 tons. That the Federal Republic has complied with the terms of the catch-limitation measure indicated in the Court's Order has not been questioned or disputed. Iceland, on the other hand, notwithstanding the measures indicated by the Court, began to enforce the new Regulations against vessels of the Federal Republic soon after they came into effect on 1 September 1972. Negotiations for an interim arrangement were, however, resumed between the two countries, and were carried on intermittently during 1972 and 1973; but they have not led to any agreement.

33. By its Judgment of 2 February 1973, the Court found that it had jurisdiction to entertain the Application and to deal with the merits of the dispute. However, even after the handing down of that Judgment, Iceland

persisted in its efforts to enforce the 50-mile limit against vessels of the Federal Republic and, as appears from the letter of 11 January 1974 addressed to the Court by the Minister for Foreign Affairs of Iceland, mentioned above, it has continued to deny the Court's competence to entertain the dispute.

*
* *

34. The question has been raised whether the Court has jurisdiction to pronounce upon certain matters referred to the Court in paragraph 3 of the Applicant's final submissions (paragraphs 12-13 above) concerning the taking of conservation measures on the basis of agreement between the Parties, concluded either bilaterally or within a multilateral framework, with due regard to the special dependence of Iceland on its fisheries and to the traditional fisheries of the Federal Republic of Germany in the waters concerned.

35. In its Judgment of 2 February 1973, pronouncing on the jurisdiction of the Court in the present case, the Court found "that it has jurisdiction to entertain the Application filed by the Government of the Federal Republic of Germany on 5 June 1972 and to deal with the merits of the dispute" (*I.C.J. Reports 1973*, p. 66, para. 46). The Application which the Court found it had jurisdiction to entertain contained a submission under letter *(b)* (cf. paragraph 12 above) which raised the issue of conservation measures. These questions, among others, had previously been discussed in the negotiations between the Parties referred to in paragraphs 27 to 31 above and were also extensively examined in the pleadings and hearings on the merits.

36. The Order of the Court indicating interim measures of protection (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Protection Order of 17 August 1972, I.C.J. Reports 1972*, p. 30) implied that the case before the Court involved questions of fishery conservation and of preferential fishing rights since, in indicating a catch-limitation figure for the Applicant's fishing, the Court stated that this measure was based on "the exceptional importance of coastal fisheries to the Icelandic economy" and on "the need for the conservation of fish stocks in the Iceland area" (*loc. cit.*, p. 34, paras. 24 and 25).

37. In its Judgment of 2 February 1973, pronouncing on its jurisdiction in the case, the Court, after taking into account the aforesaid contentions of the Applicant concerning fishery conservation and preferential rights, referred again to "the exceptional dependence of Iceland on its fisheries and the principle of conservation of fish stocks" (*I.C.J. Reports 1973*, p. 65, para. 42). The judicial notice taken therein of the recognition given by the Parties to the exceptional dependence of Iceland on its fisheries and to the need of conservation of fish stocks in the area clearly implies that such questions are before the Court.

38. The Order of the Court of 12 July 1973 on the continuance of interim measures of protection referred again to catch-limitation figures and also to the question of "related restrictions concerning areas closed to fishing, number and type of vessels allowed and forms of control of the agreed provisions" (*I.C.J. Reports 1973*, p. 314, para. 7). Thus the Court took the view that those questions were within its competence. As the Court stated in its Order of 17 August 1972, there must be a connection "under Article 61, paragraph 1, of the Rules between a request for interim measures of protection and the original Application filed with the Court" (*I.C.J. Reports 1972*, p. 33, para. 12).

39. As to the compromissory clause in the 1961 Exchange of Notes, this gives the Court jurisdiction with respect to "a dispute relating to such an extension", i.e., "the extension of the fishery jurisdiction of Iceland". The present dispute was occasioned by Iceland's unilateral extension of its fisheries jurisdiction. However, it would be too narrow an interpretation of the compromissory clause to conclude that the Court's jurisdiction is limited to giving an affirmative or negative answer to the question of whether the extension of fisheries jurisdiction, as enacted by Iceland on 14 July 1972, is in conformity with international law. In the light of the exchanges and negotiations between the Parties, both in 1959 and 1960 (paragraph 25 above) and in 1971-1972 (paragraphs 28 to 31 above), in which the questions of fishery conservation measures in the area and Iceland's preferential fishing rights were raised and discussed, and in the light of the proceedings before the Court, it seems evident that the dispute between the Parties includes disagreements as to the extent and scope of their respective rights in the fishery resources and the adequacy of measures to conserve them. It must therefore be concluded that those disagreements are an element of the "dispute relating to the extension of the fishery jurisdiction of Iceland".

40. Furthermore, the dispute before the Court must be considered in all its aspects. Even if the Court's competence were understood to be confined to the question of the conformity of Iceland's extension with the rules of international law, it would still be necessary for the Court to determine in that context the role and function which those rules reserve to the concept of preferential rights and that of conservation of fish stocks. Thus, whatever conclusion the Court may reach in regard to preferential rights and conservation measures, it is bound to examine these questions with respect to this case. Consequently, the suggested restriction on the Court's competence not only cannot be read into the terms of the compromissory clause, but would unduly encroach upon the power of the Court to take into consideration all relevant elements in administering justice between the Parties.

*

* *

41. The Applicant has challenged the Regulations promulgated by the Government of Iceland on 14 July 1972, and since the Court has to pronounce on this challenge, the ascertainment of the law applicable becomes necessary. As the Court stated in the *Fisheries* case:

> "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law." (*I.C.J. Reports 1951*, p. 132.)

The Court will therefore proceed to the determination of the existing rules of international law relevant to the settlement of the present dispute.

42. The Geneva Convention on the High Seas of 1958, which was adopted "as generally declaratory of established principles of international law", defines in Article 1 the term "high seas" as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State". Article 2 then declares that "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty" and goes on to provide that the freedom of the high seas comprises, *inter alia*, both for coastal and non-coastal States, freedom of navigation and freedom of fishing. The freedoms of the high seas are however made subject to the consideration that they "shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas".

43. The breadth of the territorial sea was not defined by the 1958 Convention on the Territorial Sea and the Contiguous Zone. It is true that Article 24 of this Convention limits the contiguous zone to 12 miles "from the baseline from which the breadth of the territorial sea is measured". At the 1958 Conference, the main differences on the breadth of the territorial sea were limited at the time to disagreements as to what limit, not exceeding 12 miles, was the appropriate one. The question of the breadth of the territorial sea and that of the extent of the coastal State's fishery jurisdiction were left unsettled at the 1958 Conference. These questions were referred to the Second Conference on the Law of the Sea, held in 1960. Furthermore, the question of the extent of the fisheries jurisdiction of the coastal State, which had constituted a serious obstacle to the reaching of an agreement at the 1958 Conference, became gradually separated from the notion of the territorial sea. This was a development which reflected the increasing importance of fishery resources for all States.

44. The 1960 Conference failed by one vote to adopt a text governing the two questions of the breadth of the territorial sea and the extent of fishery rights. However, after that Conference the law evolved through the practice of States on the basis of the debates and near-agreements at

the Conference. Two concepts have crystallized as customary law in recent years arising out of the general consensus revealed at that Conference. The first is the concept of the fishery zone, the area in which a State may claim exclusive fishery jurisdiction independently of its territorial sea; the extension of that fishery zone up to a 12-mile limit from the baselines appears now to be generally accepted. The second is the concept of preferential rights of fishing in adjacent waters in favour of the coastal State in a situation of special dependence on its coastal fisheries, this preference operating in regard to other States concerned in the exploitation of the same fisheries, and to be implemented in the way indicated in paragraph 49 below.

45. In recent years the question of extending the coastal State's fisheries jurisdiction has come increasingly to the forefront. The Court is aware that a number of States has asserted an extension of fishery limits. The Court is also aware of present endeavours, pursued under the auspices of the United Nations, to achieve in a third Conference on the Law of the Sea the further codification and progressive development of this branch of the law, as it is of various proposals and preparatory documents produced in this framework, which must be regarded as manifestations of the views and opinions of individual States and as vehicles of their aspirations, rather than as expressing principles of existing law. The very fact of convening the third Conference on the Law of the Sea evidences a manifest desire on the part of all States to proceed to the codification of that law on a universal basis, including the question of fisheries and conservation of the living resources of the sea. Such a general desire is understandable since the rules of international maritime law have been the product of mutual accommodation, reasonableness and co-operation. So it was in the past, and so it necessarily is today. In the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.

46. The concept of a 12-mile fishery zone, referred to in paragraph 44 above, as a *tertium genus* between the territorial sea and the high seas, has been accepted with regard to Iceland in the substantive provisions of the 1961 Exchange of Notes, and the Federal Republic of Germany has also applied the same fishery limit to its own coastal waters since 1964; therefore this matter is no longer in dispute between the Parties. At the same time, the concept of preferential rights, a notion that necessarily implies the existence of other legal rights in respect of which that preference operates, has been admitted by the Applicant to be relevant to the solution of the present dispute. Moreover, the Applicant has expressly recognized Iceland's preferential rights in the disputed waters and at the same time has invoked its own historic fishing rights in these

same waters, on the ground that reasonable regard must be had to such traditional rights by the coastal State, in accordance with the generally recognized principles embodied in Article 2 of the High Seas Convention. If, as the Court pointed out in its dictum in the *Fisheries* case, cited in paragraph 41 above, any national delimitation of sea areas, to be opposable to other States, requires evaluation in terms of the existing rules of international law, then it becomes necessary for the Court, in its examination of the Icelandic fisheries Regulations, to take those elements into consideration as well. Equally it has necessarily to take into account the provisions of the Exchange of Notes of 1961 which govern the relations between the Parties with respect to Iceland's fishery limits. The said Exchange of Notes, which was concluded within the framework of the existing provisions of the law of the sea, was held by the Court, in its Judgment of 2 February 1973, to be a treaty which is valid and in force.

*
* *

47. The concept of preferential rights for the coastal State in a situation of special dependence on coastal fisheries originated in proposals submitted by Iceland at the Geneva Conference of 1958. Its delegation drew attention to the problem which would arise when, in spite of adequate fisheries conservation measures, the yield ceased to be sufficient to satisfy the requirements of all those who were interested in fishing in a given area. Iceland contended that in such a case, when a catch-limitation becomes necessary, special consideration should be given to the coastal State whose population is overwhelmingly dependent on the fishing resources in its adjacent waters.

48. An Icelandic proposal embodying these ideas failed to obtain the majority required, but a resolution was adopted at the 1958 Conference concerning the situation of countries or territories whose people are overwhelmingly dependent upon coastal fisheries for their livelihood or economic development. This resolution, after "recognizing that such situations call for exceptional measures befitting particular needs" recommended that:

> ". . . where, for the purpose of conservation, it becomes necessary to limit the total catch of a stock or stocks of fish in an area of the high seas adjacent to the territorial sea of a coastal State, any other States fishing in that area should collaborate with the coastal State to secure just treatment of such situation, by establishing agreed measures which shall recognize any preferential requirements of the coastal State resulting from its dependence upon the fishery concerned while having regard to the interests of the other States".

The resolution further recommended that "appropriate conciliation and arbitral procedures shall be established for the settlement of any disagreement".

49. At the Plenary Meetings of the 1960 Conference the concept of preferential rights was embodied in a joint amendment presented by Brazil, Cuba and Uruguay which was subsequently incorporated by a substantial vote into a joint United States-Canadian proposal concerning a 6-mile territorial sea and an additional 6-mile fishing zone, thus totalling a 12-mile exclusive fishing zone, subject to a phasing-out period. This amendment provided, independently of the exclusive fishing zone, that the coastal State had:

> ". . . the faculty of claiming preferential fishing rights in any area of the high seas adjacent to its exclusive fishing zone when it is scientifically established that a special situation or condition makes the exploitation of the living resources of the high seas in that area of fundamental importance to the economic development of the coastal State or the feeding of its population".

It also provided that:

> "A special situation or condition may be deemed to exist when:
>
> *(a)* The fisheries and the economic development of the coastal State or the feeding of its population are so manifestly interrelated that, in consequence, that State is greatly dependent on the living resources of the high seas in the area in respect of which preferential fishing is being claimed.
>
> *(b)* It becomes necessary to limit the total catch of a stock or stocks of fish in such areas . . ."

The contemporary practice of States leads to the conclusion that the preferential rights of the coastal State in a special situation are to be implemented by agreement between the States concerned, either bilateral or multilateral, and, in case of disagreement, through the means for the peaceful settlement of disputes provided for in Article 33 of the Charter of the United Nations. It was in fact an express condition of the amendment referred to above that any other State concerned would have the right to request that a claim made by a coastal State should be tested and determined by a special commission on the basis of scientific criteria and of evidence presented by the coastal State and other States concerned. The commission was to be empowered to determine, for the period of time and under the limitations that it found necessary, the preferential rights of the coastal State, "while having regard to the interests of any other State or States in the exploitation of such stock or stocks of fish".

50. State practice on the subject of fisheries reveals an increasing and widespread acceptance of the concept of preferential rights for coastal States, particularly in favour of countries or territories in a situation of special dependence on coastal fisheries. Both the 1958 Resolution and the 1960 joint amendment concerning preferential rights were approved by a large majority of the Conferences, thus showing overwhelming support for the idea that in certain special situations it was fair to recognize that the coastal State had preferential fishing rights. After these Conferences, the preferential rights of the coastal State were recognized in various bilateral and multilateral international agreements. The Court's attention has been drawn to the practice in this regard of the North-West and North-East Atlantic Fisheries Commissions, of which 19 maritime States altogether, including both Parties, are members; its attention has also been drawn to the Arrangement Relating to Fisheries in Waters Surrounding the Faroe Islands, signed at Copenhagen on 18 December 1973 on behalf of the Governments of Belgium, Denmark, France, the Federal Republic of Germany, Norway, Poland and the United Kingdom, and to the Agreement on the Regulation of the Fishing of North-East Arctic (Arcto-Norwegian) Cod, signed on 15 March 1974 on behalf of the Governments of the United Kingdom, Norway and the Union of Soviet Socialist Republics. Both the aforesaid agreements, in allocating the annual shares on the basis of the past performance of the parties in the area, assign an additional share to the coastal State on the ground of its preferential right in the fisheries in its adjacent waters. The Faroese agreement takes expressly into account in its preamble "the exceptional dependence of the Faroese economy on fisheries" and recognizes "that the Faroe Islands should enjoy preference in waters surrounding the Faroe Islands".

51. There can be no doubt of the exceptional importance of coastal fisheries to the Icelandic economy. That exceptional importance was explicitly recognized by the Applicant in the Exchange of Notes of 19 July 1961, and the Court has also taken judicial notice of such recognition by declaring that it is "necessary to bear in mind the exceptional importance of coastal fisheries to the Icelandic economy" (*I.C.J. Reports 1972*, p. 34, para. 24).

52. The preferential rights of the coastal State come into play only at the moment when an intensification in the exploitation of fishery resources makes it imperative to introduce some system of catch-limitation and sharing of those resources to preserve the fish stocks in the interests of their rational and economic exploitation. This situation appears to have been reached in the present case. In regard to two demersal species—cod and haddock—the Applicant has shown itself aware of the need for a catch-limitation, which has become indispensable in view of the establishment of catch-limitations in other regions of the North Atlantic. With respect to other species fished by vessels of the Federal Republic of

Germany—redfish and saithe—it has been recognized by the Applicant that the setting up of a catch-limitation scheme for certain species also requires the establishment of overall quotas for other species, in order to prevent the fishing effort displaced from one stock being transferred to other stocks. For this reason it is for instance provided in the aforesaid Arrangement Relating to Fisheries in Waters Surrounding the Faroe Islands (Art. II) that the annual catches of demersal species other than cod and haddock shall not exceed by more than an agreed percentage the highest figure achieved in the years 1968 to 1972.

*
* *

53. The Icelandic regulations challenged before the Court have been issued and applied by the Icelandic authorities as a claim to exclusive rights thus going beyond the concept of preferential rights. Article 2 of the Icelandic Regulations of 14 July 1972 states:

> "Within the fishery limits all fishing activities by foreign vessels shall be prohibited in accordance with the provisions of Law No. 33 of 19 June 1922, concerning fishing inside the Fishery Limits."

Article 1 of the 1922 Law provides: "Only Icelandic citizens may engage in fishing in the territorial waters of Iceland, and only Icelandic boats or ships may be used for such fishing." The language of the relevant government regulations indicates that their object is to establish an exclusive fishery zone, in which all fishing by vessels registered in other States, including the Federal Republic of Germany, would be prohibited. The mode of implementation of the regulations, carried out by Icelandic governmental authorities vis-à-vis fishing vessels of the Federal Republic, despite the Court's interim measures, confirms this interpretation.

54. The concept of preferential rights is not compatible with the exclusion of all fishing activities of other States. A coastal State entitled to preferential rights is not free, unilaterally and according to its own uncontrolled discretion, to determine the extent of those rights. The characterization of the coastal State's rights as preferential implies a certain priority, but cannot imply the extinction of the concurrent rights of other States and particularly of a State which, like the Applicant, have for many years been engaged in fishing in the waters in question, such fishing activity being important to the economy of the country concerned. The coastal State has to take into account and pay regard to the position of such other States, particularly when they have established an economic dependence on the same fishing grounds. Accordingly, the fact that Iceland is entitled to claim preferential rights does not suffice to justify its claim unilaterally to exclude the Applicant's fishing vessels from all

fishing activity in the waters beyond the limits agreed to in the 1961 Exchange of Notes.

*
* *

55. In this case, the Applicant has pointed out that its vessels started fishing in the Icelandic area as long ago as the end of the last century. Published statistics indicate that for many years fishing of demersal species by German vessels in the disputed area has taken place on a continuous basis, and that since 1936, except for the period of the Second World War, the total catch of those vessels has been relatively stable. Similar statistics indicate that the waters in question constitute the most important of the Applicant's distant-water fishing grounds for demersal species.

56. The Applicant further states that the loss of the fishing grounds in the waters around Iceland would have an appreciable impact on the economy of the Federal Republic of Germany; the fishing fleet of the Federal Republic of Germany would not be able to make good the loss of the Icelandic fishing grounds by diverting their activities to other fishing grounds in the oceans, because the range of wet-fish trawlers is limited by technical and economic factors and the more distant grounds, which could be reached by freezer-trawlers, are already subject to quota limitations. It is pointed out that the loss of the fishing grounds around Iceland would require the immediate withdrawal from service of the major part of the wet-fish trawlers, which would probably have to be scrapped and the withdrawal of a considerable number of trawlers from service would have sizeable secondary effects, such as unemployment, in the fishing industry and in related and supporting industries, particularly in coastal towns such as Bremerhaven and Cuxhaven where the fishing industry plays a predominant part.

57. Iceland has for its part admitted the existence of the Applicant's historic and special interests in the fishing in the disputed waters. The Exchange of Notes as a whole, and particularly paragraph 5 thereof requiring Iceland to give the Federal Republic of Germany advance notice of any extension of its fishery limits, impliedly acknowledged the existence of fishery interests of the Federal Republic in the waters adjacent to the 12-mile limit. The discussions which have taken place between the two countries also imply an acknowledgement by Iceland of the existence of such interests. Furthermore, the Prime Minister of Iceland in a statement on 9 November 1971, after referring to the fact that "the well-being of specific British fishing towns may nevertheless to some extent be connected with the fisheries in Icelandic waters", went on to say "Therefore, it is obvious that we should discuss these issues with the British and the West Germans, both of whom have some interests in this connection".

58. Considerations similar to those which have prompted the recogni-

tion of the preferential rights of the coastal State in a special situation apply when coastal populations in other States are also dependent on certain fishing grounds. In both instances the economic dependence and the livelihood of whole communities are affected. Not only do the same considerations apply, but the same interest in conservation exists. In this respect the Applicant has recognized that the conservation and efficient exploitation of the fish stocks in the Iceland area is of importance not only to Iceland but also to the Federal Republic of Germany.

59. The provisions of the Icelandic Regulations of 14 July 1972 and the manner of their implementation disregard the fishing rights of the Applicant. Iceland's unilateral action thus constitutes an infringement of the principle enshrined in Article 2 of the 1958 Geneva Convention on the High Seas which requires that all States, including coastal States, in exercising their freedom of fishing, pay reasonable regard to the interests of other States. It also disregards the rights of the Applicant as they result from the Exchange of Notes of 1961. The Applicant is therefore justified in asking the Court to give all necessary protection to its own rights, while at the same time agreeing to recognize Iceland's preferential position. Accordingly, the Court is bound to conclude that the Icelandic Regulations of 14 July 1972 establishing a zone of exclusive fisheries jurisdiction extending to 50 nautical miles from baselines around the coast of Iceland, are not opposable to the Federal Republic of Germany, and the latter is under no obligation to accept the unilateral termination by Iceland of fishery rights of the Federal Republic in the area.

60. The findings stated by the Court in the preceding paragraphs suffice to provide a basis for the decision of the present case, namely: that Iceland's extension of its exclusive fishery jurisdiction beyond 12 miles is not opposable to the Federal Republic; that Iceland may on the other hand claim preferential rights in the distribution of fishery resources in the adjacent waters; that the Federal Republic also has established rights with respect to the fishery resources in question; and that the principle of reasonable regard for the interests of other States enshrined in Article 2 of the Geneva Convention on the High Seas of 1958 requires Iceland and the Federal Republic to have due regard to each other's interests, and to the interests of other States, in those resources.

*
* *

61. It follows from the reasoning of the Court in this case that in order to reach an equitable solution of the present dispute it is necessary that the preferential fishing rights of Iceland, as a State specially dependent on coastal fisheries, be reconciled with the traditional fishing rights

of the Applicant. Such a reconciliation cannot be based, however, on a phasing out of the Applicant's fishing, as was the case in the 1961 Exchange of Notes in respect of the 12-mile fishery zone. In that zone, Iceland was to exercise exclusive fishery rights while not objecting to continued fishing by the Applicant's vessels during a phasing-out period. In adjacent waters outside that zone, however, a similar extinction of rights of other fishing States, particularly when such rights result from a situation of economic dependence and long-term reliance on certain fishing grounds, would not be compatible with the notion of preferential rights as it was recognized at the Geneva Conferences of 1958 and 1960, nor would it be equitable. At the 1960 Conference, the concept of preferential rights of coastal States in a special situation was recognized in the joint amendment referred to in paragraph 49 above, under such limitations and to such extent as is found "necessary by reason of the dependence of the coastal State on the stock or stocks of fish, while having regard to the interests of any other State or States in the exploitation of such stock or stocks of fish". The reference to the interests of other States in the exploitation of the same stocks clearly indicates that the preferential rights of the coastal State and the established rights of other States were considered as, in principle, continuing to co-exist.

62. This is not to say that the preferential rights of a coastal State in a special situation are a static concept, in the sense that the degree of the coastal State's preference is to be considered as fixed for ever at some given moment. On the contrary, the preferential rights are a function of the exceptional dependence of such a coastal State on the fisheries in adjacent waters and may, therefore, vary as the extent of that dependence changes. Furthermore, in the 1961 Exchange of Notes the "exceptional importance of coastal fisheries to the Icelandic economy" was recognized. This expression must be interpreted as signifying dependence for the purposes both of livelihood and economic development, as in the formulas discussed at the 1958 and 1960 Geneva Conferences concerning preferential rights, and in the Exchange of Notes of 11 March 1961 between Iceland and the United Kingdom. The latter instrument was the model for the Exchange of Notes between Iceland and the Federal Republic of Germany, and the Agent of the Federal Republic has informed the Court that the difference in wording on this point between the United Kingdom Note and the Federal Republic's Note had no "legal significance" or had not been meant to have such significance. It has been suggested by the Applicant that a situation of exceptional dependence on fisheries for purposes of economic development could only exist in respect of States which are still in a stage of development and have only a minor share in the fisheries off their coasts. Such States undoubtedly afford clear examples of special dependence; however, in the present case the recognition of the exceptional importance of coastal fisheries to the Icelandic economy was made at a time when Iceland was already a State with a comparatively developed economy and possessed a substantial share in the exploitation

of the fisheries off its coasts. It is therefore not possible to accept the limited interpretation of the expression employed in the 1961 Exchange of Notes suggested by the Applicant. With regard both to livelihood and to economic development, it is essentially a matter of appraising the dependence of the coastal State on the fisheries in question in relation to that of the other State concerned and of reconciling them in as equitable a manner as is possible.

63. In view of the Court's finding (paragraph 59 above) that the Icelandic Regulations of 14 July 1972 are not opposable to the Federal Republic of Germany for the reasons which have been stated, it follows that the Government of Iceland is not in law entitled unilaterally to exclude fishing vessels of the Federal Republic from sea areas to seaward of the limits agreed to in the 1961 Exchange of Notes or unilaterally to impose restrictions on their activities in such areas. But the matter does not end there; as the Court has indicated, Iceland is, in view of its special situation, entitled to preferential rights in respect of the fish stocks of the waters adjacent to its coasts. Due recognition must be given to the rights of both Parties, namely the rights of the Federal Republic to fish in the waters in dispute, and the preferential rights of Iceland. Neither right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation.

64. It follows that even if the Court holds that Iceland's extension of her fishery limits is not opposable to the Applicant, this does not mean that the Applicant is under no obligation to Iceland with respect to fishing in the disputed waters in the 12-mile to 50-mile zone. On the contrary, both States have an obligation to take full account of each other's rights and of any fishery conservation measures the necessity of which is shown to exist in those waters. It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all. Consequently, both Parties have the obligation to keep under review the fishery resources in the disputed waters and to examine together, in the light of scientific and other available information, the measures required for the conservation and development, and equitable exploitation, of those resources, taking into account any international agreement in force between them, such as the North-East Atlantic Fisheries Convention of 24 January

1959 as well as such other agreements as may be reached in the matter in the course of further negotiation.

*
* *

65. The most appropriate method for the solution of the dispute is clearly that of negotiation. Its objective should be the delimitation of the rights and interests of the Parties, the preferential rights of the coastal State on the one hand and the rights of the Applicant on the other, to balance and regulate equitably questions such as those of catch-limitation, share allocations and "related restrictions concerning areas closed to fishing, number and type of vessels allowed and forms of control of the agreed provisions" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Measures, Order of 12 July 1973, I.C.J. Reports 1973*, p. 314, para. 7). This necessitates detailed scientific knowledge of the fishing grounds. It is obvious that the relevant information and expertise would be mainly in the possession of the Parties. The Court would, for this reason, meet with difficulties if it were itself to attempt to lay down a precise scheme for an equitable adjustment of the rights involved.

66. It is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights, as was already recognized in the 1958 Geneva Resolution on Special Situations relating to Coastal Fisheries, which constituted the starting point of the law on the subject. This Resolution provides for the establishment, through collaboration between the coastal State and any other States fishing in the area, of agreed measures to secure just treatment of the special situation.

67. The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the Principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes. As the Court stated in the *North Sea Continental Shelf* cases:

> ". . . this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes" (*I.C.J. Reports 1969*, p. 47, para. 86).

68. In this case negotiations were initiated by the Parties from the date when Iceland gave notice of its intention to extend its fisheries jurisdiction, but these negotiations reached an early deadlock and could not come to any conclusion. In its Memorial, the Applicant has asked the Court to give the Parties some guidance as to the principles which they

should take into account in their negotiations for the most equitable management of the fishery resources, and has declared its readiness to enter into meaningful discussions with the Government of Iceland for the purpose of a permanent settlement of the fisheries problem. As to Iceland, its policy was clearly stated in paragraph 3 of the Althing Resolution of 15 February 1972, namely to continue efforts to reach a solution of the problems connected with the extension through discussions with the Applicant.

69. In the fresh negotiations which are to take place on the basis of the present Judgment, the Parties will have the benefit of the above appraisal of their respective rights and of certain guidelines defining their scope. The task before them will be to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other in the waters around Iceland outside the 12-mile limit, thus bringing about an equitable apportionment of the fishing resources based on the facts of the particular situation, and having regard to the interests of other States which have established fishing rights in the area. It is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law. As the Court stated in the *North Sea Continental Shelf* cases:

> ". . . it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles" (*I.C.J. Reports 1969*, p. 47, para. 85).

*
* *

70. The Court must take into account the situation which will result from the delivery of its Judgment, with respect to the interim measures indicated on 17 August 1972 and which, *inter alia*, fixed a catch-limitation figure of 119,000 tons for vessels registered in the Federal Republic of Germany. These interim measures will cease to have effect as from the date of the present Judgment, since the power of the Court to indicate interim measures under Article 41 of the Statute of the Court is only exercisable *pendente lite*. Notwithstanding the fact that the Parties have not entered into any provisional arrangement, they are not at liberty to conduct their fishing activities in the disputed waters without limitation. Negotiations in good faith, which are ordered by the Court in the present Judgment, involve in the circumstances of the case an obligation upon the Parties to pay reasonable regard to each other's rights and to conservation requirements pending the conclusion of the negotiations. While this statement is of course a re-affirmation of a self-evident principle, it refers to the rights of the Parties as indicated in the present Judgment. It is obvious that both in regard to merits and to jurisdiction,

the Court only pronounces on the case which is before it and not on any hypothetical situation which might arise in the future. At the same time, the Court must add that its Judgment cannot preclude the Parties from benefiting from any subsequent developments in the pertinent rules of international law.

*
* *

71. By the fourth submission in its Memorial, maintained in the oral proceedings, the Federal Republic of Germany raised the question of compensation for alleged acts of harassment of its fishing vessels by Icelandic coastal patrol boats; the submission reads as follows:

> "That the acts of interference by Icelandic coastal patrol boats with fishing vessels registered in the Federal Republic of Germany or with their fishing operations by the threat or use of force are unlawful under international law, and that Iceland is under an obligation to make compensation therefor to the Federal Republic of Germany."

72. The Court cannot accept the view that it would lack jurisdiction to deal with this submission. The matter raised therein is part of the controversy between the Parties, and constitutes a dispute relating to Iceland's extension of its fisheries jurisdiction. The submission is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court's jurisdiction defined in the compromissory clause of the Exchange of Notes of 19 July 1961.

73. In its Memorial, and in the oral proceedings, when presenting its submission on compensation, the Federal Republic of Germany stated that:

> ". . . [it] reserves all its rights to claim full compensation from the Government of Iceland for all unlawful acts that have been committed, or may yet be committed . . . [it] does not, at present, submit a claim against the Republic of Iceland for the payment of a certain amount of money as compensation for the damage already inflicted upon the fishing vessels of the Federal Republic. [It does] however, request the Court to adjudge and declare that the Republic of Iceland is, in principle, responsible for the damage inflicted upon German fishing vessels . . . and under an obligation to pay full compensation for all the damage which the Federal Republic of Germany and its nationals have actually suffered thereby."

74. The manner of presentation of this claim raises the question whether the Court is in a position to pronounce on a submission main-

tained in such an abstract form. The submission does not ask for an assessment of compensation for certain specified acts but for a declaration of principle that Iceland is under an obligation to make compensation to the Federal Republic in respect of all unlawful acts of interference with fishing vessels of the Federal Republic. The Applicant is thus asking for a declaration adjudicating, with definitive effect, that Iceland is under an obligation to pay full compensation for all the damage suffered by the Applicant as a consequence of the acts of interference specified in the proceedings. In its Memorial the Federal Republic has listed a large number of incidents involving its vessels and Icelandic coastal patrol boats, and continues:

> "The Government of the Federal Republic does . . . request the Court to adjudge and declare that the Republic of Iceland is, in principle, responsible for the damage inflicted upon German fishing vessels by the illegal acts of the Icelandic coastal patrol boats *described in the preceding paragraphs*, and under an obligation to pay full compensation for *all the damage* which the Federal Republic of Germany and its nationals have actually suffered *thereby*." (Emphasis added.)

The final submission, which refers to "the acts of interference" and the "obligation to make compensation therefor", confirms the above interpretation.

75. Part V of the Memorial on the merits contains a general account of what the Federal Republic describes as harassment of its fishing vessels by Iceland, while Annexes G, H, I and K give some further details in diplomatic Notes and Annex L lists the incidents, with a statement of the kind of each incident. Some information concerning incidents is also to be found in the Federal Republic's reports regarding the implementing of the Court's Order for provisional measures.

76. The documents before the Court do not however contain in every case an indication in a concrete form of the damages for which compensation is required or an estimation of the amount of those damages. Nor do they furnish evidence concerning such amounts. In order to award compensation the Court can only act with reference to a concrete submission as to the existence and the amount of each head of damage. Such an award must be based on precise grounds and detailed evidence concerning those acts which have been committed, taking into account all relevant facts of each incident and their consequences in the circumstances of the case. It is only after receiving evidence on these matters that the Court can satisfy itself that each concrete claim is well founded in fact and in law. It is possible to request a general declaration establishing the principle that compensation is due, provided the claimant asks the Court to receive evidence and to determine, in a subsequent phase of the same proceedings, the amount of damage to be assessed. Moreover, while the Applicant has reserved all its rights "to claim compensation", it has not

requested that these damages be proved and assessed in a subsequent phase of the present proceedings. It would not be appropriate for the Court, when acting under Article 53 of the Statute, and after the Applicant has stated that it is not submitting a claim for the payment of a certain amount of money as compensation, to take the initiative of requesting specific information and evidence concerning the indemnity which, in the view of the Applicant, would correspond to each incident and each head of damage. In these circumstances, the Court is prevented from making an all-embracing finding of liability which would cover matters as to which it has only limited information and slender evidence. Accordingly, the fourth submission of the Federal Republic of Germany as presented to the Court cannot be acceded to.

*
* *

77. For these reasons,

THE COURT,

by ten votes to four,

(1) finds that the Regulations concerning the Fishery Limits off Iceland *(Reglugerð um fiskveiðilandhelgi Íslands)* promulgated by the Government of Iceland on 14 July 1972 and constituting a unilateral extension of the exclusive fishing rights of Iceland to 50 nautical miles from the baselines specified therein are not opposable to the Government of the Federal Republic of Germany;

(2) finds that, in consequence, the Government of Iceland is not entitled unilaterally to exclude fishing vessels of the Federal Republic of Germany from areas between the fishery limits agreed to in the Exchange of Notes of 19 July 1961 and the limits specified in the Icelandic Regulations of 14 July 1972, or unilaterally to impose restrictions on the activities of those vessels in such areas;

by ten votes to four,

(3) holds that the Government of Iceland and the Government of the Federal Republic of Germany are under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences concerning their respective fishery rights in the areas specified in subparagraph 2;

(4) holds that in these negotiations the Parties are to take into account, *inter alia*:

(a) that in the distribution of the fishing resources in the areas specified in subparagraph 2 Iceland is entitled to a preferential share to the extent of the special dependence of her people upon

the fisheries in the seas around her coasts for their livelihood and economic development;

(b) that by reason of its fishing activities in the areas specified in subparagraph 2, the Federal Republic of Germany also has established rights in the fishery resources of the said areas on which elements of its people depend for their livelihood and economic well-being;

(c) the obligation to pay due regard to the interests of other States in the conservation and equitable exploitation of these resources;

(d) that the above-mentioned rights of Iceland and of the Federal Republic of Germany should each be given effect to the extent compatible with the conservation and development of the fishery resources in the areas specified in subparagraph 2 and with the interests of other States in their conservation and equitable exploitation;

(e) their obligation to keep under review those resources and to examine together, in the light of scientific and other available information, such measures as may be required for the conservation and development, and equitable exploitation of those resources, making use of the machinery established by the North-East Atlantic Fisheries Convention or such other means as may be agreed upon as a result of international negotiations,

by ten votes to four,

(5) finds that it is unable to accede to the fourth submission of the Federal Republic of Germany.

Done in English, and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fifth day of July, one thousand nine hundred and seventy-four, in three copies, of which one will be placed in the archives of the Court and the others transmitted to the Government of the Federal Republic of Germany and to the Government of the Republic of Iceland respectively.

(Signed) Manfred LACHS,
President.

(Signed) S. AQUARONE,
Registrar.

President LACHS makes the following declaration:

I am in agreement with the reasoning and conclusions of the Court, and since the Judgment speaks for and stands by itself, I would not feel it appropriate to make any gloss upon it.

Judge DILLARD makes the following declaration:

I concur in the findings of the Court indicated in the first four subparagraphs of the *dispositif*. My reasons for concurrence are set out in my separate opinion in the companion case of the *United Kingdom of Great Britain and Northern Ireland* v. *Iceland*. I consider these reasons applicable *mutatis mutandis* to the present case.

While I concurred in the finding in the fifth subparagraph that the Court "is unable to accede to the fourth submission of the Federal Republic of Germany", I am impelled to add the following reservation [1].

The Court has held, in paragraph 72, that it is competent to entertain this particular submission. Although, for obvious reasons, the submission was not included in the Application filed on 5 June 1972 since the acts of harassment and interference occurred thereafter, it was included in the Memorial on the merits and in the final submissions. The delay therefore should not be a bar. The Court's construction of the nature and scope of the Exchange of Notes of 1961, revealed in its analysis of the other submissions, is clearly consistent with its finding that the compromissory clause is broad enough to cover this submission as well. In my view the conclusion that the Court is competent to entertain it, is thus amply justified.

The Court, however, has interpreted this submission as one asking the Court to adjudicate with definitive effect that Iceland is under an obligation *to pay full compensation* for *all* the damages suffered by the Applicant as a consequence of the acts of interference specified in the proceedings (para. 74). In keeping with this interpretation it considers the submission to fall outside its province under Article 53 of its Statute since it considers there is insufficient evidence to satisfy itself that *each concrete claim* is well founded in fact and law (para. 76). If the Court's interpretation of the submission were the only permissible one, I would concur without reservation in its conclusion.

But, in my view, it is not the only permissible one and it may not be the most desirable one. The Applicant both in its Memorial on the merits and in the oral proceedings has stressed the point that it is not at present submitting any claim for the payment of a certain amount of money. The submission itself only requests that the Court should declare that the acts of harassment and interference were unlawful and in consequence Iceland, as a matter of principle, is under a duty to make compensation. True the submission is couched in a form that is abstract but the question is whether this should deter the Court from passing upon it. I am not altogether persuaded that it is.

That Iceland's acts of harassment and interference (indicated in considerable detail in the proceedings) were unlawful hardly admits of doubt.

[1] All of the Applicant's submissions are set out in para. 12 of the Judgment and the fourth submission is also set out in para. 71.

They were committed *pendente lite* despite the obligations assumed by Iceland in the Exchange of Notes of 1961 which the Court had declared to be a treaty in force. That their unlawful character engaged the international responsibility of Iceland is also clear. In the *Phosphates in Morocco* case (*P.C.I.J., Series A/B, No. 74*, p. 28) the Court linked the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty right of another State". It is hardly necessary to marshal authority for so elementary a proposition. It follows that, in effect, the Court was merely asked to indicate the unlawful character of the acts and to take note of the consequential liability of Iceland to make reparation. It was not asked to assess damages.

The Court recognized this point in paragraph 74 of the Judgment but instead of stressing the limited nature of the submission it preferred to attribute to it a more extensive character. As indicated above, its interpretation led naturally to the conclusion that it could not accede to the submission in the absence of detailed evidence bearing on each concrete claim. While conceding the force of the Court's reasoning, I would have preferred the more restrictive interpretation.

I wish to add that on this matter I associate myself with the views expressed by Judge Sir Humphrey Waldock in his separate opinion.

Judge IGNACIO-PINTO makes the following declaration:

To my regret, I have been obliged to vote against the Court's Judgment. However, to my mind my negative vote does not, strictly speaking, signify opposition, since in a different context I would certainly have voted in favour of the process which the Court considered it should follow to arrive at its decision. In my view that decision is devoted to fixing the conditions for exercise of preferential rights, for conservation of fish species, and historic rights, rather than to responding to the primary claim of the Applicant, which is for a statement of the law on a specific point.

I would have all the more willingly endorsed the concept of preferential rights inasmuch as the Court has merely followed its own decision in the *Fisheries* case.

It should be observed that the Applicant has nowhere sought a decision from the Court on a dispute between itself and Iceland on the subject of the preferential rights of the coastal State, the conservation of fish species, or historic rights—this is apparent throughout the elaborate reasoning of the Judgment. It is obvious that considerations relating to these various needs, dealt with at length in the Judgment, are not subject to any dispute between the Parties. There is no doubt that, after setting

out the facts and the grounds relied on in support of its case, the Applicant has asked the Court only for a decision on the dispute between itself and Iceland, and to adjudge and declare:

> "That the unilateral extension by Iceland of its zone of exclusive fisheries jurisdiction to 50 nautical miles from the present baselines, . . . has, as against the Federal Republic of Germany, no basis in international law . . ." (Judgment, para. 12 (1)).

This is clear and precise, and all the other points in the submissions are only ancillary or consequential to this primary claim. But in response to this basic claim, which was extensively argued by the Applicant both in its Memorial and orally, and which was retained in its final submissions, the Court, by means of a line of reasoning which it has endeavoured at some length to justify, has finally failed to give any positive answer.

The Court has deliberately evaded the question which was placed squarely before it in this case, namely whether Iceland's claims are in accordance with the rules of international law. Having put this question on one side, it constructs a whole system of reasoning in order ultimately to declare that the Regulations issued by the Government of Iceland on 14 July 1972 and "constituting a unilateral extension of the exclusive fishing rights of Iceland to 50 nautical miles from the baselines specified therein are not opposable to the Government of the Federal Republic of Germany".

In my view, the whole problem turns on this, since this claim is based upon facts which, at least under present-day law and in the practice of the majority of States, are flagrant violations of existing international conventions. It should be noted that Iceland does not deny them. Now the facts complained of are evident, they undoubtedly relate to the treaty which binds the States which are Parties, for the Exchange of Notes of 19 July 1961 amounts to such an instrument. For the Court to consider after having dealt with the Applicant's fundamental claim in relation to international law, that account should be taken of Iceland's exceptional situation and the vital interests of its population, with a view to drawing inspiration from equity and to devising a solution for the dispute, would have been the normal course to be followed, the more so since the Applicant supports it in its final submissions. But it cannot be admitted that because of its special situation Iceland can *ipso facto* be exempted from the obligation to respect the international commitments into which it has entered. By not giving an unequivocal answer on that principal claim, the Court has failed to perform the act of justice requested of it.

For what is one to say of the actions and behaviour of Iceland which have resulted in its being called upon to appear before the Court? Its refusal to respect the commitment it accepted in the Exchange of Notes of 19 July 1961, to refer to the International Court of Justice any dispute which might arise on an extension of its exclusive fisheries zone, which

was in fact foreseen by the Parties, beyond 12 nautical miles, is not this unjustified refusal a breach of international law?

In the same way, when—contrary to what is generally recognized by the majority of States in the 1958 Geneva Convention, in Article 2, where it is clearly specified that there is a zone of high seas which is *res communis*—Iceland unilaterally decides, by means of its Regulations of 14 July 1972, to extend its exclusive jurisdiction from 12 to 50 nautical miles from the baselines, does it not in this way also commit a breach of international law? Thus the Court would in no way be open to criticism if it upheld the claim as well founded.

For my part, I believe that the Court would certainly have strengthened its judicial authority if it had given a positive reply to the claim laid before it by the Federal Republic of Germany, instead of embarking on the construction of a thesis on preferential rights, zones of conservation of fish species, or historic rights, on which there has never been any dispute, nor even the slightest shadow of a controversy on the part either of the Applicant or of the Respondent.

Furthermore, it causes me some concern also that the majority of the Court seems to have adopted the position which is apparent in the present Judgment with the intention of pointing the way for the participants in the Conference on the Law of the Sea now sitting in Caracas.

The Court here gives the impression of being anxious to indicate the principles on the basis of which it would be desirable that a general international regulation of rights of fishing should be adopted.

I do not discount the value of the reasons which guided the thinking of the majority of the Court, and the Court was right to take account of the special situation of Iceland and its inhabitants, which is deserving of being treated with special concern. In this connection, the same treatment should be contemplated for all developing countries in the same position, which cherish the hope of seeing all these fisheries problems settled, since it is at present such countries which suffer from the anarchy and lack of organization of international fishing. But that is not the question which has been laid before the Court, and the reply given can only be described as evasive.

In taking this viewpoint I am not unaware of the risk that I may be accused of not being in tune with the modern trend for the Court to arrogate a creative power which does not pertain to it under either the United Nations Charter or its Statute. Perhaps some might even say that the classic conception of international law to which I declare allegiance is out-dated; but for myself, I do not fear to continue to respect the classic norms of that law. Perhaps from the Third Conference on the Law of the Sea some positive principles accepted by all States will emerge. I hope that this will be so, and shall be the first to applaud—and furthermore I shall be pleased to see the good use to which they can be put, in particular for the benefit of the developing countries. But since I am above all faithful to judicial practice, I continue fervently to urge the

need for the Court to confine itself to its obligation to state the law as it is at present in relation to the facts of the case brought before it.

I consider it entirely proper that, in international law as in every other system of law, the existing law should be questioned from time to time —this is the surest way of furthering its progressive development—but it cannot be concluded from this that the Court should, for this reason and on the occasion of the present dispute between Iceland and the Federal Republic of Germany emerge as the begetter of certain ideas which are more and more current today, and are even shared by a respectable number of States, with regard to the law of the sea, and which are in the minds, it would seem, of most of those attending the Conference now sitting in Caracas. It is advisable, in my opinion, to avoid entering upon anything which would anticipate a settlement of problems of the kind implicit in preferential and other rights.

To conclude this declaration, I think I may draw inspiration from the conclusion expressed by the Deputy Secretary of the United Nations Sea-Bed Committee, Mr. Jean-Pierre Lévy, in the hope that the idea it expresses may be an inspiration to States, and Iceland in particular which, while refraining from following the course of law, prefers to await from political gatherings a justification of its rights.

I agree with Mr. Jean-Pierre Lévy in thinking that:

> "... it is to be hoped that States will make use of the next four or five years to endeavour to prove to themselves and particularly to their nationals that the general interest of the international community and the well-being of the peoples of the world can be preserved by moderation, mutual understanding, and the spirit of compromise; only these will enable the Third Conference on the Law of the Sea to be held and to succeed in codifying a new legal order for the sea and its resources" ("La troisième Conférence sur le droit de la mer", *Annuaire français de droit international*, 1971, p. 828).

In the expectation of the opening of the new era which is so much hoped for, I am honoured at finding myself in agreement with certain Members of the Court like Judges Gros, Petrén and Onyeama for whom the golden rule for the Court is that, in such a case, it should confine itself strictly within the limits of the jurisdiction conferred on it.

Judge NAGENDRA SINGH makes the following declaration:

There are certain valid reasons which weigh with me to the extent that they enable me to support the Judgment of the Court in this case and

hence I consider them of such importance as to be appropriately emphasized to convey the true significance of the Judgment—its extent as well as its depth. These reasons, as well as those aspects of the Judgment which have that importance from my viewpoint are briefly stated as follows:

I

While basing its findings on the bilateral law, namely the Exchange of Notes of 1961 which has primacy in this case, the Court has pronounced upon the first and second submissions of the Applicant's Memorial on the merits, in terms of non-opposability to the Federal Republic of Germany as requested by the Applicant. This suffices for the purpose of that part of the Judgment. It was, therefore, not necessary for the Court to adjudicate on that aspect of the first submission which relates to the general law.

In the special circumstances of this case the Court has, therefore, not proceeded to pronounce upon that particular request of the Applicant which asks the Court to declare that Iceland's extension of its exclusive fishery limit to 50 nautical miles has no basis in international law which amounts to asking the Court to find that such extension is *ipso jure* illegal and invalid *erga omnes.* Having refrained from pronouncing on that aspect it was, consequently, unnecessary for the Court to pronounce on the Applicant's legal contention in support of its first submission, namely, that a customary rule of international law exists today imposing a general prohibition on extension by States of their fisheries jurisdiction beyond 12 miles.

There is still a lingering feature of development associated with the general law. The rules of customary maritime law relating to the limit of fisheries jurisdiction have still been evolving and confronted by a widely divergent and, discordant State practice, have not so far crystallized. Again, the conventional maritime law though substantially codified by the Geneva Conferences on the Law of the Sea of 1958 and 1960 has certain aspects admittedly left over to be settled and these now constitute, among others, the subject of subsequent efforts at codification. The question of the extent of fisheries jurisdiction which is still one of the unsettled aspects could not, therefore, be settled by the Court since it could not "render judgment *sub specie legis ferendae,* or anticipate the law before the legislator has laid it down".

This is of importance to me but I do not have to elaborate this point any further since I have subscribed to the views expressed by my colleagues in the joint separate opinion of the five Judges wherein this aspect has been more fully dealt with.

II

The contribution which the Judgment makes towards the development of the Law of the Sea lies in the recognition which it gives to the concept of preferential rights of a coastal State in the fisheries of the adjacent waters particularly if that State is in a special situation with its population dependent on those fisheries. Moreover, the Court proceeds further to recognize that the law pertaining to fisheries must accept the primacy for the need of conservation based on scientific data. This aspect has been properly emphasized to the extent needed to establish that the exercise of preferential rights of the coastal State as well as the historic rights of other States dependent on the same fishing grounds, have all to be subject to the over-riding consideration of proper conservation of the fishery resources for the benefit of all concerned. This conclusion would appear warranted if this vital source of man's nutrition is to be preserved and developed for the community.

In addition there has always been the need for accepting clearly in maritime matters the existence of the duty to "have reasonable regard to the interests of other States"—a principle enshrined in Article 2 of the Geneva Convention of the High Seas 1958 which applies even to the four freedoms of the seas and has weighed with the Court in this case. Thus the rights of the coastal State which must have preference over the rights of other States in the coastal fisheries of the adjacent waters have nevertheless to be exercised with due regard to the rights of other States and the claims and counter-claims in this respect have to be resolved on the basis of considerations of equity. There is, as yet, no specific conventional law governing this aspect and it is the evolution of customary law which has furnished the basis of the Court's Judgment in this case.

III

The Court, as the principal judicial organ of the United Nations, taking into consideration the special field in which it operates, has a distinct role to play in the administration of justice. In that context the resolving of a dispute brought before it by sovereign States constitutes an element which the Court ought not to ignore in its adjudicatory function. This aspect relating to the settlement of a dispute has been emphasized in more than one article of the Charter of the United Nations. There is Article 2, paragraph 3, as well as Article 1, which both use words like "*adjustment* or *settlement* of international disputes or situations", whereas Article 33 directs Members to "*seek a solution*" of their disputes by peaceful means.

Furthermore, this approach is very much in accordance with the jurisprudence of the Court. On 19 August 1929 the Permanent Court of

International Justice in its Order in the case of the *Free Zones of Upper Savoy and the District of Gex* (*P.C.I.J., Series A, No. 22,* at p. 13) observed that the judicial settlement of international disputes is simply an alternative to the direct and friendly settlement of such disputes between the parties. Thus if negotiations become necessary in the special circumstances of a particular case the Court ought not to hesitate to direct negotiations in the best interests of resolving the dispute. Defining the content of the obligation to negotiate, the Permanent Court in its Advisory Opinion of 1931 in the case of *Railway Traffic between Lithuania and Poland* (*P.C.I.J., Series A/B, No. 42,* 1931, at p. 116) observed that the obligation was "not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements" even if "an obligation to negotiate does not imply an obligation to reach an agreement". This does clearly imply that everything possible should be done not only to promote but also to help to conclude successfully the process of negotiations once directed for the settlement of a dispute. In addition we have also the *North Sea Continental Shelf* cases *(I.C.J. Reports 1969)* citing Article 33 of the United Nations Charter and where the Parties were to negotiate in good faith on the basis of the Judgment to resolve the dispute.

Though it would not only be improper but quite out of the question for a court of law to direct negotiations in every case or even to contemplate such a step when the circumstances did not justify the same, it would appear that in this particular case negotiations appear necessary and flow from the nature of the dispute, which is confined to the same fishing grounds and relates to issues and problems which best lend themselves to settlement by negotiation. Again, negotiations are also indicated by the nature of the law which has to be applied, whether it be the treaty of 1961 with its six months' notice in the compromissory clause provided ostensibly for negotiations or whether it be reliance on considerations of equity. The Court has, therefore, answered the third submission of the Applicant's Memorial on the merits in the affirmative and accepted that negotiations furnished the correct answer to the problem posed by the need for equitably reconciling the historic right of the Applicant based on traditional fishing with the preferential rights of Iceland as a coastal State in a situation of special dependence on its fisheries. The Judgment of the Court, in asking the Parties to negotiate a settlement, has thus emphasized the importance of resolving the dispute in the adjudication of the case.

No court of law and particularly not the International Court of Justice could ever be said to derogate from its function when it gives due importance to the settlement of a dispute which is the ultimate objective of all adjudication as well as of the United Nations Charter and the Court, as its organ, could hardly afford to ignore this aspect. A tribunal, while discharging its function in that manner, would appear to be adjudicating

in the larger interest and ceasing to be narrow and restrictive in its approach.

Thus, when confronted with the problem of its own competence in dealing with that aspect of the dispute which relates to the need for conservation and the exercise of preferential rights with due respect for historic rights, the Court has rightly regarded those aspects to be an integral part of the dispute. Surely, the dispute before the Court has to be considered in all its aspects if it is to be properly resolved and effectively adjudicated upon. This must be so if it is not part justice but the whole justice which a tribunal ought always to have in view. It could, therefore, be said that it was in the overall interests of settlement of the dispute that certain parts of it which were inseparably linked to the core of the conflict were not separated in this case to be left unpronounced upon. The Court has, of course, to be mindful of the limitations that result from the principle of consent as the basis of international obligations, which also governs its own competence to entertain a dispute. However, this could hardly be taken to mean that a tribunal constituted as a regular court of law when entrusted with the determination of a dispute by the willing consent of the parties should in any way fall short of fully and effectively discharging its obligations. It would be somewhat disquieting if the Court were itself to adopt either too narrow an approach or too restricted an interpretation of those very words which confer jurisdiction on the Court such as in the case "the extension of the fishery jurisdiction of Iceland" occurring in the compromissory clause of the Exchange of Notes of 1961. Those words could not be held to confine the competence conferred on the Court to the sole question of the conformity or otherwise of Iceland's extension of its fishery limits with existing legal rules. Similarly, the Court could not hold that it was without competence to deal with the fourth submission of the Applicant pertaining to a claim for compensation against Iceland since that submission arises out of and relates to the dispute. The Court, therefore, need not lose sight of the consideration relating to the settlement of the dispute while remaining strictly within the framework of the law which it administers and adhering always to the procedures which it must follow.

IV

For purposes of administering the law of the sea and for proper understanding of matters pertaining to fisheries as well as to appreciate the facts of this case, it is of some importance to know the precise content of the expression "fisheries jurisdiction" and for what it stands and means. The concept of fisheries jurisdiction does cover aspects such as enforcement of conservation measures, exercise of preferential rights and

respect for historic rights since each one may involve an element of jurisdiction to implement them. Even the reference to "extension" in relation to fisheries jurisdiction which occurs in the compromissory clause of the 1961 treaty could not be confined to mean merely the extension of a geographical boundary line or limit since such an extension would be meaningless without a jurisdictional aspect which constitutes, as it were, its juridical content. It is significant, therefore, that the preamble of the Truman Proclamation of 1945 respecting United States coastal fisheries refers to a "jurisdictional" basis for implementing conservation measures in the adjacent sea since such measures have to be enforced like any other regulations in relation to a particular area. This further supports the Court's conclusion that it had jurisdiction to deal with aspects relating to conservation and preferential rights since the 1961 treaty by the use of the words "extension of fisheries jurisdiction" must be deemed to have covered those aspects.

V

Another aspect of the Judgment which has importance from my viewpoint is that it does not "preclude the Parties from benefiting from any subsequent developments in the pertinent rules of international law" (para. 77). The adjudicatory function of the Court must necessarily be confined to the case before it. No tribunal could take notice of future events, contingencies or situations that may arise consequent on the holding or withholding of negotiations or otherwise even by way of a further exercise of jurisdiction. Thus, a possibility or even a probability of changes in law or situations in the future could not prevent the Court from rendering Judgment today.

Judges FORSTER, BENGZON, JIMÉNEZ DE ARÉCHAGA, NAGENDRA SINGH and RUDA append a joint separate opinion to the Judgment of the Court; Judges DE CASTRO and Sir Humphrey WALDOCK append separate opinions to the Judgment of the Court.

Judges GROS, PETRÉN and ONYEAMA append dissenting opinions to the Judgment of the Court.

(Initialled) M.L.

(Initialled) S.A.

Annex 60

AD HOC ARBITRATION

THE AMERICAN INDEPENDENT OIL COMPANY V. THE GOVERNMENT OF THE STATE OF KUWAIT

FINAL AWARD

---

24 March 1982

Tribunal:
Hamed Sultan (Co-Arbitrator)
Paul Reuter (President)
Gerald Gray Fitzmaurice (Co-Arbitrator)

Table of Contents

Final Award

SECTION I. Account of the Proceedings

i. A dispute having arisen between the Government of the State of Kuwait (hereinafter called "The Government") and the American Independent Oil Company (hereinafter called "Aminoil"), an Arbitration Agreement was signed in Kuwait by the two Parties on 23 June,1979.

ii. Its terms are as follows :
ARBITRATION AGREEMENT

The Government of the State of Kuwait (hereinafter ref erred to as "the Government") and American Independent Oil Company, a corporation organized under the laws of the State of Delaware in the United States of America (hereinafter referred to as "the Company") hereby agree as follows:

I

Whereas, on 28 June 1948 the Government and the Company entered into a Concession Agreement with respect to petroleum and related resources in what was then the Kuwait-Saudi Arabia Neutral Zone, and subsequently entered into other agreements amending and supplementing that Agreement ; and

Whereas, the Government by Decree Law no 124 of 19 September 1977 declared the Agreement of 28 June 1948 to be terminated and the property and assets of the Company to be nationalized, and

Whereas, differences and disagreements have arisen between the Government and the Company with respect to the aforesaid Concession Agreement as amended, and the actions of the Government and the Company in relation thereto, and with respect to various payments made or allegedly owed by the Parties to each other; and

Whereas, both the Government and the Company are desirous of resolving all differences and disagreements between them on the basis of law ;

The Parties hereby submit the said differences and disagreements to transnational arbitration as provided in the following articles.

II

1. The arbitral tribunal (hereinafter referred to as "the Tribunal") shall be composed of three members, one appointed by each Party as recited in paragraph 2 of this Article, and a third member who shall act as president, to be appointed by The President of the International Court of Justice.

2. The member of the Tribunal appointed by the Government shall be Professor Doctor Hamed Sultan. The member appointed by the Company shall be Sir Gerald G. Fitzmaurice, G.C.M.G., Q.C.

3. If at any time a vacancy shall occur on the Tribunal by reason of death, resignation, or incapacity for more than sixty days of any member, such vacancy shall be filled in the same manner as for the original appointment to that position. If the vacancy is not so filled within sixty days after its occurrence, either Party may request the President of the International Court of Justice to make the necessary appointment, and such appointment shall be final and binding on the Parties. Upon the filling of a vacancy, the proceedings shall be resumed at the point at which the vacancy occurred, after allowing any new member sufficient time to familiarise himself with the proceedings up to that time.

4. Upon its constitution, the Tribunal shall appoint a secretary who shall possess qualifications as a lawyer in the country of the place of arbitration, who shall assist the Tribunal in the administrative arrangements for the proceedings. The Tribunal may also employ such stenographic and other assistance as it deems necessary.

III

I. The Parties recognise that the restoration of the Parties to their respective positions prior to 2C September 1977 and/or the resumption of operations under the 28 June 1948 Agreement (as amended) would be impracticable in any event, and the Company will therefore seek monetary damages instead. Accordingly, the Parties agree to limit their claims against each other to claims for monetary compensation and/or monetary damages.

The Tribunal shall decide according to law :

i) The amount of compensation, if any, payable by the Government to the Company in respect of the assets acquired by the Government under Article 2 of Decree Law n° 124.

ii) The amount of damages, if any, payable by the Government to the Company in respect of termination of the Agreement of 28 June 1948 by Article *I of Decree* Law n° 124.

III) The amount payable to the Government by the Company, and/or the amount payable to the Company by the Government, in respect of royalties, taxes or other obligations of the Company, in which connection the Tribunal shall determine the validity or invalidity of any amendments or supplements to the 28 June 1948 Agreement which are relevant.

IV) The amount of interest, if any, payable by either Party to the other, the rate of such interest and the date from which it shall be payable to be awarded at the discretion of the Tribunal.

The law governing the substantive issues between the Parties shall be determined by the Tribunal, having regard to the quality of the Parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world.

IV

Unless otherwise agreed by the Parties, and subject to any mandatory provisions of the procedural law of the place in which the arbitration is held, the Tribunal shall prescribe the procedure applicable to the arbitration on the basis of natural justice and of such principles of transnational arbitration procedure as it may find applicable, and shall regulate all matters relating to the conduct of the arbitration not otherwise provided for herein.

The Tribunal shall hold a first meeting with the Parties as soon as practicable after being constituted, for the purpose of establishing the rules of procedure to govern the arbitration. This meeting, together with any other preliminary meetings held to determine procedural matters, shall not be counted for the purpose of calculating the time limit specified in subparagraph 3(viii) of this Article.

In determining the procedures for the arbitration, the Tribunal shall observe the following provisions :

i) The language of the proceedings shall be English. However, the Parties may put forward references to authorities, decisions, awards, opinions and texts (or quotations therefrom) in French without translation.

ii) The seat of the arbitration shall be Paris.

iii) The Tribunal may, if it deems appropriate, engage experts. The Parties may also call such expert testimony (written or oral) as they wish. Both Parties shall have the right to question any such experts.

iv) The Parties shall also have the right to present the oral testimony of witnesses. The Parties undertake to use their best efforts to present witnesses only to the extent necessary to establish their claims and to refrain from calling witnesses where the presentation of documentary evidence will be equally satisfactory. Both Parties hereby express their intention that the oral hearings shall not he unduly prolonged.

v) All decisions of the Tribunal shall be by majority vote. All awards, preliminary or final, shall be in writing and signed by each arbitrator and shall state the reasons upon which the award is based. In the event that one arbitrator refuses to sign the award, the two arbitrators forming the majority shall state in the award the circumstances in which the signature of the remaining arbitrator has been withheld.

vi) If either Party fails within the prescribed time to appear or to present its case at any stage of the proceedings, the Tribunal may of its own motion or at the request of the other Party proceed with the arbitration and make an award.

vii) The Tribunal shall keep records of all its proceedings and decisions, and a verbatim record of all oral hearings.

viii) The final award shall be given within 18 months from the date of the first oral hearing on the substantive issues following the exchange of the Parties' first written submissions on those issues. The Tribunal may extend this period in its discretion. However, such extension shall not exceed 6 months, except that such period shall be extended by the number of days by which the Tribunal may be unable to conduct its business due to unforeseen circumstances beyond the control of the Tribunal or the Parties, such as periods of delay due to the death, resignation or incapacity of any member of the Tribunal, or except with the consent of the Parties.

V

The final award of the Tribunal shall be binding on both Parties who hereby expressly waive all rights of recourse to any Court, except such rights as cannot be waived by the law of the place of

arbitration. Each Party undertakes to comply therewith promptly and in good faith and within 120 days from the date of the final award.

VI

Each Party will pay its own costs and expenses. The expenses of the Tribunal, including the honoraria of its members, the remuneration of the secretary and staff, and the expenses incurred by them, shall be borne by the Parties in equal shares.

VII

1. This Agreement shall enter into force upon its signature by duly authorised representatives of both Parties. It shall be executed in three originals: one for each Party, and one to be delivered to the President of the Tribunal for deposit in the records of the Tribunal.

2. On the entry into force of this Agreement each Party will. discontinue any other proceedings it may have instituted against the other.

Signed on behalf of the Government at Kuwait on the 23rd day of July, 1979, corresponding to the 29th day of Shaban, 1399.

For the Government of the State of Kuwait :

SHEIKH ALI AL KHALIFA AL SABAH MINISTER OF OIL

Signed on behalf of the Company at Kuwait on the 23rd day of July, 1979, corresponding to the 29th day of Shaban, 1399, pursuant to authority granted by a resolution of the Company's Board of Directors adopted on the 5th day of July, 1979.

For American Independent Oil Company :

GEORGE E.TRIMBLE PRESIDENT

iii. As provided by Article VII, paragraph 1, of the Arbitration Agreement, the latter entered into force on the day of its signature.

iv. In application of its Article II, paragraph 1 the two Parties, on 23 July,1979, addressed a request to the President of the International Court of Justice for the appointment of a President of the Tribunal. By a letter dated 1 November, 1979, the President of the Court informed the Parties of the appointment of Monsieur Paul Reuter, Professor of Law at the University of Paris.

v. On 19 December, 1979, the Tribunal held a first meeting with the Parties in Paris, in order to organize the proceedings. At this meeting each of the Parties submitted to the Tribunal a draft project for the Rules of Procedure. The Tribunal, however, decided to leave the adoption of the Rules until later, but fixed 2 June,1980 as the date for the simultaneous deposit of the Parties' written Memorials, it being understood that the Counter-Memorials were to be delivered 120 days after that date, and the Replies 60 days after the Counter-Memorials.

vi. During the same Paris meeting, the Tribunal appointed Monsieur Philippe Cahier, Professor of Law at the Graduate Institute of International Studies, Geneva, as Secretary to the Tribunal, and Monsieur Bernard Audit, Professor of Law at the University of Paris, as Deputy-Secretary.

vii. At a private meeting of the Tribunal held in Geneva in July 1980, Rules of Procedure were adopted on the 16th of that month pursuant to Article IV, paragraph 2, of the Arbitration Agreement, in order to supplement and complete the procedural provisions of that Article. These Rules are set out in the Annex to the present Section.

viii. The Parties deposited their Memorials with the Secretary on 2 June,1980.

ix. By a letter dated 21 August, 1980, the Government of Kuwait requested an extension of the time-limit for depositing the Counter-Memorials, and Aminoil having been consulted, the Tribunal, by an Order of 12 September,1980, fixed 5 January, 1981 as the date for the delivery by both Parties of their Counter-Memorials, which were duly deposited on that date.

x. Aminoil, having on 30 January, 1981 requested an extension of the time-limit for the deposit of the Replies, and the Government of Kuwait having made no objection, the Tribunal, by an Order of 25 February,1981, fixed 27 April, 1981 as the date for such deposit, and this date was duly adhered to by both Parties.

xi. On 26 June,1981 the Tribunal held a meeting with the Parties in Geneva in order to settle various points in connection with the forthcoming oral hearings. Following upon this meeting, the Tribunal, by an Order dated 30 June, 1981, fixed 16 November as the date for the opening of the hearings in Paris. It was also provided that a week of the hearings should be devoted to receiving the oral evidence of witnesses and experts. In head X of the Order it was stated that

xii. "The Tribunal takes note of the mutual intention of the Parties to direct their respective accountants to produce, if possible, a joint report on questions of quantum or, if this is not possible, to produce separate reports for the Tribunal before 1 November".

xiii. As regards the order in which the Parties were to plead, head IV(a) of the Tribunal's June 30 Order specified that
"The questions to be dealt with by the Parties in accordance with the preceding paragraphs, and the Party to speak first on each question, without prejudice to the burden of proof, shall be as follows :

1. The system of law governing the arbitration as a whole and the system of law applicable to the substantive issues in the case : the Government to start.

2. The agreements at any time existing between the Parties before 1973, and the meaning and effect of particular clauses in issue between them : the Government to start.

3. The validity and effect of the instruments of 1973, including the question of the Abu Dhabi formula : Aminoil to start.

4. The validity and effect of the Government's Decree Law n° 124 of 1977 : Aminoil to start.

4. The breaches alleged by Aminoil : Aminoil to start.

6. The breaches alleged by the Government : the Government to start.

7. In so far as not already dealt with under previous heads and in any case exclusive of all questions of pure quantum :

i) Aminoil's claims : Aminoil to start;

ii) the Government's claims : the Government to start."

It was added (head IV(b)) that

"The wording of the foregoing questions implies no taking of position by the Tribunal in regard to any of them."

xiv. On 30 October, 1981, the Chartered Accountant firms of Peat, Marwick, Mitchell and Co., London, and Peat Marwick, Mitchell and Co., New York, sent the Tribunal a Joint Report on questions of quantum. In the absence of agreement on certain points, the first of the above mentioned firms deposited a separate Report on behalf of the Government of Kuwait.

xv. Under head VIII of its Order of 30 June, 1981, the Tribunal had provided for a second stage of the oral hearings to be devoted exclusively to questions of quantum. However, this was eventually found by the Tribunal to be unnecessary, and did not take place.

xvi. Oral hearings took place in Paris at the Hotel Hilton, from 16 November to 17 December, 1981. The Tribunal heard, on behalf of the Government of Kuwait Dr. Abdul Rasul Abdul Reda, as Agent, Mr D. A. Redfern, Professor A. S. El Koshen and Mr. J. m. H. Hunter, as Counsel; and on behalf of Aminoil Mr William L. Owen, as Agent, Maître Jean-Flavien Lalive, Mr. R. Young, Mr. J. L. O'Donnell and Mr. W. M. Ballantyne, as Counsel.

xvii. In the course of the week of 7 to 15 December, 1981 there were heard as witnesses and experts -on behalf of the Government of Kuwait : His Excellency Mr. Abdul Rahman Al Attiqi, Miss Siham Razzouki, Professor Z. Mikdashi, Mr. A. J. Zak and Mr Y. Matsui, - and on behalf of Aminoil : Messrs. L. Ison, *J*- T. Mitchell, J. B. Watson, T. M. Domguian, G L. Gates and W. C. Dougherty,and Dr. C. R. Hocott.

xviii. The Tribunal wishes to express its great appreciation for the help it has received from the Parties throughout the proceedings in the form of written and oral statements and documentation that have been in conformity with the highest professional standards.

xix. The Conclusions of the Parties, as given in their respective written Replies were as follows :

For the Government of Kuwait (GR p. 195) :

"The Government's claims against Aminoil may be summarised as follows : -

(1) Royalties and taxes	
(a) balance due under the 1973 Agreement for the period 1st January to 19th September, 1977 (see paragraph 3.4 et seq).	$32,876,000
(b) amount due for the period 1st November, 1974 to 19th September, 1977 in accordance with the principles established by the Abu Dhabi Formula (see paragraph 3,107 et seq).	$92,007,000 (or such amount as the Tribunal determines to be equitable)
(2) Aminoil's liabilities to third parties (see paragraph 3,153 et seq).	$18,588,867
(3) Aminoil's operations and installations	
(a) damages in relation to "lost oil" estimated at 190 million barrels -the Government's half share in the joint operations. (See para graph 5.21 of the Government's Counter-Memorial)	$5,780,750,000 (based on a figure of $30,425 per barrel and subject to adjustment).
(b) the Government's share of expenditure required at the oil fields at Wafra : -	
(i) repairing Active wells	$8,285,950
(ii) properly plugging and abandoning suspended wells	$3,346,350
(iii) other items referred to in REMI's reports (e.g. repairs to pipelines)	An amount to be determined by the Tribunal
(c) expenditure required to bring the refinery at Mina Abdullah up to a proper standard. The quantum of this claim depends upon the Tribunal's of the basis of compensation for the refinery (see paragraph 4,204)	$65,000,000 (based on assessment made by JGC of major items, and subject to adjustment)
(4) Interest	An amount to be determined by the Tribunal."

For Aminoil (AR p. 548) :

" Aminoil respectfully submits that the Tribunal should include in its Award :

(A) An award to Aminoil of the total of the following amounts :

(1) Lost profits in the amount of $2,587,136,000 ;

(2) If, for any reason, lost profits throughout the entire Concession period are not awarded, the value of physical facilities in the amount of $185,300,000 or such lesser amount as is appropriate by

reference to Table 12 of Annex XIII to Aminoil's Memorial ;

(3) Aminoil's other assets and liabilities in an amount as may be agreed by the Parties' respective auditors or, in the absence of agreement, the amount of $30,356,000 ;

(4) Overpayments made by Aminoil to the Government in the amount of 2423,072,000 ;

and

(5) Interest on the above amounts, from 19 September 1977 or 19 March 1980, as appropriate,

(B) The rejection of all the Government's claims made against Aminoil, except that an amount be credited to the Government for appropriate liabilities of Aminoil paid or assumed by the Government."

SECTION II. Statement of the Facts

xx. Aminoil is an American Company incorporated in 1947 in the State of Delaware with the object of exploring for, producing, refining and selling petroleum, natural gas and other hydrocarbons. At that time it was controlled by a group of other American oil Companies.

xxi. After having, on 26 June,1948, obtained the agrément of the Government of the United Kingdom, which was then in special relations with the State of Kuwait, Aminoil was, on 28 June, granted a Concession by its Ruler for the exploration and exploitation of petroleum and natural gas in what was then called the Kuwait "Neutral Zone". The location of the frontier between Kuwait and Saudi Arabia in this region was uncertain, and the British authorities, acting in agreement with those two countries, had in 1922 established this neutral zone to which both had access.

xxii. On 7 July, 1965, Kuwait and Saudi Arabia concluded a Treaty by which they shared this zone, henceforth to be known as the "Divided Zone". Aminoil's Concession was situated in the Kuwait part of the Divided Zone, while Saudi Arabia had granted a Concession in its part of the Zone to the Getty Oil Company. The two Companies, in their mutual interest, concluded an agreement on 26 June, 1956, approved by the Governments of these two States, and established a common and coordinated programme of exploitation in the Zone, with a common Authority (a Joint Operations Committee) to supervise their respective field operations.

xxiii. In 1961 the special relationship between Kuwait and the United Kingdom came to an end, and on 11 November, 1962 the Constitution of Kuwait was promulgated.

xxiv. The principal clauses of Aminoil's 1948 Concession relevant to the present dispute were as follows : By Article 1 it was provided that

"The period of this Agreement shall be sixty (60) years from the date of signature".

Article 2(C) provided that

"The Company shall conduct its operations in a workmanlike manner and by appropriate scientific methods and shall take all reasonable measures to prevent the ingress of water to any petroleum-bearing strata and shall duly close any unproductive holes drilled by it and subsequently abandoned. The Company shall keep the Shaikh and His Foreign Representative informed generally as to the progress and result of its drilling operations but such information shall be treated as confidential".

Article 3 provided for the immediate payment to the Ruler of a sum of 625,000 dollars, followed after thirty days by a sum of 7.25 million dollars, and subsequently by an annual royalty of 2,50 dollars for every ton of Aminoil's petroleum won and saved (as defined by the Concession Agreement) subject to a minimum annual royalty of 625,000 dollars. There were also other payments clauses that need not be detailed here.

Article 3(h) - the "Gold Clause" - provided that

"Any obligation hereunder to pay a specified sum in United States Dollars shall be discharged by the payment of a sum in United States Dollars equal to the official United States Government purchase price in force at the date of payment for such quantity of gold, of the standard and fineness prevailing at the date of the signature hereof, as such specified sum would have been sufficient to purchase at the date of signature of this Agreement at the official United States Government price then in force. The principle underlying this paragraph is that the present value of the United States Dollar shall be maintained throughout the term of this Agreement".

By Article 11 it was provided that the Ruler would have the right to put an end to the Concession before the expiry of the covenanted term of 60 years in any of three specified cases, viz. (a) failure by the Company to perform its obligations under Article 2 (vide supra)"in respect of geological or geophysical exploration or drilling"; (b) failure by the Company to make any of the payments due under Article 3; and (c)"if the Company shall be in default under the arbitration provisions of Article 18" (vide infra).

By Article 13 it was provided that, at the end of the Concession,

"... all the movable and immovable property of the Company in the State of Kuwait and said Neutral Zone shall be handed over to the Shaikh free of cost. Producing wells or borings at the time of such expiry shall be handed over in reasonably good order and repair".

Article 17 provided that

"The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in article 11. No alteration shall be made in the terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interest of both parties to make certain alterations, deletions or additions to this Agreement".

Finally, Article 18 contained provisions for the reference to arbitration of "any difference or dispute... between the Parties... concerning the interpretation or execution hereof, or anything herein contained or in connection herewith, or the rights or liabilities of either Party hereunder".

xxv. Two other oil Companies were operating in Kuwait at about this time. Much the most important one, the Kuwait Oil Company (KOC), was jointly owned by the British Petroleum Company (BP) and the Gulf Oil Corporation (Gulf), and had had a Concession since 1934. The other, Arabian Oil Company (AOC), was Japanese owned, and in 1958 obtained a Concession relating to the Continental Shelf of the Divided Zone, outside a six-mile territorial sea belt and exclusive of certain islands.

xxvi. From information given by the Government of Kuwait (GM p. 31), it appears that Aminoil's share of the State's total crude oil production was always proportionally slight, amounting for instance, even as late as 1972, to only some 2.5% of total Kuwait output. Its undertaking was, from the start, carried on under special difficulties of extraction and refining, due inter alia to the nature of the ground and the chemical composition of the oil taken from it. It was what is called a "high cost, low yield" enterprise - see paragraph (xxxv) below.

xxvii. Aminoil's commercial production and exportation of petroleum products began in 1954, and in 1958 its refinery was opened at Mina Abdullah.

xxviii. As mentioned earlier, an Agreement dated 19 June, 1961 between the Ruler of Kuwait and the Government of the United Kingdom put an end to the special relationship between the two countries and Kuwait became fully independent.

xxix. Already during the preceding months, the Government of Kuwait and Aminoil had entered into negotiations for the revision of the 1948 Concession, which led to the signature on 29 July, 1961 of a Supplemental Agreement.

xxx. By Article 11, this Supplemental Agreement, was to be "construed as an amendment and supplement to the Principal Agreement" [the 1948 Concession], and "all the provisions of the Principal Agreement shall continue in full force and effect except in so far as they are inconsistent with or modified by this [Supplemental] Agreement".

xxxi. One of the main objects of the Supplemental Agreement was to modify the financial clauses of the 1948 Concession, resulting in increased payments to the Ruler. In addition, it subjected the Company to Kuwait Income Tax law, the details being embodied in a separate "Submission to Tax Agreement", also dated 29 July 1961. By this, Aminoil was made liable to a levy of 50% as from 1955, and of 57% as from 1961. To this was added by Article 3 of the Supplemental Agreement, a "make-up" payment equal to the excess, if any, of "the greater of... 50% of the Oil Profit or... 57% of the Oil Income" over "the aggregate of" the royalty and income-tax payments due under the Agreement.

xxxii. Under Article 4, the Company had the obligation both to "establish and announce", or procure the establishment and announcing, of "its posted prices".

Article 6 (2) provided that

"No moneys paid by the Company to the Ruler under this Agreement shall, except in the case of an error in accounting, be returnable in any circumstance whatever".

xxxiii. By Article 7 (g) a new Article 11 was substituted for the existing Article 11 of the 1948 Concession -

see supra - which was deleted. The new Article 11 (paragraph (A)) gave the Ruler the right to terminate the Concession in the event of a default by the Company in its payments, and then continued as follows :

" (B) Save as aforesaid this Agreement shall not be terminated before the expiration of the period specified in article 1 hereof except by surrender as provided in article 12 or if the Company shall be in default under the arbitration provisions of article 18.

(C) In any of the above mentioned cases the Ruler shall be entitled to terminate this Agreement without prejudice to any antecedent rights hereunder and the Company shall at that time transfer to the Ruler all its movable and immovable property within the State of Kuwait and the Concession Area to the extent that such property is directly employed in operations hereunder together with all such rights as it may have to the use of property so employed so far as such rights are transferable to whomsoever belonging, which are at that time enjoyed by it provided that the Ruler assumes from the date of transfer all the obligations devolving upon the Company in respect of its enjoyment of the said rights".

xxxiv. Finally a provision was incorporated as Article 9, reading as follows :

"If, as a result of changes in the terms of concessions now in existence or as a result of the terms of concessions granted hereafter, an increase in benefits to Governments in the Middle East should come generally to be received by them, the Company shall consult with the Ruler whether in the light of all relevant circumstances, including the conditions in which operations are carried out, and taking into account all payments made, any alterations in the terms of the agreements between the Ruler and the Company would be equitable to the parties".

xxxv. A third understanding was reached, equally dated 29 July, 1961, in the shape of a "Confidential Letter", containing details and arrangements for taking account of the special conditions of Aminoil's undertaking. These were indeed technically complex. The crude oil was not of good quality; it was a low gravity oil, with high sulphur-hydrogen-sulphide, water and salt content, requiring expensive processing and refining, before marketing.
The great number of wells, requiring extensive gathering facilities, was also one of the factors of high cost. The marketing of such a crude oil and its product was difficult.

xxxvi. With reference to Article 9 (supra) of the Supplemental Agreement, it was provided by paragraph 9 of the Confidential Letter, as being understood, that "the word 'benefits' includes arrangements not involving payments".

o o o

xxxvii. On 11 November, 1962, as mentioned earlier, a Constitution was promulgated by the Ruler of Kuwait. Its Article 18 provided :

"Private ownership is safeguarded. No person shall be prevented from disposing of his property

save within the limits of the Law; and no person shall suffer expropriation save for the public benefit in the cases determined and in the manner prescribed by Law provided that he be equitably compensated therefor."

By Article 21 of the Constitution : "All of the natural wealth and resources are the property of the State."

Finally by Article 152 :

"Any concession for the exploitation of a natural resource or of a public utility shall be granted only by Law and for a determinate period."

xxxviii. Owing to the conditions of the petroleum market, the end of the 1960s was a difficult period for Aminoil which suffered financial losses and saw its production go down. In 1970 its shares were wholly bought by R. J. Reynolds Industries Inc..

xxxix. In the course of the sixties, negotiations had taken place between the Government and Aminoil concerning the financial aspects of the undertaking, particularly with respect to the expensing of royalties, i.e. the charging of royalty payments as a cost against the Company's income rather than as a credit against income tax obligations (resulting in greater tax obligations for the Company). A draft agreement was prepared in 1968 but was never signed.

xl. In February 1971, an agreement known as the Teheran Agreement was concluded between some of the Gulf States and a number of the major oil Companies. Its object was to apply various resolutions of OPEC, and in respect of the period 1971 to 1975 it provided for an increase in posted prices and an increase in the level of tax payments to 55%, the Companies receiving in exchange certain guarantees as to stabilization, particularly in the matter of governmental participation in their undertakings.

xli. However, in view of the weakness of the dollar, a new agreement was concluded in January 1972 (the Geneva I Agreement). It provided for an increase of 8.49% in posted prices and made further adjustments in oil revenues based on an index for measuring changes between the exchange rate of the dollar and nine specified currencies. Another agreement of June 1973 (the Geneva II Agreement) added two more currencies to these nine.

xlii. These Agreements led to new negotiations between the Government and Aminoil, the Government aiming at the application of the (Teheran and Geneva) Agreements, while Aminoil placed the emphasis on the special conditions of its undertaking. In a Memorandum of 24 May, 1971, the Company adumbrated a transformation in its Concession, declaring that ;
"Aminoil believes... its basic relationship with the Government should change and that under the new relationship Aminoil should become a contractor, with the Government becoming the owner of all the Kuwait assets of the Company". - (GCM App. VI.3)

xliii. This idea was not accepted by the Government, and the negotiations continued, ending in 1973 in a projected revision of the concessionary Agreements of 1948 and 1961. This projected revision was

embodied in a Draft Agreement dated 16 July, 1973. The Draft Agreement proposed to bring about numerous changes in the relationship between the Parties.

xliv. As to the financial terms, the principal changes contemplated by the Agreement were :

(1) an increase in the tax rate applicable to the Company's net income, from 57% to 80%, and

(2) an increase in the rate of computation or "make-up" payments, from 57% to 80%, both as of January 1, 1973 ;

(3) the expensing of royalties ;

(4) acceleration of payment of income tax and "make-up" payments (thereby reducing the 'lag' between operations and tax payments from about twelve months to about two and a half months) ;

(5) application to the Company of the Teheran Agreement, as supplemented by the two Geneva Agreements (Article 2(1)).

xlv. In a First Annex, various other amendments to the 1961 Agreement were introduced :

(a) the following paragraph was substituted for Article 2(C) of the Principal Agreement :

"(C) The Company shall at all times conduct its operations in the Concession Area in a proper and workmanlike manner and by appropriate scientific methods in accordance with good oilfield practice and shall take all reasonable measures to prevent fire and to prevent the ingress of water into petroleum-bearing strata and to prevent the pollution of the sea and shall close all unproductive holes drilled by it and subsequently abandoned. The Company shall keep the Appropriate Authority fully informed as to the progress and the results of its operations but such information shall be treated as confidential by the Appropriate Authority save insofar as it is required for the purpose of settling a dispute between the parties hereto."

(b) The above mentioned gold clause (Article 3(h) of 1948 - see paragraph (xxiv) supra) was deleted (Article 7, First Annex, First Part).

(c) The Government undertook to enact a new tax law in Kuwait, which the Company had requested in order to be able to claim double taxation immunity in the United States.

(d) The Draft Agreement also provided that

"Any future discussions between the Government and the Company regarding concession provisions will take into consideration that the Company should not be denied a reasonable opportunity of earning a reasonable rate of return (having regard to the risks involved) on the total capital employed in its business attributable to Kuwait." (First Annex, Second Part, V)

(e) A choice-of-law clause was introduced

(First Annex, Second Part, XIII) and a new arbitration clause was inserted (First Annex, Second Part, XIV).

xlvi. The coming into effect of the Draft Agreement was made subject to its ratification in accordance with the laws of Kuwait (Article 4), that is by the Parliament.

xlvii. Before the Draft Agreement was ratified, the "October War" broke out in the Middle East (1973). A consequence of it was the decision of OPEC members on October 16 to take into their hands the fixing of posted prices, hitherto decided by the Companies - see Article 4 of the 1961 Agreement, supra. Thus Aminoil, like other Companies, was instructed that posted prices would be raised a first time, as of October 16 and, a second time, as of November 1, 1973, and that further "adjustments" would be notified periodically as required by the Government. It was stated that Companies which would not agree should stop production. Aminoil, like other Companies, complied with these new conditions.

xlviii. At the same time, the Government began to press the Company for immediate payments under the Draft Agreement of July 1973, that is to say without awaiting its formal execution and ratification by the Kuwait authorities. This, together with modifications to the Draft Agreement, was discussed at meetings between the Parties held in Kuwait between December 10 and 17, 1973 (AR Vol. V, Exh. 9). The Company eventually agreed to comply with the Government's request. Its acceptance was formalized in a crucial letter dated December 22, 1973 addressed by Mr. Ison, Vice President and General Manager for Kuwait Operations of Aminoil, to His Excellency Abdul Rahman Salem el Attiqi, Minister of Finance and Oil of Kuwait, who signed it as being agreed on December 22, 1973.

xlix. In the first paragraph, the representative of the Company formally "accepted" the 1973 Agreement"as drafted in July of this year", together with language changes agreed during the December meetings. In addition, the two paragraphs before the last read :
"The Company will make payment of obligations arising under the 1973 agreement and the Kuwait (Specified Territory) Income Tax Decree n° 23 of 1961 with the amendments in the proposed 1974 Income Tax law in the same manner as if the 1973 agreement was effective on the date the Minister of Finance and Oil signs this letter and the proposed 1974 Income Tax law had come into force on that date and will treat all of the terms and provisions of such agreement as being effective on that date.

It is our understanding that the 1973 Agreement will be signed as soon as the final documents can be prepared, and that you will then take appropriate steps to obtain due ratification thereof." (AM Vol. VIII, Exh. 29)

l. After the signing of this letter, the Company made a payment of approximately $13 million in respect of the retroactive effect of the financial arrangements, and it thereafter effected payments under the new terms contemplated in the July 1973 Agreement. But the proposed 1974 Income Tax Law was never passed, or even presented as a bill to the Parliament. Indeed, the 1973 Agreement was modified three times in the year 1974 at the request of the Government and in a manner that increased significantly the payments due by the Company to the Government. In February of 1974, a "final draft of the 1973 Agreement" was prepared, incorporating further changes, mainly for the application to the Company of future changes in the Teheran and Geneva Agreements, both retroactively and for the future (new Article 2(1), see AM Vol. VIII, Exh- 34). On July 16, the Government notified the Company of an increase in the royalty rate from 12 1/2% to 14 1/2% as of 1 July, 1974, (AM Vol. VIII, Exh. 35). On October 7 the Government notified the Company of an increase

in the royalty rate to 16.67% as of 1 October, 1974, and an increase of the percentage of the oil profit payable to the Government to 65.75% (AM Vol. VIII, Exh. 36). All this was done by way of unilateral decision by the Government. In fact, the Government was implementing decisions taken by OPEC members (respectively on June 18 and September 13). But it may be recalled here that the official, or "posted", price of oil was quadrupled during the year 1974, so that although the Company complied with the now more onerous terms imposed by the Government, its profits rose from $3,990 million in 1973 to $24,670 million in 1974 and later $30,637 million in 1975, and to $40,649 million in 1976.

li. In 1974, the Government acquired a 60% share in KOC and, in conjunction with the Saudi Arabian Government, a 60% interest in the AOC Concession (GM p. 9 et seq.). The following year, the entire KOC Concession was taken over by the Government ; agreement was reached as to compensation for its foreign shareholders and a long-term supply agreement was concluded. This left Aminoil as the sole totally private operator in Kuwait.

lii. In the same period Conservation Regulations were adopted in Kuwait, pursuant to Law n° 19 of 1973 on the Conservation of Petroleum Resources (GM App. IV.1), and came officially into force in 1976, after a trial period of six months.

liii. In the fall of 1974, OPEC countries had begun discussing new financial terms to be imposed on the Companies in the form of taxation. In November, three Gulf States, members of OPEC, put up royalty levels to 20%, and tax levels to 85%, on posted prices; and in December 1974 a resolution was formally adopted in Vienna by the other Gulf States, Kuwait amongst them, embodying the same terms which are generally referred to as the "Abu Dhabi Formula". These terms were enforced against major concessionaires. As between the Government and Aminoil, the question of the application of the "Abu Dhabi Formula" was informally raised in the course of 1975, but no formal request to that effect was made by the Government until October 2 of that year. After informing the Company of a new increase in posted prices, the Government stated :
"We also reconfirm our verbal advice given to you some time ago that effective 1st November 1974, royalty rate is twenty per cent of posted prices and applicable rate for oil income ---- is eighty-five percent generally applied since then in Gulf area" (AM Vol. VIII, Exh. 39).

In acknowledging this the Company denied having received advice from the Government "either verbal or written" of the new terms, and indicated that application of such terms would put it at a loss on every barrel produced. The Company then requested a formal discussion of the matter (AM Vol. VIII, Exh. 40).

liv. There followed a round of negotiations initiated by a letter from the Government to the Company dated January 25, 1976 (AM Vol. VIII, Exh. 41). The avowed purpose of the Government was (i) to devise financial terms as close as possible to those of Abu Dhabi and (ii) to have those terms applied retroactively in order to recoup what it termed "windfall profits", i.e. profits which were attributable to the "explosion" of oil prices rather than to the concessionaire's efforts.

lv. Negotiations took place from February 23 through April of 1976, formal discussions being held, inter alia, on February 23 (Government's minutes of meeting in GM App. VII. 2) and 24, March 19 and 29, and April 4 and 5. In the course of these negotiations - more precisely on March 19 -the Company made a written proposal (GM App. VII.1; AR Vol, V. Exh. 12) to the effect that it would accent in

principle the Abu Dhabi Formula (subject to particular reference prices) and its application as from October 1, 1975 (the day preceding the Government's formal request). The reference price was to be adjusted so that the Company would have the opportunity of realizing a "reasonable level of earnings" on its Kuwait operations. The Company valued at about $18 million the profit necessary to maintain the required level of capital expenditures (the Government's take being valued at $202.5 million). Oil income rate would in that case be increased from 85%to 90%.

lvi. No agreement was reached on this proposal and there followed a long gap in the negotiations. During that time, the Parties were operating under the terms agreed to in December 1973, as amended in 1974.

lvii. On March 27, 1977, a Committee was appointed by the Government to complete all negotiations of pending matters with the Company within a period of fourty-five days. The discussions which followed may be divided into two phases.

lviii. In the first phase the Company, on 15 April, 1977, submitted a written proposal, essentially updating that of March 19 of the previous year, whereby its profits would amount to $18 to $20 million a year, corresponding to 70 ¢ a barrel (GM App. VII.1). The proposal was discussed formally, first at a meeting held on April 19 (Government's minutes GM App. VII.2; Company's memorandum AR Vol. V, Exh. 18). The Government's position as expressed during the meeting, was that a net return of $4,5 to $6 million would be fair enough to the Company, considering its investment, and that such profit would be achieved by applying a rate of income tax of 97 1/2%. During the following days, meetings took place between the Company and the Government's Technical Affairs Department (T.A.D.), on April 21 (Company's memorandum AR Vol. V, Exh. 19) and 23 (Company's memorandum AR Vol. V, Exh. 20), when the question of capital expenditure was discussed.

lix. During a second official meeting between the Committee and the Company's representatives, held on April 24 (Government's minutes, GM App. VII.2; Company's memorandum, AR Vol. V, Exh. 22), the Company handed out a new written proposal revising that of April 15 (AR Vol. V, Exh. 21 ; GM App. VII.1). Under the new suggested terms, the Company would make retroactive payments as from November 1, 1974, of over $37 million, and oil income rate would be gradually raised from 85% in 1974 to 95$ from 1978. The proposal was immediately discussed, but the Government's representative (although not as an official response) indicated that the Company's proposal was still not acceptable.

lx. On May 7, the Parties met again (Government's minutes, GM App. VII.2; Company's memorandum AR Vol..V, Exh. 23). The Company had no new proposal to make and the Government offered orally that the Company be allowed a profit in the order of $7.5 million a year, insisting that this was not actually a new proposal but an ultimate effort on its part in order to reach an agreement. This figure (corresponding, although this was not officially stated, to. some 25 ¢ profit per barrel) would be applicable as from January 1, 1975 and therefore would entail a retroactive payment by the Company to the Government of about $56 million. Discussions followed on the same day and at a meeting held on May 8 (Government's minutes, GM App. VII.2; Company's memorandum, AR Vol. V, Exh. 24). A group of experts also met on May 9 to work on the figures involved in the various proposals and on other technical matters (AR Vol. V, Exh. 25). At the next formal meeting, held on May 10, both Parties expressed the view that their respective positions were irreconcilable. The Company's representative accounted for the gap between the return per barrel requested by

Aminoil and that achieved by other Companies, by the fact that the latter were not putting up any capital or engaging in refining and marketing; therefore their return could be regarded as a mere management fee. However, this explanation was not followed up by any suggestion as to how the difference should be taken into account. The meeting was adjourned without any date being fixed for the next one (Government's minutes, GM App. VII.2; AR Vol.V, Exh. 26).

lxi. The time set by the Government to reach an agreement expired, and on May 21, the Government set a new deadline of one month for coming, to a conclusion, under threat of a shut-down of the Company's operations in Kuwait. This opened a new round of negotiations.

lxii. In this second phase, after informal discussions had taken place in late May between Mr. Ison and several high officials of the Government, the Company presented a totally new proposal in a letter dated June 22, 1977 (GM App. VII.1). The existing Concession would be terminated and replaced by a renewable ten-year service contract. The Government would take over the Company's assets free of charge, and all financial claims pending would be abandoned. The Company would manage the technical and administrative operations for a service fee based on oil income.

lxiii. On June 26, the Council of Ministers of Kuwait endorsed the principle of a take-over and invited the Committee to resume negotiations for this purpose.

lxiv. A formal meeting on June 27 (Government's minutes,GM App. VII.2; Company's memorandum, AR Vol. V, Exh. 30) and a meeting of experts on June 28 (Company's memorandum, AR Vol. V, Exh. 31) were devoted to the clarification of the Company's proposal; and at a second formal meeting on June 29, the Government indicated its position (Government's minutes, GM App. VII.2; Company's memorandum, AR Vol. V, Exh. 32). Concerning the take-over, the Government insisted that compensation should be calculated on the basis of net book value and that all past financial claims be negotiated between the Parties. Concerning the future, the Government favoured a simple marketing contract (or, alternatively, the sale of oil by the Government to the Company at a discounted price), for a period of three to five years. In the negotiations that followed, the main discussions turned around the valuation of the Company's assets in Kuwait and the sum which the Company would be prepared to pay in addition, in satisfaction of the Government's retroactive claims (meeting of July 26, Government's minutes, GM App. VII. 2; Company's memorandum, AR Vol. V, Exh. 33). By a letter of August 6, 1977 the Company informed the Government that, based on a valuation of its Kuwait assets, net of liabilities, of $44.6 million, it was prepared to make a $5 million cash payment (AR Vol. V, Exh. 34; GCM App. VI. 2). No answer was received.

lxv. On September 19, 1977, the Government of Kuwait issued Decree Law n° 124, "Terminating the Agreement between the Kuwait Government and Aminoil". Its main provisions were as follows (English translation of the Arabic, taken from the Middle East Eco- nomic Survey) :

" Article 1

The Concession granted to the American Independent Oil Company in accordance with the afore-mentioned Agreement dated 28 June 1948 shall be terminated.

Article 2

All the interests, funds, assets, facilities and operations of the Company, including the refinery and other installations relating to the afore-mentioned Concession, shall revert to the State.

Article 3

A committee named the Compensation Committee shall be set up by a decision of the Minister of Oil whose task it will be to assess the fair compensation due to the Company as well as the Company's outstanding obligations to the State or other parties. It shall decide what each party owes the other in accordance with this assessment.

The State or the Company shall pay what the Committee decides within one month of being notified of the Committee's decision.

Article 4

A committee shall be set up by a decision of the Minister of Oil to make an inventory of the assets, funds and facilities which have reverted to the State in accordance with this Law. This inventory shall be turned over to the Executive Committee." (AM Vol. VII, Exh. 3; GM App. II.8).

lxvi. In an Explanatory Memorandum accompanying this Decree Law, it was stated that it had been rendered necessary in the national interest by Aminoil's failure to agree to the Government's terms ; and at a press conference on the following day this explanation was repeated with the addition that there had "from the beginning... been a specific plan for the State to take over full ownership of its oil resources and put them under national management." (AM Vol. VII, Exh. 3).

lxvii. The take-over was formally protested by the Company in a letter dated October 20 (AM Vol. VII, Exh. 4). Meanwhile, the Government undertook the operation of the Company's concession, and the operations were later entrusted to KOC and a newly created Kuwait National Oil Company (KNOC) (GM App. II. 10).

lxviii. On December 20, the Company notified the Ministry of Oil of its intention to initiate proceedings for arbitration, pursuant to Article 18 of the Concession Agreement of 1948.

lxix. The Compensation Committee set up by Decree Law n° 124 was established, and it invited a high Company representative to represent the Company's point of view at one of their meetings (letter of January 7, 197 8, GM App. V.1). The Company declined in view of the arbitration proceedings initiated (letter of January 8, 1978; ibid.).

lxx. Under Article 18 of the 1948 Agreement, the place of arbitration was to be London, unless otherwise agreed. At the request of the Government, the Parties eventually agreed to hold an ad hoc arbitration in Paris. Thus the Arbitration Agreement of July 12, 1979 was concluded and the London arbitration initiated by the Company discontinued. Thenceforward the arbitral proceedings progressed as described in the immediately preceding Section I of this Award.

SECTION III. The Applicable Law

1. The Parties have approached the question of "the applicable law" by distinguishing the procedural law of the arbitration - or law governing the arbitration as a whole - and the law governing the substantive issues in the case.

2. On these topics they have furnished rival analyses and concepts which, on the scientific and academic levels, possess very great interest; but the Tribunal, in carrying out the function entrusted to it, has not experienced any difficulty as to the determination of the applicable law. The essential reason for this is twofold : the Parties themselves, by their mutual arbitral commitments, have defined with adequate clarity what the applicable law is ; and the legal systems that either do, or may, call for consideration in this connection have characteristics such that, for this case, the solution of the problem becomes easy.

3. With regard to the law governing the arbitral procedure in the broadest sense, it is not open to doubt that the Parties have chosen the French legal system for everything that is implied in the statement in Article IV,1 of the Arbitration Agreement to the effect that the proceedings are subject to "any mandatory provisions of the procedural law of the place where the arbitration is held" (namely Paris) ; and both Parties "expressly waive all rights of recourse to any Court, except such rights as cannot be waived by the law of the place of arbitration (Article V).

4. But this does not in the least entail of itself a general submission to the law of the tribunal's seat which was designated as Paris. In actual fact the Parties themselves, in the Arbitration Agreement, provided the means of settling the essential procedural rules, when they conferred on the Tribunal the power to "prescribe the procedure applicable to the arbitration on the basis of natural justice and of such principles of transnational arbitration procedure as it may find applicable" (Article IV,1), which was done by the Rules adopted on 16 July, 1980.

5. Having regard to the way in which the Tribunal has been constituted, its international or rather, transnational character is apparent. It must also be stressed that French law has always been very liberal concerning the procedural law of arbitral tribunals, and has left this to the free choice of the Parties who, often, have not had recourse to any one given national system. French law has thus befriended arbitrations the transnational character of which has been well in evidence. This tendency has been enhanced for the future by recent French legislation (Decree n° 81-500 of 12 May, 1981) which, even more specifically than before, affords recognition to transnational arbitration.

6. Respecting the law applicable to the substantive issues in the dispute, which is what is really at stake between the Parties regarding the applicable law, the question is equally simple in the present case. It can hardly be contested but that the law of Kuwait applies to many matters over which it is the law most directly involved. But this conclusion, based on good sense as well as law, does not carry any all-embracing consequences with it, - and this for two reasons. The first is that Kuwait law is a highly evolved system as to which the Government has been at pains to stress that "established public international law is necessarily a part of the law of Kuwait" (GCM paragraph 3.97(5)). In their turn the general principles of law are part of public international law - (Article 38.1(c) of the Statute of the International Court of Justice), - and that this specifically applies to Kuwait oil concessions, duly results from the clauses included in these. For instance, in the 1973 Agreement between the Parties, First Annex, Second Part, XII (GM App. I.9) the following provision is to be found (punctuation of second sentence added) :

"The parties base their relations with regard to the agreements between them on the principle of goodwill and good faith. Taking account of the different nationalities of the parties, the agreements between them shall be given effect, and must be interpreted and applied, in conformity with principles common to the laws of Kuwait and of the State of New York, United States of America, and in the absence of such common principles, then in conformity with the principles of law normally recognized by civilized states in general, including those which have been applied by international tribunals".

Although the Parties did not, in the course of the present arbitral proceedings, make any reference to this particular text, it is of all the more interest to note that the ideas it embodies are no isolated features of Kuwait practice.

7. Equally, the Offshore Concession Agreement of the Arabian Oil Company (AOC) (AR Vol.VI, Exh. 39) contains the same provision, except that reference is made to the principles common to Kuwait and to Japanese law (Article 39). The Oil Concession Agreement with the Kuwait National Petroleum Company and Hispanica de Petroleos, concluded in 1967 (AR loc. cit.), refers to the principles common to Kuwait and to Spanish law. Yet it would be quite unrealistic to suppose that these three Concessions were governed by three different regimes. Clearly, it must have been the general principles of law that were chiefly present to the minds of the Government of Kuwait and its associates.

8. But there is a second consideration which has greatly eased the task of the Tribunal, namely that the Parties have themselves, in effect, indicated in the Arbitration Agreement what the applicable law is. Article III, 2 of the Agreement provides that

"The law governing the substantive issues between the Parties shall be determined by the Tribunal, having regard to the quality of the Parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world."

Although it may in theory be possible for a litigation to be governed by an assemblage of rules different from that which, before the Arbitration, governed the situations and matters that are the object of the litigation, there must be a presumption that this is not the case. Thus, to the extent that Article III,2 of the Arbitration Agreement calls for interpretation, such an interpretation ought to be based on that provision which not only was freely chosen by the Parties in 1973 (see paragraph 6 supra), but also reflects the spirit which has underlain the carrying on of the oil concessions in Kuwait.

9. Article III,2, with good reason, makes it clear that Kuwait is a sovereign State entrusted with the interests of a national community, the law of which constitutes an essential part of intra-community relations within the State. At the same time, by referring to the transnational character of relations with the concessionaire, and to the general principles of law, this Article brings out the wealth and fertility of the set of legal rules that the Tribunal is called upon to apply.

10. The different sources of the law thus to be applied are not - at least in the present case - in contradiction with one another. Indeed, if, as recalled above, international law constitutes an

integral part of the law of Kuwait, the general principles of law correspondingly recognize the rights of the State in its capacity of supreme protector of the general interest. If the different legal elements involved do not always and everywhere blend as successfully as in the present case, it is nevertheless on taking advantage of their resources, and encouraging their trend towards unification, that the future of a truly international economic order in the investment field will depend.

SECTION IV. The Contractual Obligations of the Parties

11. Seen as a whole, the present litigation is essentially concerned with the contractual obligations of the Parties and must be determined in the light of those obligations. The Tribunal will not, however, in this Section of the Award, go into all of them, and will reserve two groups for another Section - one relatively subsidiary but the other of primary importance.

12. To the first of these groups belong (a) certain obligations technically distinct from the others, and requiring separate study, namely those relating to what is known as "good oil-field practice"; and (b) the question of Aminoil's obligation to refund certain amounts paid out by the Government in discharge of the unpaid liabilities of the Company towards third parties, still subsisting at the date of the take-over. Both these matters are dealt with in Section VI below.

13. To the second group belong the obligations entering on what are known as the "stabilisation clauses" of the Concession. These are so intimately connected with the question of the validity and effect of Kuwait Decree Law n° 124, imposing the take-over, that they are best considered in that context in Section V below.

14. In consequence, the subject-matter of the present Section, in historical order of occurrence in the relationship of the Parties, will be :
(A) - The meaning of Article 9 of the Supplemental (Concession) Agreement of 1961, which has been the vehicle of numerous modifications made to the Concession.

(B) - The legal signification of certain other agreements - in particular the one known as the"1973 Agreement".

(C) - The application of the "Abu Dhabi Formula" - (see Section II, paragraphs (liii) and (liv) above) - and the negotiations of 1976-77 in that connection.

(A) Interpretation of Article 9 of the Supplemental Agreement of 1961.

15. The meaning of this Article depends basically on its text which reads as follows :
"If, as a result of changes in the terms of concessions now in existence or as a result of the terms

of concessions granted hereafter, an increase in benefits to Governments in the Middle East should come generally to be received by them, the Company shall consult with the Ruler whether in the light of all relevant circumstances, including the conditions in which operations are carried out and taking into account all payments made, any alterations in the terms of the agreements between the Ruler and the Company would be equitable to the Parties".

This text, it should be noted, received a kind of application even before it was drafted, for it was a generalization of the 50/50 sharing of profits formula which led both to a revision of the financial terms of the Concession in 1961, and at the same time -by means of Article 9 - to giving expression to the principles on which that revision was itself founded.

16. A corresponding clause, incorrectly called in professional circles the "most-favoured-Nation" clause, was inserted into most of the Gulf concessionary contracts; but although the principle thus proclaimed has been applied elsewhere, even in the absence of express clauses, the Tribunal will, for the purposes of this analysis, proceed upon the basis of the wording employed in Article 9 of the Supplemental Agreement of 1961.

17. Three constituents can be drawn from the text of this Article (see paragraph 15 above) :
(i) it institutes a procedure for consultation,

(ii) when certain conditions are fulfilled,

and

(iii) with a view to reaching an agreement presenting certain features.

18. As to (i) - "consultation" - the text differs from what became the practice. It lay with the Government - which alone ranked for the purpose of receiving the benefits of the modifications requested -and not with Aminoil, to take the initiative ; and it was more a matter of "negotiation" than of "consultation", as is shown by the long and difficult dealings that took place on frequent occasions from 1964 to the end of the Concession.

19. As to (ii) - to give rise to the right to claim the initiation and pursuit of negotiations, some development had to have occurred generally in Middle-Eastern oil concessions in the direction of fresh benefits going to the concessionary States. A first estimate has to be made by the two Parties as to whether such a development has indeed occurred. Assuming that it has, the Company does not thereby recognize only its obligation to negotiate, but also the existence in principle of an obligation, of which only the numerical computation remains unsettled prior to the negotiation. It is not always a simple matter to determine whether some process of change has become general in the Middle-East - for, as the case of Aminoil shows, certain provisions of the agreements concerned remain confidential. Also, while Article 9 itself only functioned in respect of financial benefits, a phrase in the "Confidential Letter" of 29 July, 1961 (GM App. I.8; and paragraphs (xxxv) and (xxxvi) of Section II above) stated that

"It is understood that the word "benefits" includes arrangements not involving payments".

20. As to (iii) - Article 9 provides details concerning the object of the negotiations : it is a matter of concluding an agreement which had to have some noteworthy characteristics, - the agreement has to introduce, in favour of the Government, changes in the previous provisions of the Concession, and yet remain "equitable to the parties" - i.e. to Aminoil also. It is neither stated, nor to be presumed from this, that the original contract of concession was not "equitable to the parties" at the time when it was drawn up, - for a freely concluded agreement establishes as a matter of principle an equilibrium of interests between the parties. In spite of that, this original equilibrium will be modified in favour of another equilibrium deemed equally equitable. It seems therefore that the system established by Article 9 rests on the implied concept of a progressive process of justice revealing itself in the course of a sufficiently general historical evolution to be recognized for what it is by the Parties. This is how they can be said to have based themselves in advance on the assumption that a division of profits equitable today will need to be modified in order still to be regarded as equitable tomorrow.

21. Article 9 is somewhat more explicit about the factors to be taken into consideration in deciding on the amendments to be made in the Concession ; - this is to be done"in the light of all relevant circumstances, including the conditions in which operations are carried out and taking into account all payments made". From this phraseology there follows an important consequence, namely that the requisite changes must be based on a study of all the financial aspects of the Concession, past as well as future. Adjustments to a concession must necessarily be special to each undertaking and highly individualized. Their expression in figures has nothing of the automatic about it, and often comes up against real difficulties. The long and arguous negotiations between the Government and Aminoil regarding the application of Article 9 demonstrate these difficulties.

22. Attempts have been made to clarify the sense of Article 9 by appealing to general juridical concepts or doctrines. It has been attempted to liken this article to the clausula rebus sic stantibus of public international law, or to the theory of the unforeseen as enshrined in certain modern legal systems such as that of Kuwait. The Government has had recourse to such exercises, which are not without their usefulness; but the Tribunal will keep to what the text of Article 9 requires : in effect, it institutes an appeal from an original equilibrium to a more mature one, when the latter has become generalized throughout an extensive circle of contractual relationships. As to this, the existence of divergences between the Parties on two essential points must be emphasized.

23. The first point is that the usual tendency of the Government - without denying that the putting into effect of Article 9 depended on negotiation and mutual agreement - was to reduce the scope of the negotiation as much as possible by seeking to make the extension to Aminoil's Concession of the changes generally applied in the Middle-East, as automatic as possible. This is readily understandable. For one thing, the Government wished to obtain the greatest benefits available, - for another, it could fear that by granting Aminoil more favourable conditions than to other concessionaires, these might then claim equivalent advantages even if their particular situation did not justify that. Legitimately, Aminoil pleaded the reverse by requesting that its appreciably higher costs of production should be fully taken account of.

24. The second point is that the process contemplated by Article 9 did not provide for any other method of applying the criteria enunciated than agreement by mutual consent. The question here involved -one of those that are central to the present litigation - is a difficult one, known to all legal systems. An obligation to negotiate is not an obligation to agree. Yet the obligation to negotiate is not devoid

of content, and when it exists within a well-defined juridical framework it can well involve fairly precise requirements. In some cases the failure of the negotiations can be attributed to the conduct of one of the parties, and if so, the matter becomes transposed onto the plane of responsibility, and must find its solution there. It is not unknown for this possibility to materialize in practice; but international, as well as national precedents show that it occurs rarely. In other cases a study of the remaining clauses of the contract, as also of its juridical setting, must determine the way in which it can be modified or brought to an end. However, if the system instituted by Article 9 does not suffice of itself to indicate what the concrete content of the new obligation is to be, the Parties' agreement to put it into effect operates as a recognition of the principle of the obligation.

25. The discussion of this matter is, for the present, left at this point to be resumed in connection with the concrete topic of the Abu Dhabi Formula in Subsection (C) below, paragraph 49 et seq.

(B) Legal relevance of certain Agreements : in particular that of 1973.

26. Aminoil's legal obligations derive from two groups of sources: the contracts that were concluded in solemn form (the 1948 Concession and the Supple-mental Agreement of 1961); and the simple form undertakings of which the chief consists in the letter of 22 December, 1973 (herein called the "December 1973 Agreement"), together with others even less formal. It is this second (informal) group that has given rise to the legal difficulties which have to be resolved here. These are the validity and effect of the 1973 Agreement, includ-ing the complaint of duress; and the question of certain informal arrangements and tacit consents.

(1) The 1973 Agreement

(a) Validity and effect in general

27. The lengthy and arduous negotiations kept up over many years, with the object, on the Government's part - and in the light of the contractual transactions of 1961 - of bringing about accession to its requirements based on Article 9, were to finish in 1973. After the interchanges in May of that year, a draft agreement was drawn up on 16 July (AM Vol. VII, Exh. 23). The events of October 1973 created some new difficulties, inasmuch as the Government decided to take into its own hands the fixing of posted prices - a matter that under Article 4 of the 1948 Concession had hitherto been for the Company to effect. The Parties met again on the 10th December, when the Government called for the immediate putting into execution of the July draft, even prior to its ratification by the Kuwait Parliament, and also for certain amendments to be made to it.

28. It was thereupon - by means of a Letter of 22 December, 1973 (hereinafter called the "December 22 Letter"), signed by Aminoil and counter-signed by the Minister of Finance and Oil - that a legal

agreement between the Parties materialized. In the opening paragraph of this Letter it was stated on behalf of Aminoil that
"We accept the 1973 Agreement as drafted in July of this year with the language changes agreed at the afore-mentioned meetings and with the following amendments requested by the Ministry..."

By these words the Company seems definitely to have accepted the July 1973 Agreement. The Letter continued :

"The Company will make payment of obligations arising under the 1973 agreement and the Kuwait (Specified Territory) Income Tax Decree n° 23 of 1961 with the amendments in the proposed 1974 Income Tax law in the same manner as if the 1973 agreement was effective on the date the Minister of Finance and Oil signs this letter and the proposed 1974 Income Tax law had come into force on that date and will treat all of the terms and provisions of such agreement as being effective on that date.

It is our understanding that the 1973 Agreement will be signed as soon as the final documents can be prepared, and that you will then take appropriate steps to obtain due ratification thereof.

We shall be obliged if you will signify your agreement with the foregoing amendments and procedures by signing and returning the accompanying copy of this letter (AM Vol. VIII, Exh. 29)."

29. No instrument in the form of the July 1973 draft was annexed to the December Letter, and the representatives of the Parties endeavoured to draw up an authentic text early in 1974, with a view to getting it signed and ratified. A text in which a fresh modification was introduced was prepared in February (AM Vol. VIII, Exh. 34). Other amendments were effected in June and October (ibid. Exh. 38), after which the draft was not further amended, and the Government made no further reference to its intention of taking the steps mentioned in the December Letter as being its concern, although Aminoil went on applying the provisions of the 1973 Agreement "as if" they were in force.

30. The Company, relying on these facts, has maintained that the agreement brought into being by the December 22 Letter did not constitute a proceeding which now binds Aminoil as to the past -and this for several reasons : first, the Letter only had a provisional character, - and next, Aminoil wanted a counterpart, a quid pro quo, -finally, the Government had incurred responsibility by failing - whether from lack of diligence or serious intention - to take the necessary steps to bring the projected July 1973 Agreement into force.

31. The estimate arrived at by the Tribunal proceeds from a different standpoint. According to this, the 22 December Letter constituted an agreement separate and distinct from what would have been that of July 1973 if it had come into force. The December Letter, which the Parties sometimes (and in the actual course of the present arbitral proceedings) referred to as an "arrangement", is in fact an agreement viable per se and with its own characteristics.

32. Both in national and international practice, cognizance has often been taken of cases of contracts or treaties, the final conclusion of which as a legal transaction required a somewhat lengthy course of dealing, but which the parties wished to bring into force without delay, on a provisional, or rather, an interim basis - as to all or part of the text -(Article 25 of the Vienna Convention on the Law of Treaties). This is what the Parties did in the present case. Such an interim agreement does not act as

an exemption from continuing to seek the definitive putting into force of the main agreement itself; and the December 22 Letter never took the place of the July 1973 Agreement, or of the Kuwait Tax Law which was to be passed by virtue of it, but was not.

33. Such an interim agreement is different in two respects from the definitive agreement the place of which it provisionally takes. The first is that it can be concluded in simplified form, - such is its raison d'être. On the Kuwait side it was concluded by the Minister of Finance and Oil. It is a matter entirely of Kuwait law whether that Minister had capacity so to act, and Aminoil has correctly accepted him as duly authorized, and the Government of Kuwait has always recognized that the Minister legally bound the State. Thus this Agreement (December 1973) was always valid ab origine, and the Tribunal only needs to point out that it is entirely normal and useful that, in transnational economic relations, the capacity of the Minister in charge of economic matters should be presumed, as is that of a Minister for Foreign Affairs in inter-State relationships.

34. A second difference exists between an interim and a definitive agreement, namely the right for either Party to put an end to the former, the "provisional" not being intended to last for ever -so that, despite silence on the point in the interim agreement, it would be natural that a party to it should be able to give notice to bring it to an end if the conclusion of the definitive agreement was unduly delayed. This is what Article 25 of the Vienna Convention may be taken as implying; but in the present case, neither Party thought to notify any termination of the interim agreement, which remained in force until 19 September, 1977 (date of the take-over).

35. In addition to the question of "duress" (considered under the next sub-head) Aminoil puts forward one more argument. The Company had signed the December Letter in the hope of obtaining a quid pro quo in the shape of the conclusion of a definite agreement by means of the ratification of the July 1973 draft agreement. Its expectation would therefore have been frustrated, and for this the Government would bear a certain responsibility.

36. The Tribunal considers it to be hardly open to doubt that the Company experienced a very real need for stability, and that in its absence the normal requirements for the management of an undertaking were not satisfied. The fact that it did not have the benefit of that stability, without there having been any negligence on its part, is not wanting in legal consequence, and the Tribunal will revert to the point later. But whether responsibility for this failure can be attributed to the Government of Kuwait is quite another question.

37. To begin with - in regard to the process of ratification - a Government possesses a large measure of discretionary power that does not allow that mere delay in taking the final decision should be held against it. Then, reasons are not lacking for thinking that it could have been in the Company's own interests not to have the Agreement submitted to the Kuwait Parliament at the very time when decisions falling to be taken about the influential Kuwait Oil Company could create difficulties there for the Government. Finally, the Government of Kuwait - a participator in the decisions taken in OPEC and the Arab world - was concerned about instability in economic petroleum relationships; so that it can hardly be said that the very real difficulties that resulted for Aminoil were tied up with malevolent intentions or neglectfulness on the Government's part.

38. Aminoil has attributed special importance to the fact that in not formally adopting a new Tax Law, legally characterizing as tax payments an important part of the amounts paid over to Kuwait, the

Government deprived the Company of the benefit of certain provisions of American law, allowing it (so far as that law was concerned) credits for the avoidance of double taxation. In a case of this kind, the Tribunal believes, it would be possible to enquire whether the Company did not suffer some disturbance in the financial equilibrium of its interim agreement with the Government, and if so, to take account of that in the final reckoning, even in the absence of all tortious action imputable to the Government. However, since Aminoil has not given any precise indication of the damage caused, the Tribunal has not been led to consider the matter in any more detail.

39. Moreover, referring to the study of Article 9 of the 1961 Agreement already effected, it is pertinent to observe that in the year 1973 Aminoil not only recognized that the extant situation was of the kind contemplated by that provision, but also recognized that the solutions propounded in the projected July Agreement of that year were "equitable for the Parties". In those circumstances the revocation of the agreement realized by the December 1973 Letter, and of its effects, would have left intact the problem it was supposed to resolve.

(b) The complaint of duress

40. With regard both to the lengthy negotiations which preceded the July 1973 Agreement, and to the changes that immediately preceded and followed the December 1973 Letter, Aminoil has claimed that its consent was vitiated because its undertaking was threatened with "shut-down" or, what comes to the same thing, that all exportation would be prohibited, if it did not agree to give its consent to certain demands. These threats had been tendered both on the occasion of the conclusion of the interim agreement and on that of certain measures taken before or after it.

41. The object of this complaint was as follows. For Aminoil it was a question of destroying the obligatory force of the Letter of 22 December; and what is involved therefore is the nullification of that agreement. If however, as will be demonstrated, the nullity of the consents given by Aminoil is not established, it will not in any way follow from this that those consents were forthcoming under all the conditions that could be wished for in respect of a consent. These consents were evidently given in circumstances which, for the Company, constituted strong economic pressure, and this can result in depriving such consents of certain supplementary or side effects. In particular their application should not be enlarged by means of extensive interpretations. To take a concrete example, in October 1973 the Government of Kuwait, contrary to the terms of the Concession then in force (Article 4 of 1948), prescribed of its own motion the level of posted prices. By conforming to this behest in the circumstances of the moment, and without making any protest, the Company surrendered the right to claim the nullity of its acquiescence. But although, even in the absence of duress, it then laboured under constraints, it did not thereby forfeit the right on another occasion to withhold its consent in analogous conditions, though in point of fact it did not do so.

42. Next, as the Tribunal will again be led to say, consents that are legally valid as regards the abandonment of a specific individual right, but which have been given under economic constraint, cannot serve as precedents for establishing a customary rule of general validity.

43. That reservation having been made, it is necessary to stress that it is not just pressure of any kind that will suffice to bring about a nullification. There must be a constraint invested with particular

characteristics, which the legal systems of all countries have been at pains to define in terms either of the absence of any other possible course than that to which the consent was given, or of the illegal nature of the object in view, or of the means employed. But the illicit character of the threats directed against Aminoil has not been fully proved.

44. Supposing however that there were such threats, Aminoil gave way without even making the qualification that the Company was conscious that something illicit was being imposed upon it. It is understandable that it avoided resort to arbitration because of the delays, risks and costs of arbitral proceedings - but Aminoil entered neither reservations of position nor protests. In truth, the Company made a choice; disagreeable as certain demands might be, it considered that it was better to accede to them because it was still possible to live with them. The whole conduct of the Company shows that the pressure it was under was not of a kind to inhibit its freedom of choice. The absence of protest during the years following upon 1973 confirms the non-existence, or else the abandonment, of this ground of complaint.

45. This outcome does not involve any denial of the fact that since 1971 the balance of advantage in the Gulf region had tilted in favour of Governments, and that Aminoil had been subjected to strong pressure to accept the repeated demands of the Kuwait Government. But - and this is the only point the Tribunal has to decide - it has not been shown that these constraints were of such a nature as to cause the nullification of the interim Agreement of 1973, or of certain other consents (as to which see sub-section (2) below).

46. Having recognized the validity of the interim Agreement of December 1973, the Tribunal does not need to go into the question that any finding to the contrary would raise concerning the applicability of the "gold clause", figuring as Article 3(h) of the 1948 Concession, - and in any case that clause was cancelled by paragraph 7 of the First Annex, First Part to the July 1973 Agreement (supra, Section II, paragraphs (xxiv) and (xlv).

(2) Informal arrangements and tacit consents

47. Apart from the case of the interim Agreement of 22 December,1973, Aminoil consented promptly to several requests made by the Government. Instances already indicated above were the Government's October/November 1973 invitation to bring posted prices up to a specified level; and the 1974 amendments to the projected July 1973 Agreement in respect either of the application by Aminoil of the Teheran and Geneva Agreements, or of the level of the financial payments to be made by the Company. It may well be asked what juridical characterization should appropriately be given to some of these transactions. The minatory tone of certain of the demands presented by the Government gives them occasionally the look of an order. Thus at the time of the opening of Middle-Eastern hostilities in 1973 an embargo on shipments of oil and petrol to certain countries was proclaimed; and although not provided for under the various contracts of concession, the embargo was validly imposed upon the concessionaires.

48. In the case of other demands not in themselves justified (for they were inconsistent with the relevant contracts), it was the consent given by Aminoil that conferred upon them their validity, whether this result is arrived at on the basis of the mutual conduct of the Parties as constituting an

informal agreement, or whether - denying the existence of any contractual element - it is considered that the Company simply acquiesced in an unjustified compulsion. Whatever view is taken however, the content of the Company's obligations was to that extent modified.

(C) The interpretation and application of the Abu Dhabi Formula, and the negotiations of 1976-1977.

(1) The nature and signification of the Abu Dhabi Formula

49. The application of Article 9 of the 1961 Supplemental Agreement had always been troublesome and difficult, involving long delays and retroactive payments clearly adverse to a rational management of the undertaking. On the morrow of the interim Agreement constituted by the Letter of 22 December, 1973, Aminoil's financial future was uncertain. According to the evidence given to the Tribunal by its directors, some of them feared that the new financial liabilities would be too heavy, while others thought they would be reasonable. But the increase in posted prices imposed upon the concessionaire Companies by OPEC as a body, and hence by Kuwait upon Aminoil, brought about an appreciable amplification of their revenues. Yet at the same time, as from 1974, the Kuwait authorities specified what changes would have to be made in the current interim Agreement in order to raise the level of the payments coming from Aminoil. The latter accepted them without reservation or objection, the overall outcome being so advantageous that it was thought better not to bring up any question of principle.

50. Towards the end of 1974 the outlines became visible of a new process of change that was to prove to be the origin of the final crisis. The nature of this change, and the reasons why it led to the ending of Aminoil's Concession, must now be described. Whereas previous increases in the liabilities of the oil Companies had nevertheless left them a certain margin of managerial scope, those entailed by the "Abu Dhabi Formula" were more severe. The Gulf States that were members of OPEC and propounded this formula, no doubt weighed its advisability, for it was only three of them that, in November 1974, decided immediately to nut up the royalty level to 20%, and the tax level to 85% on posted prices which, for the Companies that used actual receipts as their tax base would have been a very drastic step. The other Gulf States, Kuwait amongst them, waited for the 42nd (Vienna) meeting of OPEC (12 and 13 December, 1974) to adopt a decision known only through a press communiqué as follows :

"The Conference... decided to adopt a new pricing system based on the financial effect of the decision taken on the 10th and 11th November, 1974, in Abu Dhabi. In accordance with this decision the average Government take from the operating oil companies will be $10.12 per barrel for the marker crude."

In point of fact this decision had a revolutionary effect, not only on prices but on the very nature of the concessions. It embodied the notion that the revenues left to the Companies would be pre-determined on a fixed (package) basis of 22 cents per barrel of the product of reference - "marker

crude" - thereby transforming the concessions de facto into service contracts. Equally, the system was based on a pre-determined estimate of costs, fixed at 0.12 cents a barrel, which could at a pinch be regarded as an acceptable mean for the case of "normal" oil deposits (taking account also of the other advantages which the major Companies had in respect of certain categories of products), but had no relation to the net costs of the products of Aminoil's Concession.

51. It is not without significance that simultaneously with this, negotiations were starting in Saudi Arabia for the nationalisation of the Aramco Company, which made it possible to foresee a general end to the concessionary regimes. Indeed, it was clear that for a Company such as Aminoil, these events would bring about difficult negotiations tending to reduce its financial returns to the point where there would be a risk of putting it into deficit, coupled with the ever-present shadow of potential nationalisation.

52. The negotiations which are the subject of the next subsection below, have been described above in Section II, paragraphs (liv) to (lxiv), but will to some extent be recapitulated where necessary in order to make the reasoning clear.

(2) The negotiations between Aminoil and the Government

53. The negotiations between the Kuwait authorities and Aminoil concerning the Abu Dhabi Formula have a major importance for the solution of some of the questions that the Tribunal has to deal with - and in particular the following ones :
(i) Did the two Parties respect the letter and spirit of Article 9 in these negotiations ? If in fact either Party was in default under that head, this would have important consequences for the ensuing responsibility thereby incurred,

(ii) Do the negotiations throw light on the situation of the Parties in regard to their contractual relations generally ?

(iii) Do the negotiations enable the situation of the Parties concerning the application of the Abu Dhabi Formula to be precisely defined ?

54. Before outlining certain features of the negotiations it must be observed that their content was made known to the Tribunal by means of two sets of descriptions which, in a general way, are mutually corroborative, the one on the Government side containing more in the nature of administrative information, and that on the Company's side furnishing greater indications as to the atmosphere of the meetings and the attitudes of the participants.

55. It is certain that the heads of the Company understood at once the gravity of the situation in which it was to find itself: the criterion adopted in Vienna (supra, paragraph 50) would soon become general, and would set in motion the mechanism of Article 9; the Company would see itself obliged, in part retroactively, to give up some of the profits it had been making - yet the Abu Dhabi Formula could not be literally applied to it without causing immediate ruin. Thus the negotiations would be

arduous.

56. The local representative of the Company therefore at once made unofficial contact with the Kuwait authorities, and tried to sound them as to their intentions, but without success, - and it was not until ten months later, on 2 October, 1975, that the Government notified Aminoil in New York, of its intention to apply to the Company retroactively "a royalty rate of 20% of posted prices and rate of 85$ for oil profits". Aminoil immediately asked for the opening of negotiations, and the Minister fixed the date for 23 February, 1976. Here there is straightway apparent a significant feature of the negotiations, namely the delays that characterised them into 1977. After preliminary contacts on 23 and 24 February, 1976, Aminoil sent in, on March 19, a very complete formal proposal explaining and justifying its position; and further meetings were held on 29 March and 4 and 5 April, limited however, on the side of the Kuwait representatives, to asking for information and clarification, without otherwise making their own position known. To enquiries about the future of the negotiations, several times put in by Aminoil, the answer given was that resumption was not for the moment being contemplated. In short, the year 1976 was a year of contacts only, and the real negotiations did not start until 9 April, 1977.

57. This process of delay is somewhat surprising. It has been explained by reference to the overload of work weighing on the Kuwait technical and administrative staff. It is also possible that the Kuwait authorities wanted to bring the nationalisation of the Kuwait Oil Company (KOC) Concession to a successful conclusion in order to put themselves in a position the more easily to settle the case of Aminoil afterwards. Be that as it may, in so proceeding the Government did no more than act within its rights: yet this conduct had important consequences.

58. First of all, Aminoil remained for more than two years in uncertainty as to the receipts that would ultimately be still available to it; and the technical and financial management of its affairs undoubtedly suffered from that. But in any case important sums were destined to end up in Aminoil's banking accounts abroad; and this fact, far from facilitating negotiation, was going to make it more difficult, by inevitably arousing feelings of mutual suspicion.

59. The above-described "contact" phase of the negotiations, indicates what the position of Aminoil was, respecting not only its general contractual relations with the Government but also as regards the application of the Abu Dhabi Formula. Granted that a party cannot be held to attitudes taken up in the course of negotiations - involving, as is often the case, concessions and renunciations offered for the sake of reaching an agreement - the same is not true of an initial position taken up at the outset of the negotiations, for this reflects, at least grosso modo, the way in which that party assesses its rights and obligations on the juridical plane.

60. It is therefore important briefly to evaluate Aminoil's formal proposal of 19 March, 1976, contained partly (in general terms) in a letter from the President of the Company to the Minister of Oil, and as to its details in an information booklet attached to that letter (AR Vol. V, Exh. 12; GM App. VII.1). The Company, within certain bounds, started from the basis of the prevailing tendency to transform oil concessions by placing an upper limit on the returns that these should bring. Hence the Company accepted that agreements should be drawn up giving it the possibility (but not any guarantee) of earning limited profits, - in this differing from contracts known as service contracts which guarantee a minimum return. Thus the proposal implied a renunciation of one of the attractions of the classical concession which, subject to the payments to be made to the concessionary authority,

leave the remainder of the realized revenues to the concessionaire.

61. To set against this, the Company estimated its costs at a fairly high figure so as to cover itself against various risks; and in particular asked that the possible returns should be such as to enable it to finance investment for modernization and development. It was therefore the Company which took the initiative in raising this further matter. The last important investment - for a desulpherizer - went back to 1968 ; and now certain installations needed to be brought up to date, while new exploration teams were required. The Company therefore requested that, in accordance with normal practice in the industry, returns should be such as to allow such expenditure to be financed out of revenue. It must be recognized that this attitude on the Company's part was in line with the one it had taken up in the past (AR Vol. V, Exh. 10 - and see to similar effect a letter of 28 July, 1972, GCM App. VI.9).

62. The Tribunal however registers equally that the Company, from the outset, recognized that Article 9 was, as such, applicable, and that in consequence the principle of a re-adjustment (which could only be in favour of the Government) had to be admitted - see the 19 March 1976 Letter (ubi supra) in which it was stated that

"We recognize the Government's concern that the royalty rate, oil profit rate and crude postings applied to Aminoil be consistent with those used in other OPEC countries and we have no objection to adopting Abu Dhabi terms provided that our product reference prices are modified as discussed below".

But in spite of this statement the real negotiations were not to start until 1977, and in a very different style from those of 1976. At once, a speeding-up of the exchanges is to be noticed. On 27 March, 1977, the Government had appointed a "Negotiating Committee", giving it 45 days in which to finish. Meetings were held on 21, 23 and 24 April, and on 7, 8, 9 and 10 May; and then, on the basis of new offers from Aminoil, meetings took place on 27, 28 and 29 June and again on 25 and 26 July.

63. In the course of these meetings the Government unmistakeably brought out the nature of the change it intended to effect in the essential principle of Aminoil's Concession. It offered as a basis of the normal annual return to be obtained by the Company, a definite amount, at first 6 million dollars, which was afterwards increased to 7.5 million; whereas Aminoil had asked for 18 million. But the Government, regarding the Concession as "matured", failed to recognize that the Company had recently carried out a new programme of investment, and refused to take its present proposed programme into account (Minutes of the first meeting, GM App. VII.2). The Company was thus faced with being allocated a fixed basis of return, deemed by it insufficient; and it was afraid of not being protected against inflation, and generally of finding itself in a less easy and more precarious position than with a contract of service.

64. This second phase of the negotiations saw the introduction of a new prospect - that of nationalisation. It may not be entirely clear which side took the initiative over that. It was on 21 May,1977 that the Minister of Oil requested Aminoil to table new proposals, and on 22 June that Aminoil suggested a "take-over" (GM App. VII.1). The course of the negotiations, as sketched above, had shown that they would come to this. The notion of a nationalisation had equally not been absent from the mind of the Government which, as far back as 5 April, 1976 (AR Vol. V, Exh. 14), had unofficially proposed it, tempered by the suggestion of a contract of service.

65. However, Aminoil's take-over proposition not only did not resolve the issue of the Abu Dhabi Formula, but brought that issue into the question of the compensation to be afforded in respect of a nationalisation. Indeed, rather than have these two matters dealt with separately, Aminoil proposed to eliminate the compensation question on the basis of a retention by the Company of a substantial part of the profits received by it since 1975 but liable to revert to the Government on Abu Dhabi account. In addition, the Company wanted the benefit of a service contract. This solution was intended by Aminoil to by-pass a difficult exercise - that of evaluating the compensation that would be due to it for renouncing the benefit of the Concession.

66. This proposition did not obtain the concurrence of the Government, - whether because the latter was chiefly concerned with improving its own position, - or rather, because it wanted to be able to present its Parliament with a more clear-cut transaction, separately detailing all the various elements of the settlement.

67. Account must also be taken of the fact that, amongst other causes of the ultimate failure of the negotiations, a marked deterioration in the "climate of attitude" occurred in 1977, although personal relations between the Kuwait Authorities and Aminoil's representatives always remained perfectly courteous. On both sides, oppositions of feeling and contradictory preoccupations had developed.

68. The Government of Kuwait had just crowned its petroleum policy by the completed nationalisation of the Kuwait Oil Company. In the world at large, the view points of the petroleum-producing countries and of OPEC had in great measure triumphed. Even when the companies' oil revenues, amassed in consequence of the increases in the price of petroleum products, were lodged abroad in foreign bank accounts in the name of the concessionaire company, they were psychologically considered by the producing States as being morally their property, apart from the modest amounts the Governments would be willing to leave to the Companies as remuneration for their services of extraction, processing and marketing. In the case of Aminoil, the delays in applying the Abu Dhabi Formula had, from the Government's stand-point, allowed an important capital sum to accumulate in the hands of the Company which, in the eyes of some, appeared as the holder of a stake, the restitution of which was being bargained for. Thence, annoyance and suspicion, perhaps. hastening the oncoming of a "shut-down" the possibility of which had never been excluded.

69. As for the Company, it felt itself helpless. It had learnt from experience that no one was much interested in the ultimate fate of small or middle-sized producing companies. The major companies, in the arrangements they entered into, could find an indirect satisfaction in the operations of processing, converting and marketing. The smaller undertakings did not enjoy similar advantages, yet had to submit to the rigours of a regime not fashioned to their situation. Such feelings had been vividly experienced by the representatives of Aminoil at each negotiation about Article 9, - and not without some reason they feared that the Company's fate over compensation, in the event of a nationalisation, would be worse still.

70. Thus, in reviewing the history of the negotiations in the light of hindsight, it would be possible - as with all negotiations that have come to grief - to pin-point lost opportunities, and chances of agreement that were disregarded. It is not the Tribunal's function to weigh these up, but to state the law. As to that, the main points are as follows :
(i) A scrutiny of the negotiations fails to reveal any conduct on either side that would constitute a

shortcoming in respect of Article 9 of the 1961 Supplemental Agreement, or of the general principles that ought to be observed in carrying out an obligation to negotiate, - that is to say, good faith as properly to be understood; sustained upkeep of the negotiations over a period appropriate to the circumstances; awareness of the interests of the other party; and a persevering quest for an acceptable compromise. The Tribunal here makes reference in particular to the well known dicta in the North Sea Continental Shelf and Lac de Lanoux cases.

(ii) With constancy, Aminoil kept to the line which it always followed throughout the difficulties arising from Article 9, and experienced in the course of operating, namely - (regarding its contractual position with the Government) - to maintain for itself, as far as circumstances permitted, the essential features of a contract of concession, while being willing to confine its profits within the limits of a "reasonable return" so that when, confidentially, but at a high level, the possibility was mooted of turning the contract of concession into a contract of service, the Company's representative stated on 5 April, 1976 that he preferred "to continue for several years under the present arrangements with modifications in the level of payments (AR Vol. V, Exh. 14).

(iii) The Company recognized that there was occasion to apply Article 9, and the Government was at one with the Company in recognizing that there was nothing automatic about the application of the Abu Dhabi Formula, and that a reasonable rate of return must remain available for the Company. It also appeared, according to the position taken up by the Company, that in applying the Abu Dhabi Formula, the question of assessing a reasonable rate of return could have a certain connection with that of the indemnification of the Company, should the possibility of terminating the Concession be simultaneously raised.

(3) The Tribunal's competence to apply the Abu Dhabi Formula

71. The competence of the Tribunal is a question that only arises if it is established that something is due from Aminoil under this head. Since the Tribunal finds affirmatively on this point it must begin by considering whether it has jurisdiction to go into the matter.

72. The respective attitudes of the Parties in this respect involve important questions of principle. As far back as in its Counter-Memorial (ACM paragraphs 34 and 282), Aminoil - citing international precedent in the shape of the Tacna-Arica question - expressed the view that

"... it must be doubted whether this Tribunal is competent to prescribe for the Parties the terms of an agreement which they could not make for themselves. The equitable revision of the terms of an agreement is not a function which a tribunal will normally undertake unless the intent of the Parties to confer such an extended competence upon it is clearly expressed."

In its Reply (GR paragraphs 3,105 and 3,106) the Government observed that

"In the present arbitration, however, the Government is not asking the Tribunal to make a new contract. There is no need to do so. The Government is asking the Tribunal to determine "the amount payable to the Government... in respect of royalties, taxes or other obligations of the Company" (see Article III, 1 (iii) of the Arbitration Agreement).

The reference to the "other obligations of the Company" in the Arbitration Agreement is plainly a reference to such legal obligations as Aminoil owed to the Government, including its obligation to implement the Abu Dhabi Formula. Accordingly, the Tribunal has jurisdiction to determine, first, whether Aminoil was under any obligation to implement the Abu Dhabi Formula and, secondly, if it was, how much it should nay to the Government under that Formula, either as royalties and taxes, or as damages for breach of the obligation".

In the course of the Oral Hearings the representatives of Aminoil made the following statements (Day 10,pp. 26, paragraph: H, 27, paragraphs A, B, C, 47, paragraph F and 48 paragraph A)

"I want to make clear that Mr. Redfern's version of the Company's position on this point is unfounded. It goes back to statements in Aminoil's Counter-Memorial, which were replying to proposals in the Government's Memorial, that this Tribunal should determine (Government Memorial, para. 4.17): "What can be considered 'equitable to the parties' on the basis of the Abu Dhabi formula". In its Reply at that time (Amin-oil Counter-Memorial 282). Aminoil questioned whether it would be proper for this Tribunal to make such a determination on an "equitable basis" and on the basis of the formula. The reason was that the Tribunal was directed to decide according to law, and that the application of the formula was in itself an issue in the Arbitration.

Aminoil, in no way then or now, intended to suggest that the Tribunal was not fully competent to decide, in accordance with the Arbitration Agreement, and on the basis of law, on the amounts which may be payable by either party to the other".....

"... the Parties did not reach a mutual agreement as envisaged by Article 9. Since they did not do so, there was no amendment whatever to the terms between them which existed at the time. The current arrangements stood. Therefore, no payment of any kind, or in any amount, is due by Aminoil to the Government by means of their failure to agree on an equitable application of the Abu Dhabi terms or otherwise and that is very fundamental.

I close my rebuttal by completing Mr. Redfern's reference to Article 3(1) of the Arbitration Agreement. The Tribunal will recall that that Article provides that the Tribunal shall decide according to law."

73. The Tribunal has thought it necessary to quote fully these views, expressed by the Parties, because in this matter it is its own competence that is in question, and this depends entirely on the common will of the Parties. The international aspects of the Tribunal's mandate create a special duty for it to be scrupulous regarding jurisdiction. Its competence relative to this question is challenged in two quite distinct respects : that of the power of a tribunal to complete an incomplete contract; and that of the right of an arbitral tribunal to proceed on the basis of equity. These will be considered in turn.

74. As to the first, there can be no doubt that, speaking generally, a tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations - or to modify a contract - unless that right is conferred upon it by law, or by the express consent of the parties. The law does often give a tribunal this right, and precedents in many countries could be cited of cases in which, on the basis of the applicable law, courts have completed a contract: But arbitral tribunals cannot allow themselves to forget that their powers are restricted. It is not open to doubt that an arbitral tribunal -constituted on the basis of a "compromissory" clause contained in relevant

agreements between the parties to the case, and seized in the matter unilaterally by one of the parties only - could not, by way of modifying or completing a contract, prescribe how a provision such as the Abu Dhabi Formula must be applied. For that, the consent of both parties would be necessary.

75. But in the present case, the Tribunal thinks that it is not really a question of modifying or completing the contract of concession. The Tribunal is not expected to devise new provisions that will govern the contractual relations of the Parties for the future, but to liquidate the Various consequences of their past conduct, and of the contractual clauses that once bound them but are now at an end. Under this head, the Arbitration Agreement founding the competence of the Tribunal is widely drawn, and confers jurisdiction to investigate whether, as part of a general settlement of the issue pending between the Parties, and on the basis of their respective attitudes and of the principles, the Tribunal must rely on for effecting such a settlement, a liability can be ascribed to Aminoil on Abu Dhabi account.

76. As to this, the Tribunal, before going further, takes note of the fact that, during the whole course of the negotiations between the Parties on this matter, Aminoil never questioned but that the requisite conditions for bringing Article 9 into play were present, and that a liability, of which only the actual amount remained unsettled, existed.

77. The second objection made to the jurisdiction of the Tribunal in respect of this matter (see paragraph 73 above) was to the effect that it could not proceed to apply Article 9 because, by the very terms of that provision, such a process could only be based on equitable considerations, whereas, by virtue of the terms of the Arbitration Agreement, the Tribunal cannot decide except according to law.

78. This argument cannot however be accepted in the context of the assessment of a sum of money -for if it had to be, it would by that very token cause the Tribunal to lack capacity to make an assessment of the amounts due to Aminoil by way of compensation for the nationalisation. It is well known that any estimate in money terms of amounts intended to express the value of an asset, of an undertaking, of a contract, or of services rendered, must take equitable principles into account. As the International Court of Justice said in a well known case concerning a tribunal which had held that "redress will be ensured ex aequo et bono by the granting to the complainant of the sum set forth below" :

"It does not appear from the context of the judgement that the Tribunal thereby intended to depart from principles of law. The different intention was to say that, as the precise determination of the actual amount to be awarded could not be based on any specific rule of law, the tribunal fixed what the Court, in other circumstances, has described as the true measure of compensation and the reasonable figure of such compensation (Corfu Channel Case, Judgement of December 15th 1949, I.C.J. Reports 1949 p. 249)."

As was declared even more forthrightly by the same Court in the case already cited above of the North Sea Continental Shelf, paragraph 85 :

"... in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles....."

79. To sum up, - the foregoing enquiry into the circumstances of the 1976-1977 negotiations leads the Tribunal to come to the following conclusions :
(1) - In the course of these negotiations, both Parties observed the obligations incumbent on them as well in regard to Article 9 as to the general principles of law.

(2) - The requisite conditions for the application of Article 9 in respect of the Abu Dhabi Formula were present, and this was recognized by both Parties. From this it follows that in principle something is owing by Aminoil to the Government on Abu Dhabi account.

(3) - The total due must consist of the sum of the profits received by the Company in excess of what would have constituted a reasonable rate of return, after taking account of its operating conditions, - such a rate of return having always been the basis of its position and legitimate expectations at this time.

(4) - Within the framework of a general settlement of the consequences of the cancelling of Aminoil's Concession, which is the object of the special Arbitration Agreement concluded by the Parties, the Tribunal has jurisdiction to determine the amount due.

SECTION V. The question of the validity of Kuwait Decree Law n° 124

80. The question of the validity of Decree Law n 124 lies at the core of the present litigation. It was therefore to be expected that a full and sometimes fine-drawn set of arguments on this topic should have been submitted to the Tribunal by the Parties. An important part of this controversy puts in question the interpretation of certain articles of the Concession which the Tribunal has had occasion to consider in Section IV above. The present Section will be concerned with, on the one hand, the "stabilisation" clauses (Article 17 of the 1948 Concession Agreement, and Article 11 as amended by the Supplemental Agreement of 1961); and, on the other hand, the impact of the "adaptation" clause (Article 9 of 1961), already considered in Section IV.

81. Before proceeding to a general examination of the essential questions here involved, it is desirable to call attention in a preliminary way to certain fundamental points.
(1) No failure on the part of the Company can be alleged in determining the validity of the Decree Law. At the start of the written proceedings, the Government of Kuwait seemed to attach much importance to two aspects of the Company's behaviour that might be regarded as inconsistent with its contractual undertakings: to begin with the Company was said not to have conformed to its obligations under Article 9, - and, furthermore, not to have paid due regard to its obligations concerning "good oil-field practice" a matter that will be gone into later (see Section VI (B)). These two alleged shortcomings were said to be at the root of the Decree Law. Later, and in particular during the oral proceedings, this attitude was modified, and the Government put forward arguments directed to establishing the validity of the Decree Law without calling in question the Company's conduct.

(2) As regards the problem of non-conformity with Article 9, the Tribunal has already analysed that

provision (Section IV(C)) and indicated the conditioned and limited obligation it created. It considers that the negotiations held in 1976 and 1977 do not reveal any bad faith on the part of the Company, which sought consistently and with flexibility for the means that might lead to an agreement, so that no complaint can be made against it on that score.

(3) With reference to the complaint of "bad oil-field practice", it was recognised that this had not been formulated at any time prior to Decree Law n° 124. It follows that it cannot in any way be taken into account for the purpose of determining the validity of that Decree. The Government's claim under this head raises a different issue -dealt with in Section VI (B) below.

(4) Another observation of a fundamental kind must be made about the characterisation to be given to Decree Law n° 124. The operation brought about by the Decree Law had a double aspect : it constituted at one and the same time the termination of a contract, and also a nationalisation. Indeed the two are linked. However, the arguments of the Parties distinguished, and to a certain extent contrasted, these two aspects. For Aminoil the nationalisation was carried out only in order to resolve a difference of view between the Parties arising in a contractual setting and falling to be resolved within that setting by the prescribed methods. On behalf of the Government it was maintained after a certain amount of hesitation that the essential character of the Decree was to put into execution an act of nationalisation even if this simultaneously terminated a contractual situation that could not go on indefinitely.

82. In order to go fully into the competing contentions of the Parties the Tribunal will consider in turn the following questions :
(A) Would Decree Law n° 124 have been legitimate if no account were taken of the lack of success of the negotiations for the revision of the agreements relating to the Concession ?

(B) Supposing Decree Law n° 124 to have been legitimate on the basis of question (A), would it remain so having regard to the fact that it occurred at the very time when a difficult negotiation between the Parties was still in progress ?

(C) Should there have been recourse to arbitration before Decree Law n° 124 was issued ?

Question (A)

83. Various objections to the validity of the nationalisation ordained by Decree Law n° 124 have been put forward, - on the one hand that it did not conform to certain general requirements for the validity of an act of nationalisation; on the other, that it was contrary to some precise contractual undertakings applicable in the circumstances. These different objections will now be considered.

84. The Parties are at one in saying that a nationalisation is effected by a transfer, in the public interest, of property from the private to the public sector. However, in order to distinguish nationalisation from other comparable measures, it is also claimed that a nationalisation must apply to the totality of a given sector of the economy -that is to say, without discrimination, to an assemblage of undertakings.

85. In regard to Decree Law n° 124, it has been objected that by reason of its specific character, it took the form of a single measure not directed to any object of general interest. This contention does not seem to be well founded. It is generally known that all Middle-Eastern States belonging to OPEC (as well as other producing countries) have always considered that their overall petroleum policy must, in its final phases, result in the nationalisation of the whole local petroleum industry, and it is the fact that the entity operating much the most important concession in the land (the Kuwait Oil Company) - after having been made the object of a 60% participation in its share capital by the Government - was subjected very soon afterwards, and before Decree Law n° 124, to a total nationalisation. In short, after having nationalised over 90$ of petroleum production in its territory, the Kuwait Government, now in possession of staff and plant already in situ, was able without difficulty to nationalise Aminoil's much less important undertaking.

86. The Tribunal does not see why a Government that was pursuing a coherent policy of nationalisation should not have been entitled to do so progressively. It is hardly necessary, additionally, to stress the reasonable character of a policy of nationalisation operating gradually by successive stages, in step with the development of the necessary administrative and technical availabilities. The 1976-1977 negotiations are revealing on this point. As the Tribunal has indicated earlier (Section IV(C)), these brought out the existence of tendencies much in favour of nationalisation. As early as the meeting of 23 February, 1976, the representative of the Government was declaring (AR Vol. V, Exh. 10; GM Apr. VII.2) that nationalisation was not contemplated "at this time" (emphasis added); and see also per Mr. Adasani, Under-Secretary of State at the Ministry of Oil, in GCM App. II.4). It may be added that the official stand taken by the Kuwait Government in the statements following upon the Decree Law cited the carrying out of a general programme, - for in a press conference held on 20 September, 1977 the Minister for Oil (AM Vol. VII, Exh. 3) made a declaration which, subject to the correctness of the press translation, was as follows :

"I would like to clarify and stress one point : from the beginning there has been a specific plan for the State to take over full ownership of its oil resources and nut them under national management."

87. If however, the progressive character of the measures of nationalisation concerned does not justify the assumption that there was no general plan of nationalisation, another question emerges. In 1977 nationalisation was not extended to both of the Companies then operating as concessionaires, viz. Aminoil and the "Arabian Oil Company" (AOC). The latter was spared. The question accordingly arises whether the nationalisation of Aminoil was not thereby tainted with discrimination, and whether this differentiation does not show that the Decree Law had other objects than that of realising a programme of economic development. The Tribunal does not think so. First of all, it has never for a single moment been suggested that it was because of the American nationality of the Company that the Decree Law was applied to Aminoil's Concession. Next, and above all, there were adequate reasons for not nationalising Arabian Oil. At the press conference mentioned above, the Minister for Oil had touched upon this question and had given the following reasons for the non-nationalisation of AOC - which there is no difficulty in finding convincing :

"AOC's high-cost off-shore production operations are such as to give it a special position which requires a high degree of expertise. At the same time, it is working within the framework of a concession granted by both Kuwait and Saudi Arabia, so its position is completely different. Any modification of the concession must be agreed to by both countries." (AM Vol. VII, Exh. 3)

88. Accordingly, the Tribunal sees nothing in the conclusions to be drawn from an examination of the above-mentioned circumstances that would prima facie prevent recognition of the validity of the nationalisation effected by Decree Law n° 124. Nevertheless, Aminoil's concessionary contract contained specific provisions in the light of which it may be queried whether the nationalisation was in truth lawful. The provisions concerned are Articles 1 and 17 of the Concession Agreement of 1948, and Article 7(g) of the 1961 Supplemental Agreement which introduced a new version of Article 11 of 1948. The relevant part of Article 1 of 1948 provided that

"The period of this Agreement shall be sixty (60) years from the date of signature... "

Article 17 of 1948 provided as follows :

"The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in Article 11. No alteration shall be made in the terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interest of both parties to make certain alterations, deletions or additions to this Agreement."

Finally, Article 7(g) of the Supplemental Agreement of 1961 provided for the deletion of Article 11 of 1948 and the substitution for it of a new Article 11. This new version, after indicating in a first paragraph (A) certain events (not here relevant) in which the Ruler of Kuwait would he entitled to terminate the Concession, went on in a second paragraph (B) to state

"(B) Save as aforesaid this Agreement shall not be terminated before the expiration of the period specified in Article 1 thereof except by surrender as provided in Article 12 or if the Company shall be in default under the arbitration provisions of Article 18."

These clauses combined, but especially Article 17, constituted what are sometimes called the "stabilisation" clauses of the contract. A straightforward and direct reading of them can lead to the conclusion that they prohibit any nationalisation. Such is the view maintained by the Company. The Government of Kuwait on the other hand, in a series of arguments the merits of which the Tribunal must now consider, maintained that, on the contrary, these clauses did not prevent a nationalisation.

89. The Tribunal will begin by discarding two arguments which it does not consider reliable.
Firstly, the more radical one consists in affirming that these clauses do no more than embody general principles of contract law, and that in consequence the legal regime of the Concession is the same as that of any contract, and that these clauses add nothing to what would in any event be the legal position. This argument cannot be accepted, for it is a well-known principle of the interpretation of contractual undertakings (and indeed of all juridical instruments) that the interpretation to be adopted must be such as will give each clause a worth-while meaning or object. In the present case, as Aminoil has pointed out, that object resides precisely in the fact that one of the Parties, being a State, had available to it all the powers of a public Authority and, by using them, could take those steps against which it was the very object of these clauses to protect the concessionaire.

Secondly, according to an initial Government contention, these provisions had a "colonial"

character and were imposed upon Kuwait at a time when that State was still under British protectorate, and not in possession of its full sovereign powers. On this basis the stabilisation clauses were devoid of value. However, quite apart from any attempt to enquire into the factual circumstances in which these clauses were adopted, this contention cannot be upheld, for they were expressly confirmed on the occasion of the 1961 revision of the Concession after the attainment of complete independence by Kuwait, and again in 1973 when the text of the"1973 Agreement" was put into operation.

90. Other Government arguments were as follows :
(1) It was contended that the stabilisation clauses - initially valid and effective - were annulled by the emergence of a subsequent factor in the shape either of the Kuwait Constitution of 1962, or of a public international law rule of jus cogens forming part of the law of Kuwait. The relevant provisions of the Kuwait Constitution were those registering the permanent sovereignty of the State over its natural resources, and in particular Articles 21 and 152 which provided as follows (translation from the Arabic taken from AM Vol. VII, Exh. 13):

Article 21 : "All of the natural wealth and resources are the property of the State. The State shall preserve and properly exploit those resources heedful of its own security and national economy requisites."

Article 152 : "Any concession for the exploitation of a natural resource or of a public utility shall be granted only by Law and for a determinate period. Preliminary measures shall guarantee the facilitation of exploration and discovery and shall ensure publicity and competition."

However, it does not appear from these provisions that they in any way prevented the State from granting stabilisation guarantees by contract. Even if they should be interpreted as doing so, it was the State's duty towards its co-contractant to notify the latter of the putting into force of the resulting constitutional modifications to current contracts. This was not done; nor was it done either at the time of the revision of 1961, or of that of 1973.

(2) Equally on the public international law plane it has been claimed that permanent sovereignty over natural resources has become an imperative rule of jus cogens prohibiting States from affording, by contract or by treaty, guarantees of any kind against the exercise of the public authority in regard to all matters relating to natural riches. This contention lacks all foundation. Even if Assembly Resolution 1803 (XVII) adopted in 1962, is to be regarded, by reason of the circumstance of its adoption, as reflecting the then state of international law, such is not the case with subsequent resolutions which have not bad the same degree of authority. Even if some of their provisions can be regarded as codifying rules that reflect international practice, it would not be possible from this to deduce the existence of a rule of international law prohibiting a State from undertaking not to proceed to a nationalisation during a limited period of time. It may indeed well be eminently useful that "host" States should, if they so desire, be able to pledge themselves not to nationalise given foreign undertakings within a limited period; and no rule of public international law prevents them from doing so.

(3) Another argument advanced by the Government of Kuwait requires consideration. According to this, Aminoil's Concession belonged to the general category of "administrative contracts" in respect

of which - as much by Kuwait law as on the basis of general legal principles - special faculties were reserved to the State, of which account must be taken in the interpretation of the stabilisation clauses.

91. The " administrative contract ", as it was originally developed in French law, and subsequently in other legal systems such as those of Egypt and Kuwait, is based on the idea that certain contracts concluded by the State, or by public entities, are governed by special rules, the two principal ones being as follows :

(i) - The public Authority can require a variation in the extent of the other party's liabilities (services, payments) under the contract. This must not however go so far as to distort (unbalance) the contract; and the State can never modify the financial clauses of the contract, - nor, in particular, disturb the general equilibrium of the rights and obligations of the parties that constitute what is sometimes known as the contract's "financial equation". This characteristic is also to be found in certain ordinary private law contracts, and respect for the equilibrium of reciprocal undertakings is a fundamental principle of the law; of contracts. But in the present case it has to be realized that the main difficulties that arise are not about respect for the financial equation that reflects the contractual equilibrium, but about the method of applying Article 9, - that is to say not over respect for the original equilibrium, but over the search for a new, equitable, equilibrium.

(ii) - The public authority may proceed to a more radical step in regard to the contract, namely to put an end to it when essential necessities concerning the functioning of the State (operation of public services) are involved, It is with this second aspect of the notion of an administrative contract that the present case could in theory be concerned. Yet even if Aminoil's Concession belonged to this category of contract, it would still be necessary that exigencies connected with essential State functioning should be such as to justify Decree Law n° 124.

92. In order to find an answer to this question, in connection with that of the effect of the stabilisation clauses of the Concession, the matter has to be seen in its historical perspective.

93. It seems fair to say that what the Parties had in mind in drafting the stabilisation clauses in 1948 and 1961, was anything which, by reason of its confiscatory character, might cause serious financial prejudice to the interests of the Company. Thus, as mentioned earlier, Article 7(g) of 1961, instituting a new revised Article 11 of 1948, enumerated and strictly limited all the instances in which the Concession can terminate through a forfeiture of the concessionaire's rights (for failure in its obligations), but is silent as to all acts that would lead to the ending of the Concession without having a confiscatory character. It can be held that the case of nationalisation is precisely one of those acts, since as a matter of international law it is subject inter alia to the payment of appropriate compensation.

94. The case of nationalisation is certainly not expressly provided against by the stabilisation clauses of the Concession. But it is contended by Aminoil that notwithstanding this lacuna, the stabilisation clauses of the Concession (Articles 17 and revised 11) are cast in such absolute and all-embracing terms as to suffice in themselves -unconditionally and in all circumstances - for prohibiting nationalisation. That is a possible interpretation on the purely formal plane; but, for the following

reasons, it is not the one adopted by the Tribunal.

95. No doubt contractual limitations on the State's right to nationalise are juridically possible, but what that would involve would be a particularly serious undertaking which would have to be expressly stipulated for, and be within the regulations governing the conclusion of State contracts; and it is to be expected that it should cover only a relatively limited period. In the present case however, the existence of such a stipulation would have to be presumed as being covered by the general language of the stabilisation clauses, and over the whole period of an especially long concession since it extended to 60 years. A limitation on the sovereign rights of the State is all the less to be presumed where the concessionaire is in any event in possession of important guarantees regarding its essential interests in the shape of a legal right to eventual compensation.

96. Such is the case here, - for if the Tribunal thus holds that it cannot interpret Articles 17 and 7(g) - revised 11 - as absolutely forbidding nationalisation, it is nevertheless the fact that these provisions are far from having lost all their value and efficacity on that account since, by impliedly reouiring that nationalisation shall not have any confiscatory character, they re-inforce the necessity for a proper indemnification as a condition of it.

97. There is another aspect of the matter which has weighed with the Tribunal. While attributing its full value to the fundamental principle of pacta sunt servanda, the Tribunal has felt obliged to recognize that the contract of Concession has undergone great changes since 1948: changes conceded -often unwillingly, but conceded nevertheless - by the Company. These changes have not been the consequence of accidental or special factors, but rather of a profound and general transformation in the terms of oil concessions that occurred in the Middle-East, and later throughout the world. These changes took place progressively, with an increasing acceleration, as from 1973. They were introduced into the contractual relations between the Government and Aminoil through the play of Article 9, or else as the result of at least tacit acceptances by the Company, which entered neither objections nor reservations in respect of them. These changes must not simply be viewed piece-meal, but on the basis of their total effect, - and they brought about a metamorphosis in the whole character of the Concession.

98. This Concession - in its origin a mining concession granted by a State whose institutions were still incomplete and directed to narrow patrimonial ends - became one of the essential instruments in the economic and social progress of a national community in full process of development. This transformation, progressively achieved, took place at first by means of successive increases in the financial levies going to the State, and then through the growing influence of the State in the economic and technical management of the undertaking, particularly as to the control of pricing policy, taken over in 1975, and the regulation of works and investment programmes. The contract of Concession thus changed its character and became one of those contracts in regard to which, in most legal systems, the State, while remaining bound to respect the contractual equilibrium, enjoys special advantages.

99. In relation to Aminoil's undertaking therefore, the State thus became, in fact if not in law, an associate whose interests had become predominant. Moreover, in spite of its unfinished, and in certain ways improvised character, the text of the projected Agreement of July 1973, made applicable by the 22 December, 1973 Letter, bears witness to this evolution.

100. The faculty of nationalising the Concession could not thenceforward be excluded in relation to the régime of the undertaking as it resulted from the sum total of the considerations relevant to its functioning. This conclusion concerning the interpretation of the stabilisation clauses, as being no longer possessed of their former absolute character, which the Tribunal has thus reached, is in harmony with that régime as it stood in 1977, - and a contrary interpretation would, in addition, disregard its other contractual components.

101. The Tribunal wishes however to stress here that the case is no: one of a fundamental change of circumstances (rebus sic stantibus) within the meaning of Article 62 of the Vienna Convention on the Law of Treaties. It is not a case of a change involving a departure from a contract, but of a change in the nature of the contract itself, brought about by time, and the acquiescence or conduct of the Parties.

102. The Tribunal thus arrives at the conclusion that the "take-over" of Aminoil's enterprise was not, in 1977, inconsistent with the contract of concession, provided always that the nationalisation did not possess any confiscatory character.

Question (B)

103. Does Decree Law n° 124 - supposing it to be lawful within the meaning of Question (A), remain so, having regard to the fact that it supervened at a moment when a difficult negotiation between the Parties was still in progress ?

104. The Tribunal has just found that, leaving out of account the negotiations for revision taking place in 1977, a lawful nationalisation of Aminoil's undertaking had occurred. It is nevertheless quite undeniable that the state of relations between the Company and the Government at the time of the Interruption of negotiations played a major part in the termination of the Concession involved by the Decree Law. The official documentation of the period openly shows it, and the contentions out forward by the Government in the course of the arbitral proceedings make such of the condition of relations between the Parties on the eve of the Decree.

105. On the juridical level, the Government at a certain moment even went so far as to profess that it was the attitude of the Company that had brought about this lack of success of the negotiations, through a failure to respect the obligations incumbent upon it under Article 9 of 1961. Later, the Government confined itself to saying that the perpetuation of this state of affairs created a situation on the contractual level that could not be indefinitely prolonged, and that even involved an "intolerable" aspect. Hence, this condition of the contractual relationship would for the Government constitute an additional motive for nationalisation, and would in some degree strengthen the basis of the one that was declared by Decree Law n° 124.

106. For Aminoil on the other hand, this aspect of the Decree Law constituted one of the chief elements of its lack of validity. The fundamentally important circumstance was the disagreement that occurred in the course of the negotiations for the revision of the Concession. The Decree Law, by its recourse to the concept and forms of nationalisation would in this case only be a stratagem, a

procedural malversation employed to resolve a dead-lock which, according to Article 9 of 1961, ought to be resolved by agreement, but which could in no event be resolved unilaterally, and thus it was that the Government had committed a fundamental breach of contract.

107. The dialectic thus developed by the two Parties highlights an essential facet of the difficulties which arise in contract law in those cases where - for the amendment of certain provisions, or the formulation of supplementary ones - the Parties have created an obligation to negotiate, the results of which will depend entirely on the freely given consent of both of them. If the negotiations break down, what then is the legal position ? In private law, as in international law relationships, there are only palliatives. Judicial annulment of the contract has the drawback of abolishing it entirely: termination unilaterally pronounced by one of the parties is worse still.

108. As regards certain contracts (the "administrative contracts" of French law), the right reserved for the benefit of the party representing the public authority, of terminating the contract unilaterally, is practicable only because the regularity of such acts is subject to the control of judicial organs enjoying the confidence of both the parties. If this were not the case, and if the State had to be regarded as being entitled to have recourse to nationalisation at its discretion, there would be an end to any possibility of a negotiation that enabled reasonable account to be taken of the interests of both parties, since the negotiation would only be conducted under the threat of a nationalisation that would supervene at the first serious difficulty.

109. Thus the apprehensions that motivated the reasoning of the Company can be perfectly well understood, and it can be conceded in its favour that a nationalisation whose alleged justification lies solely in the advantages to be derived from putting a term to a contractual dispute, would not be regular. Nevertheless, in the circumstances of the present litigation, that is not precisely the point. It is incontrovertible that, though without haste, Kuwait had consistently pursued a general programme aimed at placing the State in control over the totality of the petroleum industry, and that a nationalisation of Aminoil was in itself lawful (see answer to Question (A) above). The problem is to decide whether this nationalisation, in itself legitimate, became illegitimate because it additionally enabled an end to be put to a contractual situation which had been the subject of a difficult negotiation that had not reached a result during the preceding months.

110. The Tribunal does not think it possible to go so far. The existence of this situation may have been decisive for the choice of the date of the nationalisation, but the latter obtained its justification from a general policy duly established and substantiated. In the concrete case submitted to the Tribunal, it would be all the more unacceptable to claim the contrary, seeing that although the first stage of the negotiations of 1976-1977 was about a revision of the Concession, the Parties subsequently sought an agreement for realising the nationalisation of the Concession: the negotiations, without departing from their initial aim, were enlarged, so that it became indeed a question of the conditions for the transfer to the State of all the components of the undertaking in Kuwait territory. As from that point, it becomes difficult to contend (merely because there was, for the moment, no outcome to a negotiation having as its object to settle terms of nationalisation by mutual agreement) that a nationalisation subsequently imposed by the public authority was rendered illegitimate in principle solely by virtue of that fact.

Question (C) - as to the obligation to have recourse to arbitration.

111. Even on the assumption that all the foregoing conclusions are correct Aminoil has also contended that since there was a dispute between the Parties, the most serious complaint to be made against the Government was that it did not have recourse to the arbitral procedures provided for in the contract, but clinched the matter unilaterally. This being so, the Tribunal believes that some comments are called for on the place of arbitration in the present context.

112. The Tribunal will disregard the controversy between the Parties as to whether, failing the arbitration clause in the July 1973 Agreement which Aminoil did not recognise, the analogous clause of the Concession Agreement was operative; and it will be assumed that there did exist some provision enabling a Party to set the machinery of arbitration in motion. But in the present context the possibility (prior to the issuing of Decree Law n° 124) of seizing an arbitral tribunal with the particular question over which the Parties had failed to come to an understanding - namely the application of the Abu Dhabi Formula - did not exist, because unless and until the Government took some concrete step -such as nationalisation - in consequence of that failure, there would have been no definite complaint with which to seize any arbitral tribunal (see Section IV above, paragraph 74). Therefore, to all intents and purposes the Parties would have had to request the arbitrators to draw up fresh contractual provisions applying that formula. Technically, the conclusion of a Special Agreement ("Compromis") to that effect was possible; but it is not at all clear that the Parties would have been able to agree on the terms of such a Compromis, and no complaint could have been made against either for not being able so to agree. The only definite issue for arbitration would therefore have been the claim of one of the Parties that the termination of the Concession ought to be pronounced in the absence of an understanding as to the conditions of a revision, the principle of which both Parties accepted as legally necessary. The complaint made by Aminoil against the Government consequently comes to this, that by unilaterally terminating the Concession, the Government took a step which it ought to have left to an arbitrator to take, - but which the arbitrator could not have taken without first deciding what were the terms for the application of the Abu Dhabi Formula that the Parties ought to have agreed upon, but had failed to do.

113. However, quite apart from the impracticable nature of such a course, at that stage, this argument does not appear well-founded since, as the Tribunal has already ruled, the Concession had become a contract under the changed régime of which the State had, over the years, acquired a special position that included the right to terminate it, if such a step became necessary for the protection of the public interest, and subject to the payment of adequate compensation. In the course of the long delays inseparable from the arbitral process, sums of money, of which a preponderant part might eventually redound to the State, would have gone on being accumulated abroad. The Company, in a situation of absolute uncertainty as to its future, and as to what sums would ultimately remain at its disposal, would have continued not to be able to carry out the major work of renovation and development which each passing day made more urgent.

114. Looked at in this way, Decree Law n° 124 appears, and did legitimately appear to the Government of Kuwait, as a necessary protective measure in respect of essential national interests which it was bound to safeguard. By subsequently submitting the totality of its dispute with Aminoil to the present arbitral process, the Government of Kuwait has accorded to international arbitration its due place.

115. Subject to the foregoing observations, the Tribunal considers that Decree Law n° 124 did not

constitute a violation by Kuwait of its obligations towards Aminoil, as these stood in 1977.

SECTION VI. Other Government Counter-Claims

116. The Government of Kuwait has made two counter-claims against Aminoil which, in its Final Conclusions (see Section I above, paragraph (xix)), are entitled Aminoil's Liabilities to Third Parties and Aminoil's Operations and Installations. The first concerns amounts due but unpaid by the Company on 19 September, 1977 (the date of the take-over), for which the Government, in the normal course of business, assumed responsibility. The second concerns what has been called "bad oil-field practice". These claims, which involve totally different questions, and have weighed very unequally with the Parties, must be dealt with separately.

(A) Aminoil's liabilities to third parties

117. The relevant Agreements between the Parties did not contain any provisions regulating the situation resulting from a possible end of the Concession by reason of the unilateral act of the public Authority. Decree Law n° 124, and the measures taken under it, determined the transfer of the Company's assets and operations on the basis of the clause in the Concession providing for a normal completion of its term (GM App. V).

118. This way of dealing with the matter was not opposed by Aminoil. The transfer of the assets gave rise to a credit in its favour, whereas that of the liabilities created a debt. The sums due at the date of 19 September, 1977, and paid by the Government, have to be refunded by the Company, as provided in Ministerial Decision n° 53 instituting a Compensation Committee and instructing it to pay "any debts relating to the Company's operations" (AM Vol. VII, Exh. 3, p. IV).

119. The Government claims certain refunds from Aminoil (GM paragraph 4.20; GCM paragraph 4.27) and the latter has conceded the principle of this (ACM paragraph 54) while requesting that the amounts involved should be checked and a guarantee given for the final extinction of the debts vis-à-vis third parties.

120. Both sides were in agreement during the proceedings to submit these matters to a joint audit (ACM paragraph 62, GCM paragraph 4.27, and GR paragraph 3,154). This audit was carried out in respect of the sum total of Aminoil's liabilities by the London and New York branches of the accounting firm of Peat, Marwick, Mitchell & Co., who are the regular auditors of Aminoil's books on behalf, respectively, of the Government and of the Company. Their Joint Report, dated 30 October, 1981, was duly furnished to the Tribunal which will have occasion to revert to it (infra, paragraph 172). In this Report (p. 14) the Accountants say :

"We have spent considerable time assessing and reviewing the various figures produced and in particular the liabilities referred to in the report of the Inventory Committee appointed by the Government. We have not been able to verify or reconcile completely all the various figures

produced, but we have been able to reach broad agreement. The areas of difference between us are mostly of an immaterial amount or are differences concerning the basis of valuation. We consider that, in view of the amounts involved and of the nature of the differences between us, no point would be served in attempting* to arrive at a closer agreement."

Accordingly, the Tribunal has gone by the figures of this Joint Report, adopting their mean where they differ.

(B) The claim of "bad oil-field practice"

121. The Government of Kuwait makes a financial claim against Aminoil based on an allegation according to which the Company was said to have failed in respect of certain usages applicable to the technological operation of the undertaking. These usages make up a body of rules that may be called in a general way the rules of "good oil-field practice".

122. An initial distinction must be drawn with reference to the juridical character of the rules the infraction of which is alleged: they can either emanate from the legislative or regulatory power of the State, or be embodied in the contracts of Concession. In the latter case they have a contractual character, and make reference to professional standards and practices traditionally of general acceptance. Historically as regards Kuwait, the case is one of the original contractual provisions of the 1948 Concession, slightly modified as to their wording by subsequent amendments to it, but without substantial alteration - (Article 2(C) of 1948; Article 8, paragraphs (3) and (6) of 1961; and Article 6 of the First Part of the First Annex to the July 1973 Agreement). The standards contemplated by these provisions are professional ones : "in work-manlike manner", "appropriate scientific methods", "all reasonable measures", "according to good oil-field practice", etc. It was only at a late date that Kuwait introduced any legislation - (Law n° 19 on the Conservation of Petroleum Resources - see GM App. IV.1) - and still later that Regulations on that matter were issued by the Minister of Oil, in 1974, to be applied only in 1976 however, and on a trial basis of 6 months before coming officially into force.

123. These provisions instituted a detailed and strict regime not suited to the special conditions of Aminoil's undertaking; but subsection 4 of Section 1 of Part E of the Regulations provided for a relief procedure, under which Aminoil had made applications that were in the course of consideration at the moment of the take-over. The correspondence between Aminoil and the official Kuwait technical services shows that the Company's conduct in its relations with the Administration over this legislation could not be faulted.

124. There remains for consideration the behaviour of the Company regarding those general standards of practice with which the relevant contractual provisions, as mentioned above, were concerned.

125. It must first of all be noticed that never, during the whole period of the Concession, was any complaint of failure proffered by the Kuwait authorities against the Company. Even allowing for the inevitable delays for installing in a newer State the technical services requisite for the supervision of the concessions, this fact raises an extremely strong presumption that the conduct of Aminoil had

been correct. This presumption is further reinforced by the fact that all its oil-field operations were carried on by agreement and in common with another oil Company - Getty - which also functioned in the Divided Zone (see Section II, paragraph (xxii) above) under a Concession from, and subject to the super-intendance of Saudi Arabia - and that Aminoil's operations never gave rise to any criticism coming from Getty or the Saudi Arabian authorities. If the various obligations to report, which were incumbent on the Company under the contracts of Concession, are taken into account, as well as the supervisory powers available to the concessionary Authority, it has to be concluded that the latter was in possession of all the means of being perfectly well informed.

126. There is a further necessary general observation: the standards governing the practices which should prevail in an oil-field undertaking must inevitably possess a considerable element of flexibility; and it scarcely needs saying that they undergo an evolution in the light of scientific progress. This was considerable between 1954 (when exploitation by Aminoil began) and 1977. Such an evolution is also influenced by certain economic factors. Standards concerned with safety, and the protection of human life, have an absolute character, - but it cannot be so with standards for the exploitation, in the economically most rational way, of natural resources. Thus, expenditures that would be quite unjustified when the barrel of oil was worth little more than a dollar, become normal when it rises to thirty dollars.

127. Passing now to the criticisms advanced in respect of Aminoil's operations, and in order to assess these more concretely, two groups of installations must be distinguished - on the one hand surface installations exclusive of wells, but including refineries; and, on the other, the oil wells themselves.

128. As regards the surface installations -conduit pines, reservoirs for stocking, refinery and sundry other plant - the objection made by the experts who were consulted by the Government was not that these installations were not in a fit state to function at the date of the take-over, - nor could it have been, for these installations went on functioning after that date, and in the same condition as before - a condition which had not called forth any expression of disapproval from the competent governmental services. The objection made by the experts called by the Government was that one of the components of the refinery (the desulphurizer) worked unsatisfactorily in a refinery itself of inferior design. In this connection is certainly not possible to impute any lack of factual information to one of those experts, for it was his own business undertaking which had carried out the task of planning and executing the work on the component and plant concerned. However, such objectivity in the giving of evidence would have been more convincing if it had not been at the expense of his former clients.

129. The Tribunal believes that the Management of Aminoil was extremely anxious to keen its expenditures down to the minimum - (thus the general look of the plant would not have given an impression of opulence) - and also, as much as practicable, to defer putting important works in band until a later date. That was why the Company took the initiative of requesting that, in the assessing of the reasonable return the allocation of which it was asking for in the course of the 1976-1977 negotiations, there should be included at least a part of the amounts that would be needed for investments of which the State would ultimately be the chief beneficiary. But no quarrel can be picked with the Company for operating under a regime of some austerity when a similar restrictiveness was being forced upon it in respect of its own final profits.

130. It was however, with the topic of oil-well construction and maintenance that the written and oral

proceedings, and the testimony of the witnesses and experts of the Parties, was mainly concerned. Here, the Government's contentions did not, as in the case of the surface installations just considered, stop at alleging that the oil-well equipment was not in a condition that could be called brilliant. The allegation was that the oil-well casings both in themselves and as to their upkeep against corrosion; the defective sealing off of wells the working of which was in suspension; the delays in repairing leaking wells, etc. - had collectively caused a major deterioration in one of the oil-reservoirs (at First Eocene level) by means of infiltrations of external water of a high degree of salinity. These infiltrations had not only led to a faster deterioration of the wells, and an increase in the costs of treating and refining the oil raised, but bad also, by reason of the abnormal quantity of water coming into the deposit of oil, resulted in the loss of a large volume of otherwise recoverable oil, and/or to the considerable expenditure required for such recovery, in particular by the sinking of new wells in order to work deposits cut off from the main mass by the abnormal level of the water.

131. Substantial expert reports, and the oral evidence of witnesses and experts called by both sides, were devoted to this matter, which puts in issue the correct running of the oilfields, back to a somewhat remote date between 1954 and 1962.

132. On the legal plane the question is one of establishing whether, at the time of the alleged bad oil-field practices, these practices were such as to be inconsistent with the course that should have been followed by a skilled and circumspect operator. The Tribunal considers that this has not been affirmatively established, - and that is the essential point. Moreover, if there existed in this First Eocene reservoir a large quantity of water rich in chlorides, it has not been denied that the level concerned has an extremely complicated geomorphic structure. The levels above it (the Dammam formation) seem to have characteristics that can lead to infiltration despite all the precautions that can be taken by the concessionaire.

133. The most that might be allowable in the light of the technology of today, and of the present price of oil, would perhaps be to regret that some extra care was not taken over certain of the operations of more than twenty years ago. But this could in no way affect the fundamental finding that neither a departure from the standards applicable at that time, nor the nexus of cause and effect between the practices followed and the actual condition of the oil reservoir concerned, has been established.

134. The Tribunal is satisfied as to the impartiality and thorough knowledge of the experts whose views were placed before it in regard to a multiplicity of technical questions, turning in particular on the salinity and external presence of the water; the effects of the presence of that water; the size of the oil deposits lodged in the reservoir, etc... If these assessments reflect serious divergences of view, these are not due to any lack of qualifications on the part of those who support them, any more than to a want of rigour, but to the complexities of the subject and to the impediments to scientific development that exist even to-day.

135. The multiplication of expert opinions could only bear witness to the difficulties and limitations involved. In these circumstances the Tribunal considers that it is not called upon to conduct an independent investigation of its own, as one of the Parties has suggested.

136. The Tribunal therefore disallows the Government's claim under this head.

SECTION VII. The question of Indemnification

1. Principles and Methods

137. The Tribunal notes in the first place that there is a very considerable gap between the amount of the claim made by the Company following upon Decree Law n° 124, and the offer made by the Government. The latter maintains that, all in all, it owes no more to the Company than the "net book value" of the assets transferred to the State. The Company on the other hand calculates the amount of the payment due to it by bringing in all the revenues which it would have received up to the expiry of the concessionary period, - these revenues being quantified on the basis of the 1961 Agreement by means of projections as to the amount of oil produced, the cost of producing it, and the price of oil during the period 1977 - 2008.
Before going into this question as a matter of law, the Tribunal will make certain general observations.

138. The determination of an indemnification has always presented technical difficulties. This has been the case in regard to indemnifications due in consequence of illicit acts, where it is as the equivalent of a restitutio in integrum that the calculation is in principle effected. But it has been so especially for indemnities due in consequence of acts of expropriation or of legitimate nationalisations. Indeed, in this last case, the difficulties are added to by controversial questions of foreign investments, and operations involving an important economic complex. Since the end of the 19th century, every kind of economic, moral and ideological consideration has been put forward by "host" countries in the endeavour to keep in their own hands the evaluation of the indemnifications due, and to reduce them to the minimum or nothing. When the international political outlook was favourable, the investing States espoused more or less energetically the claims of their nationals and, at least on the level of principle, upheld the rule of equivalence in monetary terms to the value of what had been taken.

139. Since the end of the second World War, nationalisations have multiplied, and have given rise to much regulation by Convention, but to few arbitrations. Through decolonisation and the development of older countries that were never colonised, or became independent much earlier, a "Third World" has emerged, dominating the debates in the United Nations. This has led to the adoption of numerous General Assembly Resolutions which, with few exceptions, have more often than not been the occasion of confrontations between the older investing countries, reduced to a small numerical minority, and large majorities of newer countries wanting to render nationalisations as easy as possible.

140. Many regulations agreed upon by Convention have also been arrived at during this period, particularly in the field of nationalisations in the petroleum industry; and it has been sought to maintain that these furnish a body of precedent from which it is possible to deduce rules of customary international law. This important matter will be reverted to later.

141. First however, a caveat of a general kind must be entered concerning the succession of events taking

place on the world plane in the petroleum industry since 1971, which have been abundantly invoked in the course of the present case. These events, in their totality, have undoubtedly constituted an important general historical episode because of their political and economic repercussions. They call for appraisals of every kind, political, moral, economic and ideological, all of which are quite outside the competence of the Tribunal. These events have led to the frequently progressive elimination of foreign investments from producing countries. The final result of the nationalisations concerned is today secured as a matter of law, and is no longer contested. This consolidation has resulted from consents given by the interested Companies, and sometimes by the States they belong to. These facts do not compel the conclusion that, at the time when it was taken, each of these measures (the combined effect of which has led to the now existing situation) was then necessarily in conformity with the obligations incumbent on the State instituting Them. This Tribunal is not however called upon to pronounce on such matters, alien to the present litigation.

142. What the Tribunal does have to do - as was provided in the Arbitration Agreement and was stressed by the Parties in the course of the proceedings - is to decide according to law, signifying here principally international law which is also an integral part of the Law of Kuwait. The Tribunal will first indicate the general legal rules applicable to the case, and will then enquire into the circumstances intrinsic to it.

A. The applicable general rules

143. The most general formulation of the rules applicable' for a lawful nationalisation was contained in the United Nations General Assembly Resolution n° 1803 (XVII) of 14 December, 1962, on Permanent Sovereignty over Natural Resources, Article 4 of which provides that
"Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law."

This text which obtained a unanimous vote in the

General Assembly, codifies positive principles, recognised by the Constitution and Law of Kuwait, that have not been contested in the present proceedings. It calls for a concrete interpretation of the term "appropriate compensation". Other disputes have long since turned upon different terms such as "fair", "just", "equitable", not to speak of "adequate", "effective", "prompt", etc. There are indeed, several tendencies, all appealing to the same principle, one of which however reduces compensation almost to the status of a symbol, and the other of which assimilates the compensation due for a legitimate take-over to that due in respect of an illegitimate one. These tendencies were in mutual opposition in the United Nations when the Resolutions following n° 1803 were voted, none of which obtained unanimous acceptance, and some of which, such as the Charter of the Economic Rights and Duties of States, have been the subject of divergent interpretations.

144. The Tribunal considers that the determination of the amount of an award of "appropriate" compensation is better carried out by means of an enquiry into all the circumstances relevant to the

particular concrete case, than through abstract theoretical discussion. Moreover the Charter of the Economic Rights and Duties of States, even in its most disputed clause (Article 2, paragraph 2c) -and the one that occasioned reservations on the part of the industrialized States - recommended taking account of "all circumstances" in order to determine the amount of compensation - which does not in any way exclude a substantial indemnity.

145. Careful consideration of the circumstances proper to each case sometimes enables certain difficulties to be set aside. Thus the opposition manifested by some States to any but the most incomplete compensation may be explicable on the basis that their object is to do away with foreign investments entirely, because they do not welcome foreign capital and are even less favourable to investing abroad themselves. What they want is to break loose from the round of foreign investment; and it can be concluded that in their own mutual relations inter se such States apply very restrictive rules in the matter of compensation.

146. But as regards States which welcome foreign investment, and which even engage in it themselves, it could be expected that their attitude towards compensation should not be such as to render foreign investment useless, economically. In this respect it is not disputed that Kuwait is a country favouring foreign investment, and itself an important investor abroad. The Tribunal does not intend either to examine, or resolve the complex of juridical problems created by the fact that there are some States that are motivated by very different sets of conceptions about foreign investment, possibly involving within the framework of the international community what the International Court of Justice has called an "intense conflict of systems and interests" (Barcelona Traction, etc., case, I.C.J. Reports 1970, p. 48, paragraph 49). The Tribunal will therefore confine itself to registering that in the case of the present dispute there is no room for rules of compensation that would make nonsense of foreign investment.

147. This is a fundamental precept. It is pertinent during the life-time of a concession; it is equally pertinent when a concession comes to an end. Compensation then, must be calculated on a basis such as to warrant the upkeep of a flow of investment in the future.

148. Both Parties to the present litigation have invoked the notion of "legitimate expectations" for deciding on compensation. That formula is well-advised, and justifiably brings to mind the fact that, with reference to every long-term contract, especially such as involve an important investment, there must necessarily be economic calculations, and the weighing-up of rights and obligations, of chances and risks, constituting the contractual equilibrium. This equilibrium cannot be neglected - neither when it is a question of proceeding to necessary adaptations during the course of the contract, nor when it is a question of awarding compensation. It is in this fundamental equilibrium that the very essence of the contract consists.

149. For assessment of that equilibrium itself, and of the legitimate expectations to which it gives rise, it is above all the text of the contract that signifies, and it is of moment that this text should be precise and exhaustive. But it is not only a question of the original text; there are also the amendments, the interpretations, and the behaviour manifested along the course of its existence, that indicate (often fortuitously) how the legitimate expectations of the Parties are to be seen, and sometimes seen as becoming modified according to the circumstances.

150. It is on the footing of these general principles that the Tribunal will now enquire into the

circumstances specific to the case of Aminoil.

B. Circumstances specific to Aminoil's case

151. The first and principal question is to ascertain on what basis Aminoil's compensation is to be evaluated. Some long-term concessionary contracts expressly provide for the possibility of a termination prior to the maturity of the concession, and therefore regulate the conditions of it; but this is not so as regards Aminoil's Concession. In order to resolve certain of the problems produced by the nationalisation, the Parties to the present litigation have, up to a point, derived instruction from the rules provided by the Concession for its termination at the end of its period of 60 years (see Section VI, paragraph 117).. The most important of these was Article 13 of 1948 which provided that at the expiry of the Concession, the entire undertaking should be "handed over to the Shaikh" - i.e. the Government - "free of cost" - that is, without compensation. Since, however, this is not appropriate to the present circumstances, the factors that have to be taken into account for the indemnification of Aminoil have still to be determined. In order to do so, the Tribunal will consider the arguments of the Parties in turn, which will lead it progressively to define its own position, to be reverted to later.

152. On behalf of Aminoil, it has been shown that there was a choice between two methods :

(i) - a method based on the sum total of the anticipated profits, reckoned to the natural termination of the Concession, but discounted at an annual rate of interest in order to express that total in terms of its "present value" on the day when the indemnification is due; and without taking account of the value of the assets that would have been transferred to the concessionary Authority, "free of cost", upon that termination;

(ii) - a method whereby total anticipated profits are counted and discounted in the same way over a limited period of years only, but taking countervailing account of the value of the assets (for this, Aminoil furnished examples of results calculated over ten year periods).

153. Subject to what is stated later as to the system for determining the annual profits involved, the Tribunal agrees in principle that both of the methods suggested by Aminoil are acceptable, and can be checked against each other. But, while aware that the first method may have been adopted in certain arbitrations, the Tribunal considers that in effecting a general evaluation, it is preferable to employ a combination of methods, according to the different factors that have to be taken into account. Moreover, the Tribunal disagrees with Aminoil's assumptions and calculations on two basic points. In this connection the Company has furnished an estimate on the lines of the principle of a restitutio in integrum founded on the assumption that the Concession should have continued for its full term under the contractual conditions fixed in 1961, without modification. This calculation is based on a projection of the quantities of oil recovered, the prices, the costs of production, and the operations to be undertaken until the end of concession. The Company has also produced its estimate of the value of the assets, in case the Tribunal should choose the second method.

154. The two basic points on which the Tribunal differs from Aminoil's position are as follows :

(a) - First,in respect of the foundation for the calculation of anticipated profits, which Aminoil takes as being exclusively the financial arrangements of 1961, the Tribunal has already found in Section IV above, both that the 1973 Agreements were valid, and that something is owing to the Government on Abu Dhabi account. Not only is no refund due of moneys paid to the Government under the 1973 arrangements, but the latter are also a component of the present "legitimate expectations" of the Company. Even more pertinent, the negotiations between the Parties about the application of the Abu Dhabi Formula involved a recognition of the principle of a monetary obligation to the Government, and of a modification for the future of the financial relations of the Parties. It is therefore on a combination of these data not on those of 1961, that the indemnification of the Company must be proceeded to.

(b) - Next - and this constitutes the second aspect of the difference between the Tribunal's and Aminoil's positions - the Tribunal cannot accept the projections as to the future of the petroleum industry based on the consultations of experts that the Company has relied upon. These have been criticized by the Government. If, however, the Tribunal does not accept them, this is not because they include speculative elements, since all methods of assessment, whatever they may be, will do that. It is because the Tribunal thinks that in the present case, as will be shown later, the Parties adopted a different conception in the course of their relations and negotiations, - namely that of the reasonable rate of return. This it is, therefore, that must guide the Tribunal.

155. On behalf of the Government, it was maintained that the only compensation Aminoil was entitled to claim must be determined by precedents resulting from a series of transnational negotiations and agreements about compensation. These precedents, so it was said, had instituted a particular rule, of an international and customary character, specific to the oil industry. Attention was called to the fact that a number of nationalisations of oil concessions had occurred in the Middle East, and elsewhere in the world, in the years 1971-77. However, the solutions adopted in the case of these precedents were not identical but had certain common features: the compensation granted was very incomplete and had reference only to the "net book value" of the redeemable assets. These precedents, it was claimed, had generated a customary rule valid for the oil industry - a lex petrolea that was in some sort a particular branch of a general universal lex mercatoria. That was why Kuwait, in the course of the 1977 discussions, had offered no more than the net book value of the redeemable assets as compensation for the expropriation.

156. The Tribunal cannot share this view, for reasons of fact, as of law.
As regards reasons of fact - it must be noticed that the overall results of negotiations about compensation are, more often than not, complex. They do not simply comprise the payment of an indemnity but also include bilateral arrangements of every kind - contracts of service, long term supply, contracts covering particular benefits, etc. Such contracts have not all been made public, and even the amounts of compensation paid and the method of computing them are not always known with certainty. What is certain is that in addition to the compensation, a preferential relationship was often instituted or maintained between the State and the foreign entity concerned (whereas in the case of Aminoil all relations were severed). It would be difficult to express in figures the value in terms of money of these preferential arrangements; for the advantages they bring depend on the structuring and policy of the former concessionaire Company. What can be affirmed is that the advantages for major integrated-concerns are often considerable. But even if such relations had been maintained for the benefit of Aminoil, their value could not have been the same because of

the modest dimensions of that undertaking, not similarly integrated economically. At the most, it might be possible to go so far as to say that certain large transnational groups may have preferred compensation that had no relation to the value of their undertaking, if it was coupled with the preservation of good relations with the public authorities of the nationalising State with, possibly, resulting prospects for the future giving promise of greater worth than the compensation forgone.

157. As regards the reasons of law -

(i) If reliance is to be placed on the precedents just mentioned - and always supposing them to be conclusive about the order of size of the indemnity (which, as has been seen, they are not) -it would still be necessary for them to constitute an expression of the opinio juris - (North Sea Continental Shelf case, I.C.J. Reports 1969, p. 45, paragraph 77). But, as it happens, the conditions in which these compensation agreements were concluded were peculiar, and the documentation submitted to the Tribunal brings out certain relevant aspects of the matter. These are : the circumstances in consequence of which the concerted petroleum policy of OPEC as from 1973 had to be taken into account ; the progressive character of the steps taken; the crucial preoccupations of concessionaire Companies to ensure the continued supply of petroleum products to consumers; and the passivity of the importing States. All this led the major transnational Companies to accept de facto what the exporting countries demanded. It can be maintained that such acceptance was wise -but it would be somewhat rash to suggest that it had been inspired by juridical considerations: the opinio juris seems a stranger to consents of that type.

(ii) Such consents were given under the pressure of very strong economic and political constraints; and in connexion with the consents given by Aminoil, the Tribunal has already considered whether these constitute a case of "duress", leading to invalidation, and has given a negative answer. Speaking generally, it can be held that the consents given in the course of this period were not obtained by means amounting to duress, and they were valid and final. But the economic pressures that lay at the root of them had nothing to do with law, and do not enable them to be regarded as components of the formation of a general legal rule. A juridical entity has the faculty, even in the case of pressure exercised through economic constraints, to handle its own business affairs in such a way as to produce concrete valid results; but it cannot be claimed that such dealing is apposite for generating general rules of law applicable in other cases too.

158. The Tribunal now comes to the basis on which the evaluation of the legitimate expectations of Aminoil must proceed. There exist, as well in the contract of Concession as in the attitude of Aminoil, indications concerning this, which it is right to recall and describe.

159. To start with, as was mentioned earlier in connexion with Aminoil's nationalisation, whereas the contract of concession did not forbid nationalisation, the stabilisation clauses inserted in it (and equally - by 1977 - not forbidding that) were nevertheless not devoid of all consequence, for they prohibited any measures that would have had a confiscatory character. These clauses created for the concessionaire a legitimate expectation that must be taken into account. In this context they dissipate all doubts as to the strength of the respect due to the contractual equilibrium.

160. But above all, account must be taken of the position of Aminoil in its relations with the Government of Kuwait. From the time when its rate of production reached a satisfactory level, Aminoil was in

the position of an undertaking whose aim was to obtain a "reasonable rate of return" and not speculative profits which, in practice, it never did realise. As stated earlier it was threatened with two dangers. One was not to be able to dispose of products the high net cost of which made their sale on the market difficult; and the other was to have to agree to payments to the Government of Kuwait that did not allow the Company to ensure the viability of the enterprise. The persistent desideratum of its representatives was to see the prospect of retaining for it a reasonable rate of return. It was on this note that it opened the negotiations of 1976-77, and in the light of this expectation that appropriate compensation has now to be assessed.

161. It is correct to say that the attitudes taken up by a party over the long course of a negotiation that eventually breaks down cannot be made the basis of an arbitral or judicial decision. But there is no question here of facing Aminoil with the latest proposals it made in 1977 in a final effort to come to terms. The point is simply to register the fact that, over the years, Aminoil had come to accept the principle of a moderate estimate of profits, and that it was this that constituted its legitimate expectation.

162. There are not wanting indications given by Aminoil as to what could be a reasonable rate of return. They appear in particular in a letter of 28 July, 1972 (GCM App. VI.9 and "Notes on Meetings of 12 and 13 May, 1973" GCM App. VI.1), and in the opening proposals for the 1976 negotiation (AR Vol. V, Exh. 12). Moreover, in the Second Part of the First Annex to the July 1973 Agreement, Section V, it was stated that :
"Any future discussions between the Government and the Company regarding concession provisions will take into consideration that the Company should not be denied a reasonable opportunity of earning a reasonable rate of return (having regard to the risks involved) on the total capital employed in its business attributable to Kuwait."

163. Here three points need to be brought out
(i) - Assuming that a normal level of profits has been determined having regard to the total capital invested, it would be ordinary business practice in the case of a concession intended to last, to add a reasonable profit margin that would preserve incentives, and allow for risks whether commercial or technological. But this necessity disappears when it is a question of deciding on the amount of compensation due for a concession that has already been terminated, - for in that event the risk (for the concessionaire) has ex hypothesi vanished.

(ii) - As regards a Concession which provides that, ultimately, all the installations and assets are to be handed over to the concessionary Authority "free of cost", it would be normal that at least a part of necessary current investment should be effected out of profits. Such was the position -fair in principle - of Aminoil at the start of the 1976 negotiations, and that was why, for the Company, the reasonable return of which it was claiming the benefit had to include an amount for operations that would ordinarily prove indispensable. But again, this point has not much relevance when the Concession has come to an end.

(iii) — A third point is that in the present case the reasonable rate of return has to be determined for two distinct purposes. First, in connection with the Abu Dhabi Formula, over the period stretching from 1 January, 1975 to 19 September, 1977, - this is a period for which the profits of Aminoil's undertaking are known, and in respect of which, it is not necessary to provide for the financing

of works that were never carried out, or for what would constitute an incentive for further development. Secondly, the reasonable rate of return, assessed on a somewhat more liberal scale, constitutes one of the elements of compensation.

164. Having thus described the place occupied by the notion of a reasonable rate of return in the indemnification of Aminoil, the Tribunal must now indicate what principles are, in its view, valid for determining the compensation due in respect of the Company's assets. As the Tribunal has stated earlier, it considers it to be just and reasonable to take some measure of account of all the elements of an undertaking. This leads to a separate appraisal of the value, on the one hand of the undertaking itself, as a source of profit, and on the other of the totality of the assets, and adding together the results obtained.

165. As regards deciding on a method for valuing the physical assets, it is not possible to postulate any absolute rule. Doubtless it is necessary in all cases to consider the value of the assets as at the date of transfer, taking due account of the depreciation they have undergone by reason of wear and tear and obsolescence. But in general, only values for accounting or taxation purposes can be utilized - and they must always be reasonably arrived at. Thus, the method called that of the net book value may be suitable when it is a case of a recent investment, the original cost of which was not far from that of the present replacement cost. But when that is not so, other methods are indicated.

166. This leads to a last general observation, touching upon the combined evaluative problems concerning Aminoil. If these problems had arisen in concreto in a stable economic world, it would be possible to express matters in terms of some given monetary unit - for instance to regard the dollars of 1948 and succeeding years as being assimilable to those of 1977 or 1982. But the proportions assumed by world inflation must lead to appraisals that are more in line with economic realities, and the determination of an indemnification cannot be tied down to the inflexible consequences of a purely monetary designation. That is why, in calculating the value of depreciating assets, it would be unfair to settle it on the basis of a superannuated cost consisting of the original purchase price, when that price has no relation to the actual present cost.

167. One of the most pertinent economic considerations justifying the profits claimed by the countries producing non-renewable oil or other minerals, is that these profits are not truly in the nature of income, but represent a capital value, since the State must aim at reconstituting the worth of the oil or mineral deposits against the day when these will be exhausted. But it is no less of a necessity for the oil or mining undertaking to reconstitute in real terms the capital value of the investment it put into it. Such an undertaking can in no way be assumed to go out of business at the end of its Concession: it must carry on elsewhere or in another form. It must re-invest.

168. Moreover, the need not to neglect the economic effects of inflation goes beyond the case of assets liable to depreciation. For instance, in the course of the oral proceedings, different appraisals were made, bringing in various factors expressed in money terms and stretching from 1948 to 1977 - being either added together or compared. But for such calculations to be in point they must be carried out on the basis of components expressed in units having a comparable economic signification, and if it were thought necessary to arrive at the total figure of the capital invested by Aminoil in its undertaking, it would be appropriate to do so without holding the dollars of 1977 to

be equivalent to those of 1948.

169. The Tribunal has to point out that the general principle of the preservation of the value of money which has just been discussed is consistent with the spirit of the contract of Concession and, grosso modo, with the attitudes of the Parties, in particular during the petroleum crisis after 1973; in the negotiations for the revision of the Concession; and in the proceedings before the Tribunal. Thus the original (1948) Concession contained a "gold clause" (Article 3(h)) the text of which will be found in Section II, paragraph (xxiv) supra. A similar preoccupation with expressing values for economic transactions in a manner independent of purely monetary fluctuations is equally apparent in the politics of petrol prices. Such was the case at the level of the Gulf States and the major oil Companies in respect of the Geneva Agreement of January 1972 which adopted the principle of adjusting oil revenues by reference to a "basket of currencies". It was the same in the relations between Aminoil and Kuwait: for the July 1973 Agreement on the one hand cancelled Article 3(h) of the 1948 Concession containing the "gold clause" (see head (7) of the First Part of the First Annex to the 1973 Agreement), -and, on the other hand (Article 2(2) (v) of the main Agreement), took account of "the purchasing power or real value of revenues related to oil exported from Kuwait".

170. This need for stability is such that in the present proceedings the Government of Kuwait has argued that in the event of the 1973 Agreement not being held applicable, and of the relations between the Parties remaining governed by the 1961 Agreement, the Tribunal ought, even in the absence today of any "official United States Government purchase price" for gold (see Article 3(h) of 1948), to have reference to other equitable standards in order to replace that official price. But this problem is no longer actual, since the Tribunal has found that the 1973 Agreement was applied by the two Parties up to the end of the Concession. However, the position taken up by the Government on the subject remained significant, - and if the correspondence exchanged between the Parties, and the minutes of their meetings are looked at, it can be seen that inflation had an important place in their discussions. Especially in the negotiations of the years 1976 and 1977, did Aminoil adjust its proposals to take account of it. The Government sometimes discussed from this point of view the evaluations that were made, and did not reject the principle (AR Vol. V, Exh. 14, p. 3; Exh. 18, p. 2; Exh. 21, p. 6; Exh. 22, p. 1; and Exh. 30, p. 6).

171. The Tribunal has not overlooked the fact that there may be different ways of assessing the levels of inflation. As regards the payments made by Aminoil under the 1973 Agreement, or any to be made under the Abu Dhabi Formula, these have, by reason of the method of calculating them, been automatically indexed on the petroleum products market in the Gulf States. In the compensation to be paid to Aminoil, it would be natural to take account of the progress of inflation generally, and in particular by reference to the price of refined petroleum products on the American market.

2. the Figures

172. In order to calculate the amount of the indemnification due, the Tribunal has available to it numerous elements furnished by the Parties and by the experts they have commissioned for that purpose. In particular, the Tribunal has had available to it the Joint Report dated 30 October, 1981, referred to in paragraph 120 above. This Report had been the subject of head X of the Order of the Tribunal of 1 July, 1981, which stated

"The Tribunal takes note of the mutual intention of the Parties to direct their respective accountants to produce, if possible, a joint report on questions of quantum or, if this is not possible, to produce separate reports for the Tribunal before 1 November."

173. Having given careful consideration to this Report and to the analyses, statements and counter-statements to be found in the written proceedings and furnished by Counsel and experts during the oral hearing, the Tribunal is persuaded that it is not indispensable for the final adjustment of the present case to hear the Parties again on matters of quantum, and the Parties were so informed in a communication from the Secretary of the Tribunal. Where there are differences between the accounting firms above-mentioned, the Tribunal has taken the mean of the two totals indicated.

174. The Tribunal has however determined for itself certain factors in respect of which it did not possess any data as numerically worked out as those that are included in the above-mentioned Joint Report. As regards these factors the Tribunal had a choice between various alternatives the merits of which were comparable although they could lead to different results. Where this was the case, the Tribunal has taken each of these factors into account within the global conspectus of a balanced indemnification.

175. The Tribunal must now first determine the balance-sheet of the financial rights and obligations of the Parties as at 19 September, 1977. It will then be possible to determine the situation at the date fixed for the carrying out of this Award. The state of the Parties' rights and obligations as at 19 September, 1977 involves examining seriatim their respective debts and credits at that time.

176. The debts of Aminoil -

(1) Under the 1973 Agreement, Aminoil still owed, on 19 September, 1977, and amount as to which there is a slight difference of view between the two sets of accountants, - $33,210,000 as against $31,247,000. Taking the mean between these two figures gives $32,228,500. No difficulty of interest on this amount, nor of inflation, arises, since it is basically founded on the price of petrol, and only becomes payable after 19 September, 1977.

(2) the Application of the Abu Dhabi Formula, resulting from the decisions collectively taken in mid-December 1974, does not have to be contemplated until, at the earliest, January 1975. Here, a balanced appraisal of the circumstances leads the Tribunal to fix $10 million as a reasonable rate of return for Aminoil given the fact that the important works which were to have been carried out by the Company in the near future, and, financed, at least partly, out of the profits of the undertaking, ceased to be a charge on it. This total (of 10 million), valid for the year 1975, must be increased by 10% per annum to take account of inflation; but, allowing this return for only 261 out of 365 days in 1977, the amount for that year is $8,652,000 - say $29,652,000 for the three years 1975-77 inclusive. This sum is deductible against the total profits going to Aminoil in those three years. As to these, the Joint Report of the accountants gives two fairly close figures, of which the Tribunal has taken the mean - say $101,615,000. Deducting from this the above mentioned $29,652,000, an amount of $71,963,000 is shown as due from Aminoil under the Abu Dhabi Formula. For this total, inflation does not have to be allowed for, since this is already reflected in the price of oil. Nor does it call for the allowance of interest, if the late date of the opening of the negotiations proper is borne in mind, together with the practice of the Government of Kuwait of not requiring payment of interest

in cases of this kind - see the evidence of Dr. Nurredin Farrag (GCM App. II.V, p. 12).

(3) Finally, with reference to the liabilities of Aminoil to third parties, discharged by the Government, the two Parties being in agreement about the principle, the figures given in the accountants' Joint Report ($19,114,000 and $18,585,000) will be taken at their mean by the Tribunal - say $18,849,500.

177. Thus, the total liabilities of Aminoil as at 19 September, 1977, come to $123,041,000.

178. Amounts due to Aminoil -

(1) These are made up of the values of the various components of the undertaking separately considered, and of the undertaking itself considered as an organic totality - or going concern - therefore as a unified whole, the value of which is greater than that of its component parts, and which must also take account of the legitimate expectations of the owners. These principles remain good even if the undertaking was due to revert, free of cost, to the concessionary Authority in another 30 years, the profits having been restricted to a reasonable level.

(2) As regards the evaluation of the different concrete components that constitute the undertaking, the Joint Report furnishes acceptable indications concerning the assets other than fixed assets. But as regards the fixed assets, the "net book value" used as a basis merely gives a formal accounting figure which, in the present case, cannot be considered adequate.

(3) For the purposes of the present case, and for the fixed assets, it is a depreciated replacement value that seems appropriate. In consequence, taking that basis for the fixed assets, taking the order of value indicated in the Joint Report for the non-fixed assets, and taking into account the legitimate expectations of the concessionaire, the Tribunal comes to the conclusion that, at the date of 19 September, 1977, a sum estimated at $206,041,000 represented the reasonably appraised value of what constituted the object of the takeover.

(4) According to the above mentioned data, the sum total of the amount due to Aminoil as at 19 September, 1977, comes to $206,041,000 less the liabilities of $123,041,000, that is to say $83,000,000. This represents the outcome of the balance-sheet of the rights and obligations of the Parties as at 19 September, 1977.

(5) In order to establish what is due in 1982, account must be taken both of a reasonable rate of interest, which could be put at 7.5%, and of a level of inflation which the Tribunal fixes at an overall rate of 10%, - that is to say at a total annual increase of 17.5% in the amount due, over the amount due for the preceding year.

(6) Capitalizing the above-mentioned figure of $83,000,000 at a compound rate of 17.5% annually, gives the amount specified in the Operative Section (Dispositif) below.

SECTION VIII. OPERATIVE SECTION (DISPOSITIF)

179. For these reasons,
THE TRIBUNAL, unanimously, having regard to all of the above mentioned considerations,

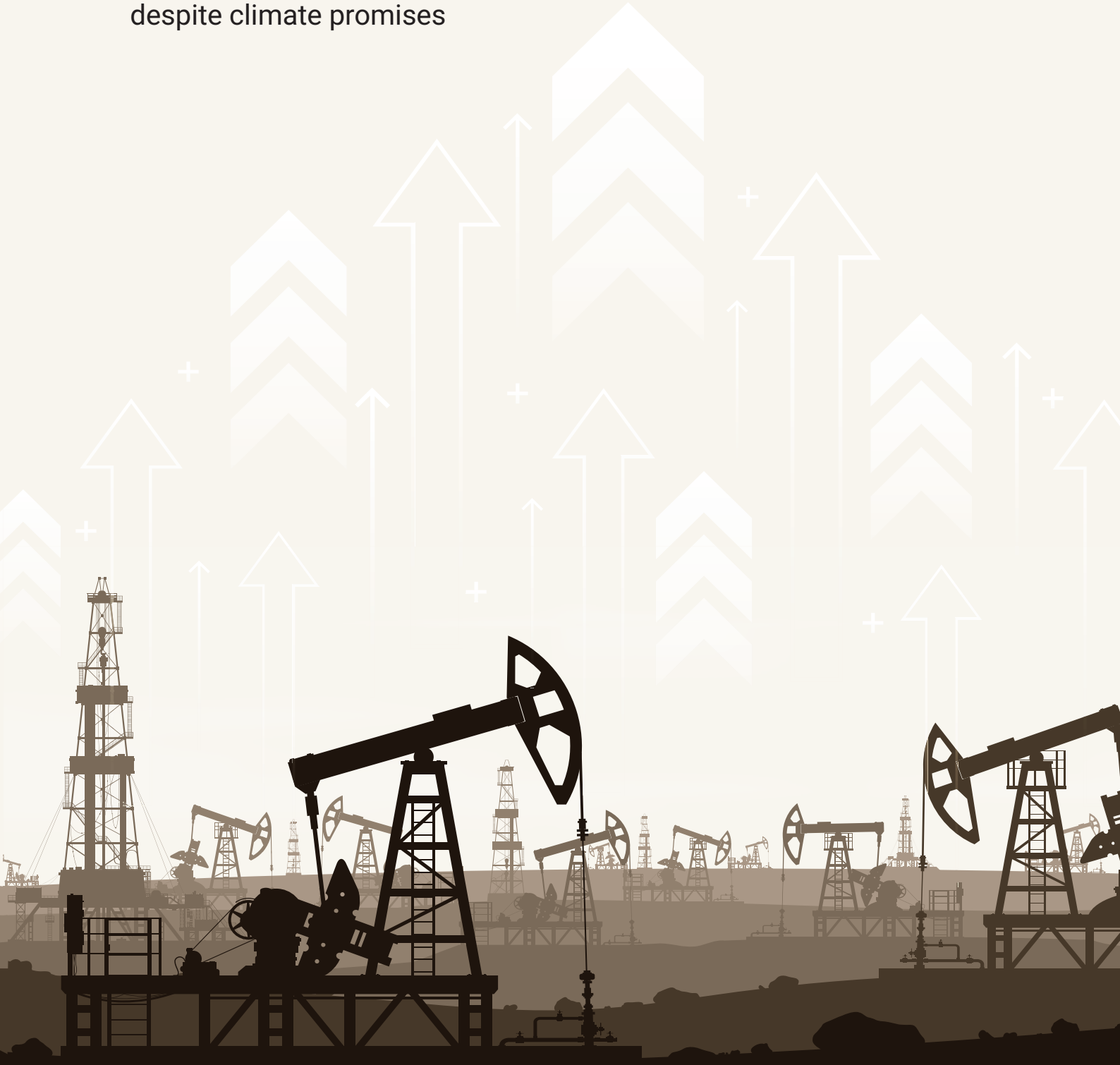
AWARDS to Aminoil,

THE SUM OF ONE HUNDRED AND SEVENTY NINE MILLION, SEVEN HUNDRED AND FIFTY THOUSAND, SEVEN HUNDRED AND SIXTY FOUR UNITED STATES DOLLARS ($179,750,764) calculated on the basis of being payable on 1 July, 1982.

Annex 61

Phasing down or phasing up?

Top fossil fuel producers plan even more extraction despite climate promises



SEI Stockholm Environment Institute

CLIMATE ANALYTICS

E3G

IISD

UN environment programme

Production Gap Report 2023

About This Report

This is the fourth edition of the Production Gap Report, first issued in 2019. The report tracks the misalignment between governments' planned fossil fuel production and global production levels consistent with limiting global warming to 1.5°C or 2°C. The report represents a collaboration of several research and academic institutions, including inputs and reviews from more than 80 experts from 30 countries spanning the Global North and Global South. The report is externally peer-reviewed, with additional guidance and support from the United Nations Environment Programme, and review by the United Nations Framework Convention on Climate Change's government focal points.

This year's report features two major updates to the production gap analysis, drawing on the new mitigation scenarios database compiled for the Intergovernmental Panel on Climate Change's Sixth Assessment Report and changes in government plans and projections since August 2021. The report also provides individual country profiles for 20 major fossil-fuel-producing countries, evaluating governments' latest climate ambitions and their plans, policies, and strategies that support fossil fuel production or the transition away from it.

The production gap analysis is based on recent and publicly accessible plans and projections for fossil fuel production published by governments and affiliated institutions. Other information presented throughout the report, such as details on fossil fuel investments and policies is supported by a mix of government, intergovernmental, peer-review, and other research sources listed in the references.

The report and its materials can be accessed online at https://productiongap.org/2023report.

Citation

This document may be cited as: SEI, Climate Analytics, E3G, IISD, and UNEP. (2023). *The Production Gap: Phasing down or phasing up? Top fossil fuel producers plan even more extraction despite climate promises.* Stockholm Environment Institute, Climate Analytics, E3G, International Institute for Sustainable Development and United Nations Environment Programme. https://doi.org/10.51414/sei2023.050

Photo Credits

Getty Images.

Erratum: The colour coding of some countries in Figure 2.3 was corrected on 24 Nov 2023.

Acknowledgements

We would like to thank the following contributors for their input:

Asterisk (*) connotes lead author. Parentheses indicate institutional affiliation.

Steering Committee

Manfredi Caltagirone (United Nations Environment Programme (UNEP)), Andrea Guerrero García (Growald Climate Fund), Niklas Hagelberg (UNEP), Joana Portugal Pereira (Federal University of Rio de Janeiro (UFRJ)), Youba Sokona (University College London (UCL)).

Authors

Chapter 1

Ploy Achakulwisut (Stockholm Environment Institute (SEI)) and Michael Lazarus (SEI).

Chapter 2

Ploy Achakulwisut* (SEI), Neil Grant (Climate Analytics), Céline Guivarch (CIRED), Michael Lazarus (SEI), Steve Pye (UCL), Roberto Schaeffer (UFRJ).

Chapter 3

Ploy Achakulwisut (SEI), Aisha Al-Sarihi (Middle East Institute, National University of Singapore), Raja Asvanon (SEI), Jesse Burton (E3G), Patricio Calles Almeida (SEI), Laura Cameron (International Institute for Sustainable Development (IISD)), Kristian Coates Ulrichsen (Rice University), Vanessa Corkal (IISD), Bruno S. L. Cunha (UFRJ), Rebecca Draeger (UFRJ), Dimas Fauzi (SEI), Emily Ghosh (SEI), Kamila Godzinska (E3G), Gang He (City University of New York), Frank Jotzo (The Australian National University), Bård Lahn (University of Oslo), Michael Lazarus (SEI), Yury Melnikov (independent sustainable energy consultant; UNECE Task Force on Hydrogen), Tatiana Mitrova (Columbia University), Yacob Mulugetta (UCL), Anisha Nazareth (SEI), James Ogunleye (Carbon Limits Nigeria), Serik Orazgaliyev (Nazarbayev University), Julia Paletta Crespo (UFRJ), Steve Pye (UCL), Leo Roberts (E3G), Alexandre Szklo (UFRJ), Roberto Schaeffer (UFRJ), Aliya Sembayeva (Sustainable Development Solutions Network; Nazarbayev University), Tom Swann (The Sunrise Project), José Vega Araújo (SEI).

Reviewers

The following people reviewed one or more sections of this report: Sheila Aggarwal-Khan (UNEP), Alaa Al Khourdajie (Imperial College), Yerdaulet Abuov, Yousef M. Al-Abdullah (Kuwait Institute for Scientific Research (KSIR)), Osamah Alsayegh (KSIR), Andrzej Ancygier (Climate Analytics), Tabaré Arroyo Currás (TAC Energy Concepts), Jonathan Banks (Clean Air Task Force), Olivier Bois von Kursk (IISD), Elina Brutschin (International Institute for Applied Systems Analysis), Michael Burger (Columbia Law School), John Christensen (UNEP), Mohammed Dahiru Aminu (Clean Air Task Force), Brook Dambacher (Uplift), Nandini Das (Climate Analytics), Knut Einar Rosendahl (Norwegian University of Life Sciences), Courtney Freer (Emory University), Lisa Fischer (E3G), Claire Fyson (Climate Analytics), Ricardo Gorini (International Renewable Energy Agency), Neil Grant (Climate Analytics), Richard Halsey (IISD), Kathryn Harrison (University of British Columbia), Laury Haytayan (Natural Resource Governance Institute (NRGI)), Sarah Heck (Climate Analytics), Hauke Hermann (Öko-Institut), Andrea Hinwood (UNEP), Thomas Houlie (Climate Analytics), Jean Jiang (SEI), Daniel Jones (Uplift), Natalie Jones (IISD), Maarten Kappelle (UNEP), Hongyou Lu (Lawrence Berkeley National Laboratory), Yury Melnikov (independent sustainable energy consultant, UNECE Task Force on Hydrogen), Alfredo Miranda-González (Clean Air Task Force), Gaylor Montmasson-Clair (Trade & Industrial Policy Strategies), Victor Maxwell (Climate Analytics), Claire O'Manique (Oil Change International), Natalia Ortiz (SEI), Sandeep Pai (Swaniti Initiative), Katrine Petersen (E3G), Angela Picciariello (IISD), Deborah Ramalope (Climate Analytics), Alison Reeve (Grattan Institute), Carley Reynolds (Climate Analytics), Allie Rosenbluth (Oil Change International), Lorne Stockman (Oil Change International), Claudia Strambo (SEI), Maxim Titov, Fabby Tumiwa (Institute for Essential Services Reform), Sergey Vakulenko (Carnegie Endowment for International Peace), Jorge Villarreal (Iniciativa Climática de México), Paola Yanguas Parra (Technische Universität Berlin).

Project Coordination

Ploy Achakulwisut (SEI) and Michael Lazarus (SEI) served as coordinating lead authors for this report. Emily Ghosh (SEI) served as coordinator of the country profiles in Chapter 3.

Editing and Communications

Stephen Graham (independent) and Lynsi Burton (SEI) led the report's editing. Lynsi Burton and Ulrika Lamberth (SEI) led the report's outreach and communications.

Design and Layout

The report cover was designed by UNEP. The report interior was designed by One Visual Mind. Mia Shu (SEI) designed some report figures. Ploy Achakulwisut (SEI) designed the website.

Translations

ION Translations provided translations of the Executive Summary in Arabic, Indonesian, Chinese, French, Russian, and Spanish.

Thanks also to:

John Christensen (UNEP), Maarten Kappelle (UNEP), Christophe McGlade (International Energy Agency), Anne Olhoff (CONCITO – Denmark's green think tank), Mark Radka (UNEP), Kaisa Uusimaa (UNEP), Patrick Heller (NRGI), and Emma Dahmani (NRGI); and national government UNFCCC focal points and their colleagues who provided feedback on Chapter 3.

Thanks to the KR Foundation, the Netherlands Ministry of Economic Affairs and Climate Policy, the Rockefeller Philanthropy Advisors, and the Swedish International Development Agency (Sida) for funding and supporting the work of the Production Gap Report.

Glossary

Carbon dioxide equivalent (CO_2eq)
The amount of carbon dioxide (CO_2) emissions that would cause the same warming over a given time horizon as an emitted amount of greenhouse gases.

Fossil fuel production
A collective term used in this report to represent processes along the fossil fuel supply chain, which includes locating, extracting, and processing, and delivering coal, oil, and gas to consumers.

Government plans and projections (GPP)
A global pathway of future fossil fuel production estimated in this report, based on the compilation and assessment of recent national energy plans, strategy documents, and outlooks published by governments and affiliated institutions. This term was formerly called the "countries' plans and projections (CPP)" pathway in the 2021 PGR.

Greenhouse gases (GHGs)
Atmospheric gases that absorb and emit infrared radiation, trap heat, contribute to the greenhouse effect, and cause global warming. The principal GHGs are carbon dioxide (CO_2), methane (CH_4), and nitrous oxide (N_2O), as well as hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF_6).

Just transition
In the context of climate policy, this refers to a shift to a low-carbon economy that ensures disruptions are minimized — and benefits maximized — for workers, communities, consumers, and other stakeholders who may be disproportionately affected.

Long-term low-emission development strategies (LT-LEDS)
Under the Paris Agreement and its accompanying decision, all countries are invited to communicate LT-LEDS by 2020, taking into account their common but differentiated responsibilities and respective capabilities, in light of different national circumstances.

Multilateral development bank (MDB)
An international financial institution chartered by multiple countries to support economic and social development in lower-income countries.

Nationally determined contributions (NDCs)
Submissions by Parties to the Paris Agreement that contain their stated ambitions to take climate change action towards achievement of the Agreement's long-term goal of limiting global temperature increase to well below 2°C, while pursuing efforts to limit the increase to 1.5°C. Parties are requested to communicate new or updated NDCs by 2020 and every five years thereafter.

Production gap
The discrepancy between governments' planned/projected fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C.

Stranded assets
Assets that suffer from unanticipated or premature write-offs or downward revaluations, or that are converted to liabilities, as the result of a low-carbon transition or other environment-related action.

Subsidy
A financial benefit accorded to a specific interest (e.g. an individual, organization, company, or sector) by a government or public body.

Abbreviations

AR6	Sixth Assessment Report (from the IPCC)
Bcf	Billion cubic feet
Bcm	Billion cubic meters
BECCS	Bioenergy with carbon capture and storage
CCS	Carbon capture and storage
CCUS	Carbon capture, utilization, and storage
CDR	Carbon dioxide removal
CO_2	Carbon dioxide
CO_2eq	Carbon dioxide equivalent
COP	Conference of the Parties (to the UNFCCC)
°C	Degrees Celsius
DACCS	Direct air carbon capture and storage
EJ	Exajoule
EU	European Union
G7	Group of Seven
G20	Group of Twenty
GDP	Gross domestic product
GHG	Greenhouse gas
GPP	Government plans and projections
Gt	Gigatonne (billion tonnes)
IAM	Integrated assessment model
IEA	International Energy Agency
IPCC	Intergovernmental Panel on Climate Change
JETP	Just Energy Transition Partnership
LNG	Liquefied natural gas
LT-LEDS	Long-term, low-emission development strategies
Mb/d	Million barrels per day
Mt	Million tonnes
NDC	Nationally determined contribution
NZE	Net Zero by 2050 pathway for the energy sector (from the IEA)
OECD	Organization for Economic Co-operation and Development
PGR	Production Gap Report
SOE	State-owned enterprise
Tcm	Trillion cubic meters
UAE	United Arab Emirates
UN	United Nations
UNFCCC	United Nations Framework Convention on Climate Change
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America

Foreword

Climate change has battered the world's most vulnerable for years. Now, wealthier nations and communities find themselves taking hits as heatwaves, droughts, wildfires and storms grow. The whole world is clinging to the handrails on a boat that is lurching through increasingly turbulent seas. Nobody is safe.

The escalating frequency and intensity of these events are a direct result of anthropogenic climate change, which is driven by humanity's addiction to fossil fuels. By committing to limiting global temperature rise through the Paris Agreement, governments have shown they understand this. They have shown they want to change.

Yet, as this report shows, the addiction to fossil fuels still has its claws deep in many nations. Governments are planning to produce, and the world is planning to consume, over double the amount of fossil fuels in 2030 than is consistent with the pathway to limiting global temperature rise to 1.5°C. These plans throw the global energy transition into question. They throw humanity's future into question. Governments must stop saying one thing and doing another, especially as it relates to the production and consumption of fossil fuels.

Powering economies with clean and efficient energy is the only way to end energy poverty and bring down emissions at the same time. Starting at COP28, nations must unite behind a managed and equitable phase-out of coal, oil and gas — to ease the turbulence ahead and benefit every person on this planet.

Inger Andersen
Executive Director
United Nations Environment Programme

The recent global energy crisis and the worsening climate crisis have a common root: our excessive dependence on fossil fuels. This root must now be severed to achieve real energy security and climate security. From the latest IPCC report to the latest climate disaster headlines, the message is clear: Governments must lead a swift and just transition away from fossil fuels towards clean energy.

And yet as this year's report shows, the world's governments still, in aggregate, plan on increasing coal production out to 2030 and increasing oil and gas production out to at least 2050. Most have pledged net-zero emissions by mid-century: a necessary target, but one that can only become a reality if translated into concrete plans and actions to reduce production and use of coal, oil, and gas.

Wealthier countries that are less dependent on fossil fuels for livelihoods and revenues will need to reduce faster. Other countries will require support. And none want to act alone. That's why all eyes will be on governments as they convene in Dubai this December to take on the long-overdue work of phasing out fossil fuels fairly and equitably.

Måns Nilsson
Executive Director
Stockholm Environment Institute

Contents

Appendix available online

Executive Summary

Key Findings

Governments, in aggregate, still plan to produce more than double the amount of fossil fuels in 2030 than would be consistent with limiting warming to 1.5°C. The persistence of the global production gap puts a well-managed and equitable energy transition at risk.

Taken together, government plans and projections would lead to an increase in global coal production until 2030, and in global oil and gas production until at least 2050. This conflicts with government commitments under the Paris Agreement, and clashes with expectations that global demand for coal, oil, and gas will peak within this decade even without new policies.

Major producer countries have pledged to achieve net-zero emissions and launched initiatives to reduce emissions from fossil fuel production, but none have committed to reduce coal, oil, and gas production in line with limiting warming to 1.5°C.

Governments should be more transparent in their plans, projections, and support for fossil fuel production and how they align with national and international climate goals.

There is a strong need for governments to adopt near- and long-term reduction targets in fossil fuel production and use to complement other climate mitigation targets and to reduce the risks of stranded assets.

Given risks and uncertainties of carbon capture and storage and carbon dioxide removal, countries should aim for a near total phase-out of coal production and use by 2040 and a combined reduction in oil and gas production and use by three-quarters by 2050 from 2020 levels, at a minimum. The potential failure of these measures to develop at scale calls for an even more rapid global phase-out of all fossil fuels.

An equitable transition away from fossil fuel production must recognize countries' differentiated responsibilities and capabilities. Governments with greater transition capacity should aim for more ambitious reductions and help finance the transition processes in countries with limited capacities.

Executive Summary

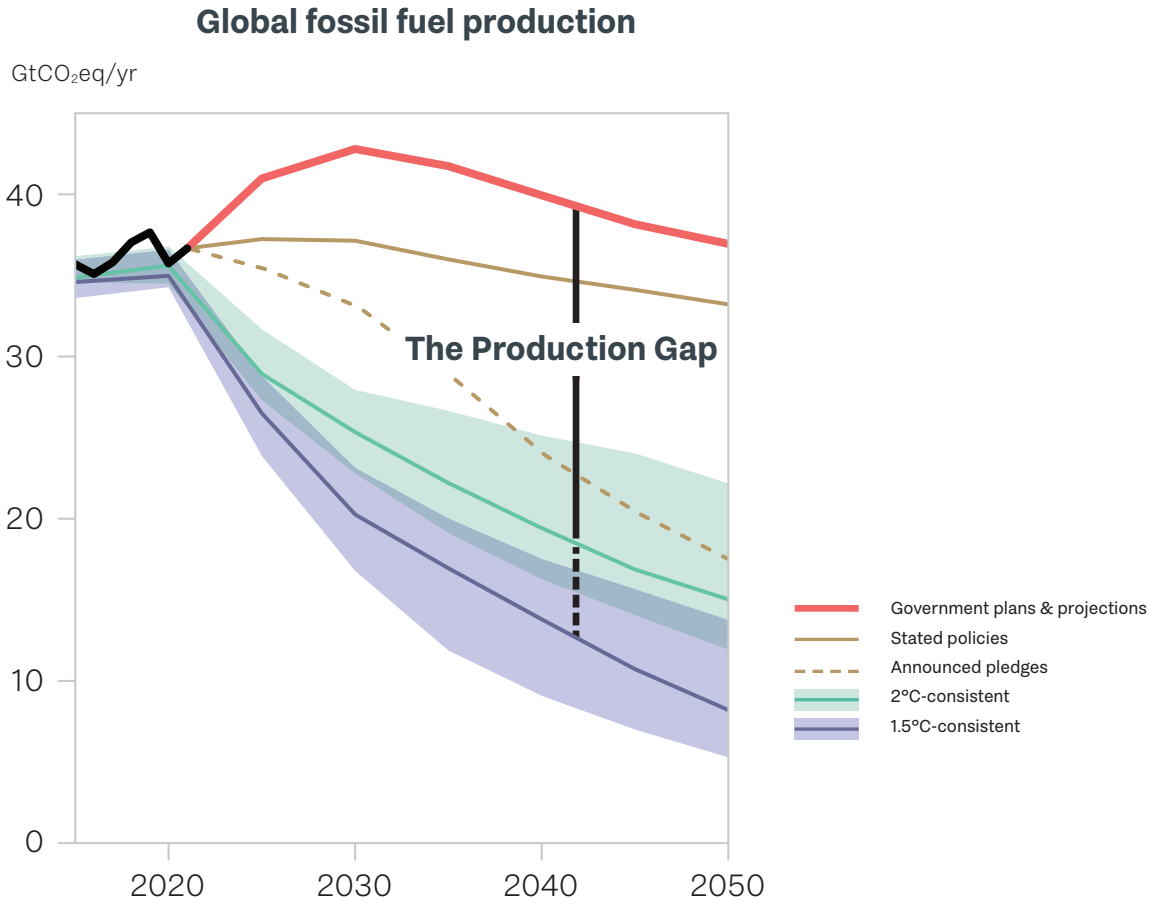
Soon after the release of the 2021 Production Gap Report, governments agreed to accelerate efforts towards "the phasedown of unabated coal power" at the 26th Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) in Glasgow. It was a significant milestone in the history of international climate governance: for the first time, an explicit reference to fossil fuels appeared in a COP decision text.

Yet since that time, the production and use of fossil fuels have reached record high levels. If global carbon dioxide (CO_2) emissions — of which close to 90% stem from fossil fuels — continue at the current pace, the world could exceed the remaining emissions budget compatible with a 50% chance of limiting long-term warming to 1.5°C by 2030.

Both global CO_2 emissions and fossil fuel production need to peak and swiftly decline to keep the Paris Agreement's temperature goal within reach. Informed by the latest scientific evidence, this report identifies global pathways for coal, oil, and gas production from now until 2050 that are consistent with this goal. It then assesses governments' plans, projections, and policies for fossil fuel production and how aligned — or misaligned — they are with respect to these pathways.

Figure ES.1

The fossil fuel production gap — the difference between governments' plans and projections and levels consistent with limiting warming to 1.5°C and 2°C, as expressed in units of greenhouse gas emissions from fossil fuel extraction and burning — remains large and expands over time. (See details in Chapter 2 and Figure 2.1.)



The report's main findings are as follows:

Since it was first quantified in 2019, the global production gap has remained largely unchanged. Despite encouraging signs of an emerging clean energy transition, the world's governments still plan to produce more than double the amount of fossil fuels in 2030 than would be consistent with limiting warming to 1.5°C.

The production gap is the difference between governments' planned fossil fuel production and global production levels consistent with limiting global warming to 1.5°C or 2°C. This year's production gap assessment features two major updates. First, the "government plans and projections" global pathway reflects how major fossil-fuel-producing countries have adjusted their coal, oil, and gas production targets in light of developments since late 2021, including a global energy crisis and increased climate mitigation ambitions. Second, global pathways for fossil fuel production consistent with limiting warming to 1.5°C or 2°C have been updated using the new scenario database compiled for the Working Group III contribution to the Intergovernmental Panel on Climate Change (IPCC)'s Sixth Assessment Report (AR6).

The resulting analysis finds that, in aggregate, governments are planning on producing around 110% more fossil fuels in 2030 than would be consistent with limiting warming to 1.5°C, and 69% more than would be consistent with limiting warming to 2°C, as shown in Figure ES.1. The magnitude of the production gap is also projected to grow over time: by 2050, planned fossil fuel production is 350% and 150% above the levels consistent with limiting warming to 1.5°C or 2°C, respectively.

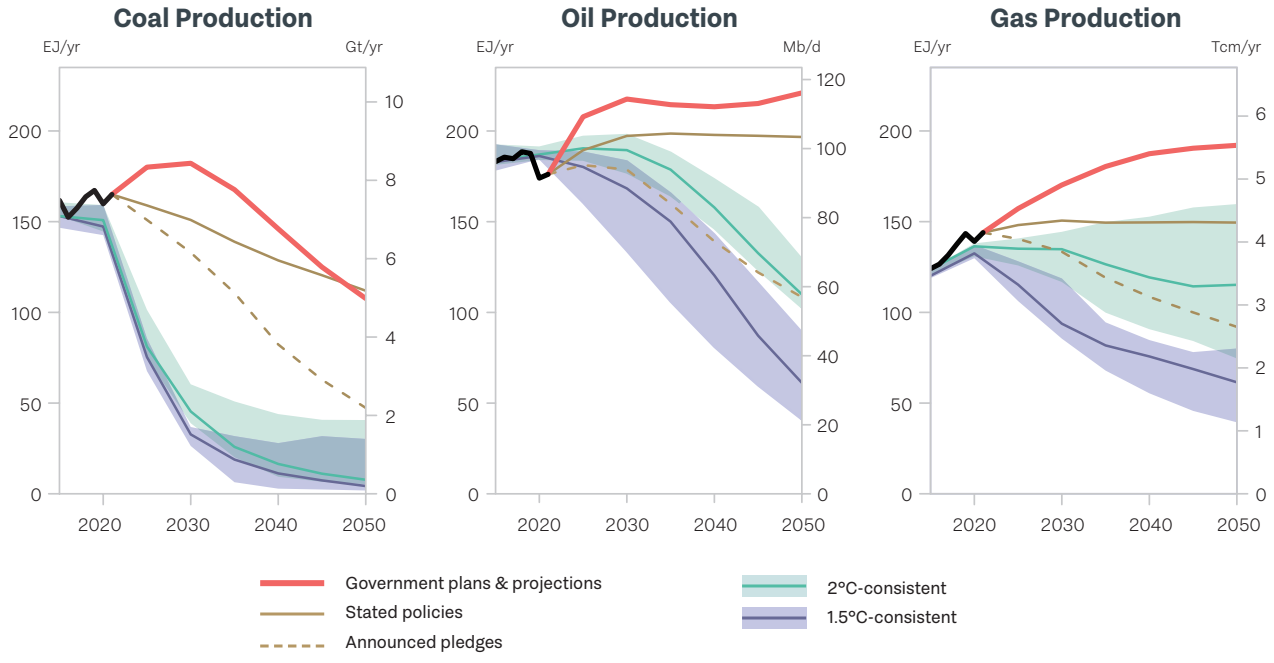
The global levels of fossil fuel production implied by governments' plans and projections, taken together, also exceed those implied by their stated climate mitigation policies and implied by their announced climate pledges as of September 2022, as modelled by the International Energy Agency. As discussed below, few countries have developed fossil fuel production projections that are aligned with their national climate goals or with limiting warming to 1.5°C.

Many major fossil-fuel-producing governments are still planning near-term increases in coal production and long-term increases in oil and gas production. In total, government plans and projections would lead to an increase in global production until 2030 for coal, and until at least 2050 for oil and gas, creating increasingly large production gaps over time.

To be consistent with limiting warming to 1.5°C, global coal, oil, and gas supply and demand must instead decline rapidly and substantially between now and mid-century. However, the increases estimated under the government plans and projections pathways would lead to global production levels in 2030 that are 460%, 29%, and 82%

Figure ES.2

Government plans and projections would lead to an increase in global coal production until 2030, and in global oil and gas production until at least 2050. (See details in Chapter 2 and Figure 2.2.)



higher for coal, oil, and gas, respectively, than the median 1.5°C-consistent pathways, as shown in Figure ES.2. The disconnect between governments' fossil fuel production plans and their climate pledges is also apparent across all three fuels.

The size and nature of the global production gap also raise the question of how it can be closed in a managed and equitable way, especially given that countries are expected to uphold "the principle of equity and common but differentiated responsibilities and respective capabilities, in light of different national circumstances" under the UNFCCC framework.

As explored in the 2020 Production Gap Report and informed by emerging literature on this topic, an equitable transition should recognize that countries' circumstances differ widely depending on their financial and institutional capacity, as well as their level of socioeconomic dependence on fossil fuel production. Based on these principles, one might expect higher-income countries and those less dependent on fossil fuel production to lead the transition, while lower-capacity countries will require assistance and finance to pursue alternative low-carbon and climate-resilient development pathways.

However, the combined levels of coal, oil, and gas production being planned/projected by 10 high-income countries alone would already exceed 1.5°C-consistent pathways for each fuel by 2040. Similarly, the trajectories of oil and gas production being planned and projected by 12 countries with relatively lower levels of economic dependence on their production would exceed the respective 1.5°C-consistent pathways by 2040 (see Section 2.5). Without active dialogue and engagement between higher- and lower-income countries, these inequities may continue to exist and to erode trust in global cooperation on climate action.

In addition to government plans and projections for fossil fuel production that inform the global production gap analysis in Chapter 2, this report also reviews, in Chapter 3, the climate ambitions and fossil fuel production policies and strategies of 20 major producer countries: Australia, Brazil, Canada, China, Colombia, Germany, India, Indonesia, Kazakhstan, Kuwait, Mexico, Nigeria, Norway, Qatar, the Russian Federation, Saudi Arabia, South Africa, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland (UK), and the United States of America (US). Altogether, these countries account for 82% of production and 73% of consumption of the world's fossil fuel supply. The status of discourses and policies towards a managed and equitable transition away from fossil fuel production in these countries is also evaluated.

While 17 of the 20 countries profiled have pledged to achieve net-zero emissions, and many have launched initiatives to reduce emissions from fossil fuel production activities, most continue to promote, subsidize, support, and plan on the expansion of fossil fuel production. None have committed to reduce coal, oil, and gas production in line with limiting warming to 1.5°C.

As shown in Table ES.1, some countries are planning on increasing their coal production until 2030, banking on continued and growing domestic and international coal markets. Meanwhile, the majority of oil and gas producers anticipate increasing their production between 2021 and 2030, and some until 2050.

The war in Ukraine, the ensuing pressures on global energy supply, and record high prices for internationally traded gas have further spurred plans for and investment in liquefied natural gas infrastructure by exporters and importers alike. Many countries are promoting gas as a "bridge" or "transition" fuel, but with no apparent plans to transition away from it. Eight countries profiled in Chapter 3 project relatively flat or increasing gas production from 2021 until 2035–2050. However, gas could hinder or delay the transition to renewable energy systems by locking in fossil-fuel-based systems and institutions. Moreover, despite some local air pollution benefits when substituting for coal, advances in the quantification of methane leakage along the gas supply chain have substantially reduced the expected climate benefits of replacing coal with gas (see Chapter 3).

In recent years, many governments have launched initiatives to reduce emissions from fossil fuel production activities. As shown in Table ES.1, 14 of the 20 countries profiled in Chapter 3 have signed onto the Global Methane Pledge to collectively reduce global methane emissions from all sources by 30% by 2030 compared to 2020 levels. Six major oil- and gas-producing countries, all of which are among the 20 profiled in Chapter 3, have also launched the Net Zero Producers Forum aimed at reducing emissions from the sector. Such efforts, while important, are also deeply insufficient. In the pathways consistent with limiting warming to 1.5°C explored in this report, global methane emissions from the energy sector decline by more than 60% between 2020 and 2030. Furthermore, and perhaps most importantly, these initiatives fail to recognize that reducing fossil fuel production itself is also needed to limit warming to 1.5°C.

Table ES.1

A large majority of countries profiled in this report have made net-zero pledges and signed onto the Global Methane Pledge and the Glasgow Statement on international finance. Most are also planning to increase oil and gas production, and some are planning to increase coal production, until 2030. (See details in Chapter 3 and Tables 3.2–3.3.)

Country	Status of national net-zero commitment; net-zero target year	Signatory of Global Methane Pledge	Signatory of Glasgow Statement	Planned change in annual fossil fuel production for 2030 relative to 2021 (EJ)		
				Coal	Oil	Gas
Australia	In law 2050	✓		▲ 0.2	■ 0[b]	▲ 0.7
Brazil	NDC objective 2050	✓		No data	▲ 5.2	▲ 1.0[d]
Canada	In law 2050	✓	✓	No data	▲ 3.0	▲ 0.6
China	NDC objective 2060			▼ 5.3	■ 0	▲ 2.6
Colombia	In law 2050	✓		▲ 1.7	▼ 0.1	■ 0
Germany	In law 2045	✓	✓	▼ 0.5	■ 0	▼ 0.1
India	NDC objective 2070			▲ 10.7	No data	No data
Indonesia	In strategy document 2060	✓		▲ 2.5	▼ 0.2	▲ 1.1
Kazakhstan	In strategy document 2060			▼ 0.2	▲ 0.4	▲ 0.1[d]
Kuwait	Political pledge 2050 (oil & gas sector) 2060 (rest of economy)	✓		No production	▲ 2.1	▲ 0.1
Mexico	No commitment	✓		No data	▲ 1.4	▲ 0.6
Nigeria	In law 2060	✓		No data	▲ 1.3	▲ 2.6[d]
Norway	No commitment[a]	✓		No data	▼ 0.5	▼ 0.3
Qatar	No commitment			No production	No data	▲ 3.9[c]
Russian Federation	In strategy document 2060			▲ 3.2	▲ 2.9	▲ 3.3
Saudi Arabia	Political pledge 2060	✓		No production	▲ 5.5	▲ 1.3
South Africa	In strategy document 2050			No data	No data	No data
UAE	NDC objective 2050	✓		No production	▲ 1.8[c]	▲ 0.4[b]
UK	In law 2050	✓	✓	No data	▼ 0.7	▼ 0.6
US	In policy document 2050	✓	✓	▼ 5.1	▲ 5.2	▲ 2.5

[a] Norway has committed to a "low-emission society" by 2050 in its 2018 Climate Change Act, with 90–95% emission reduction targets.
[b] Planned change for 2028, furthest year for which data is available.
[c] Planned change for 2027, furthest year for which data is available.
[d] Excluding gas that is re-injected, consumed by producers, and/or flared.

Sources: Net Zero Tracker (2023) and own analyses (see Chapter 3).

Governments should be more transparent in their plans, projections, and support for fossil fuel production and how they align with national and international climate goals.

Governments play a central role in setting the direction of future fossil fuel production. State-owned entities control half of global production for oil and gas and over half for coal. Governments' existing targets, policies, and support for fossil fuel production help to influence, legitimize, and enable continued investments in domestic and international fossil fuel projects, which are undermining the transition to renewable energy and global climate mitigation efforts. At the same time, many fossil fuel projects planned and under development are now at risk of becoming stranded assets as the world decarbonizes and global demand for coal, oil, and gas are expected to peak and decline within this decade, even without additional policies.

Nevertheless, there are some encouraging signs of movement. Thirty-four countries, including four profiled in Chapter 3 (Table ES.1), have signed onto the Glasgow Statement on International Public Support for the Clean Energy Transition to end international public financing for "unabated" fossil fuel projects by the end of 2022 and to redirect investments into clean energy. It is important to note though that while the term "unabated" (see Box 2.1) is being increasingly used in policy commitments related to fossil fuel reductions, it is often highly contested, poorly defined, and open to interpretation regarding the required rate of carbon capture for abatement.

Since the 2021 Production Gap Report, two more countries (Canada and China) — in addition to Germany and Indonesia — have begun to develop scenarios for domestic fossil fuel production that are consistent with national or global net-zero or carbon-neutrality targets. Meanwhile, discourses on just transitions for fossil-fuel-dependent workers and economies are advancing in many countries, though these are still mostly limited to coal-fired power generation. Among the 20 countries profiled, Colombia recently signed on to an international initiative targeted at phasing out fossil fuel production (see Table 3.2).

There is a need for governments to adopt both near- and long-term reduction targets for fossil fuel production and use to complement other climate mitigation benchmarks and reduce the risks of stranded assets. Countries with greater transition capacity should aim for faster reductions than the global average.

The current misalignment of climate ambitions and fossil fuel production plans undermines efforts to reduce fossil fuel use and emissions by sending mixed signals about countries' intentions and priorities and by locking in new fossil fuel production infrastructure that will make the

energy transition more costly, difficult, and disruptive. The almost-exclusive focus of climate policy on the demand for fossil fuels and on the territorial emissions associated with their combustion over the past decades has proven to be insufficient. Ultimately, the global energy landscape is shaped by both demand and supply. A well-managed energy transition will thus require plans and actions to reduce both fossil fuel production and consumption in a coordinated fashion.

Combining targets and policies to actively phase out fossil fuel production with other important climate mitigation and just transition measures — such as reducing fossil fuel consumption, expanding renewable energy, reducing methane emissions from all sources, and targeting investments and social protection for affected communities — can reduce the costs of decarbonization, promote policy coherence, and ensure that renewables replace, rather than add to, fossil fuel energy.

The long-term, cost-optimized mitigation scenarios selected and analysed in this report from the IPCC AR6 database suggest that, to limit warming to 1.5°C, global coal, oil, and gas production should decline rapidly and substantially between now and mid-century, in parallel with other key mitigation strategies.

The selected scenarios differ substantially with respect to their reliance on carbon capture and storage (CCS) and carbon dioxide removal (CDR). The median 1.5°C-consistent global fossil fuel production pathways shown in Figures ES.1–ES.2 assume that, by mid-century, 2.1 billion tonnes of CO_2 per year ($GtCO_2$/yr) of fossil-fuel-combustion emissions will be captured and stored, 2.2 $GtCO_2$/yr of atmospheric CO_2 will be sequestered by conventional land-based CDR methods (afforestation, reforestation, and management of existing forests), and over 3 $GtCO_2$/yr will be sequestered by novel CDR methods (CCS coupled to bioenergy or direct air capture), on average.

However, there are large uncertainties in the technical, economic, and institutional feasibility of developing and deploying novel CDR and fossil-CCS technologies at the extensive scale envisioned in these scenarios. Around 80% of pilot CCS projects over the last 30 years have failed, with annual capacity from operational projects resulting in dedicated CO_2 storage currently amounting to less than 0.01 $GtCO_2$/yr (see Section 2.4). There are also widespread concerns around the potential negative impacts arising from extensive land-use for conventional or novel CDR, which could affect biodiversity, food security, and the rights of Indigenous peoples and traditional land users.

Given risks and uncertainties of CCS and CDR, countries should aim for a near total phase-out of coal production and use by 2040 and a combined reduction in oil and gas production and use by three-quarters by 2050 from 2020 levels, at a minimum. The potential failure of these measures to become sufficiently viable at scale, the non-climatic near-term harms of fossil fuels, and other lines of evidence, call for an even more rapid global phase-out of all fossil fuels.

While the above reduction targets are derived from 1.5°C-consistent scenarios that align with taking a precautionary approach to limiting reliance on CCS and CDR, they still assume that these measures will become available at scale to some degree (see Section 2.4). Ultimately, the pace and extent of the required reductions in global coal, oil, and gas production will also depend on many normative and values-based choices. For example, one mitigation scenario that relies only on conventional CDR and no CCS coupled to fossil fuels, bioenergy, or direct air capture sees reductions in global oil and gas production of 90% and 85%, respectively, between 2020 and 2050.

There are additional compelling reasons to strive for an even faster global phase-out of all fossil fuels. Research has found that the committed emissions of CO_2 expected to occur over the lifetime of existing fossil-fuel-producing infrastructure already exceed the remaining carbon budget for a 50% chance of limiting warming to 1.5°C by 2100. This implies that no new coal mines and oil and gas fields can be developed unless existing infrastructure is retired early, a task that is hard to achieve in practice.

Moreover, fossil fuel extraction and burning are associated with many near-term and localized non-climatic social, economic, and environmental harms that are rarely accounted for in climate mitigation scenarios, including the ones analysed in this report (see Section 2.4).

Continued production and use of coal, oil, and gas are not compatible with a safe and livable future. Achieving net-zero CO_2 emissions by 2050 requires governments to commit to, plan for, and implement global reductions in the production of all fossil fuels alongside other climate mitigation actions, beginning now.

1

Introduction

1. Introduction

For over a century, energy from fossil fuels has helped to deliver jobs, revenue, and economic growth around the world. Consequently, most governments view coal, oil, and gas as sources of geopolitical power, energy security, and development. Forgoing such resources — as will be necessary to retain a liveable climate — is neither easy nor conventional. Thus, it is not surprising that many governments continue to support, finance, and expand fossil fuel production. However, such policies are irreconcilable with global climate commitments and the plummeting cost of renewable energy. Amid growing calls from citizens and scientists for a fossil-fuel-free future, it is important for governments to recognize that while energy is essential to the fabric of society, fossil fuels are not.

This report examines how governments — particularly those responsible for producing much of the world's coal, oil, and gas — are reckoning with the need to rapidly transition away from fossil fuel production. While the global energy landscape is shaped by both demand and supply, this report series focuses on the latter, given its notable absence in national and international climate policymaking until recent years. The report assesses governments' plans and projections for coal, oil, and gas production and the extent to which, taken together, they exceed levels consistent with the Paris Agreement's goal of "holding the increase in global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels" (Paris Agreement, 2015, art. 2.1). This misalignment, referred to as the "production gap", is a metric that this report series has tracked since 2019.

In the two years since the last report was released, the global energy landscape has shifted significantly. On top of supply chain disruptions — in part due to extreme weather events and a rapid economic rebound following the COVID-19 pandemic — the outbreak of war in Ukraine catalysed a global energy crisis and a global food crisis (IEA, 2023c). Oil prices rose to almost USD 140 per barrel, a level last seen in 2008 (Brower, 2022). These developments prompted countries to rethink their energy plans, bringing the geopolitical risks of fossil fuel dependence into sharp focus. Energy security emerged as a top policy concern for many countries, especially those reliant on fossil fuel imports or facing growing energy needs.

On the one hand, oil and gas companies increased their upstream investments by 39% to nearly USD 500 billion in 2022 worldwide, the highest level since 2014 (IEF & S&P Global, 2023). Some major energy companies have abandoned or slowed plans to reduce oil and gas production and shift investments towards renewables (Bousso & Adomaitis, 2023; Reed, 2023; Visavadia, 2023).

On the other hand, the energy crisis has helped to accelerate the broader transition to clean sources. For example, the global pace of vehicle electrification has vastly exceeded prior expectations (IEA, 2023b). In Europe, renewable power capacity is expected to double over the 2022–2027 period (IEA, 2023c). Australia and the United States of America passed landmark climate laws in 2022, China is on track to double its wind and solar energy capacity by 2025 instead of 2030, and India earmarked over USD 4 billion for clean energy in its national budget (Mei et al., 2023; REN21, 2023). Since 2021, several Just Energy Transition Partnerships (JETPs) have been launched, with wealthier governments committing tens of billions of US dollars to support the shift away from fossil fuels in four emerging and developing countries (see Box 3.2). Thirty-four countries and five public finance institutions have committed to end international public finance for fossil fuels and prioritize clean energy (see Chapter 3).

Despite these encouraging signs, the overall size of the production gap, particularly out to 2030, has not discernibly changed since the first assessment in 2019.

Governments offer various rationales for continuing to support and expand fossil fuel production: meeting expected demand; reducing dependency and foreign exchange costs on imports; generating revenue for government services through taxes and royalties; following through on legal obligations under existing statutes and treaties; or confidence in winning out as one of the last producers in a dwindling market. Some also argue that producing their country's oil and gas with relatively lower upstream emissions will lead to an overall reduction in global greenhouse gas (GHG) emissions. However, research shows that curtailing production of fossil fuels, especially oil, will reduce global consumption and thereby also reduce global GHG emissions, regardless of who the producer is and after accounting for substitution by other producers (Erickson & Lazarus, 2018; Prest et al., 2023).

While these rationales for supporting fossil fuels may have merit in some limited circumstances, wide adoption of such policies results in the persistent production gap identified in this report. This gap "locks in" unsustainable levels of fossil fuel production that impede the energy transition and undermine climate goals in the near term. In the longer term, economies and communities risk seeing costly fossil fuel investments turn into liabilities, as markets for coal, oil, and gas shrink and prices drop (Mercure et al., 2018). The president of COP28 and head of the United Arab Emirates' national oil company has acknowledged that "phasing down fossil fuels is inevitable and essential" (Alkousaa, 2023).

Indeed, all fossil fuels must be effectively phased out to secure a safe and liveable future. The scientific evidence on this is clear. The production and use of fossil fuels are the predominant driver of the climate emergency, accounting for close to 90% of human-made carbon dioxide (CO_2) emissions (Friedlingstein et al., 2022). If global GHG emissions continue at current levels, the remaining "carbon budget" of allowable emissions for a 50% chance of limiting warming to 1.5°C is likely to be exceeded by 2030 (Forster et al., 2023).

Furthermore, the CO_2 emissions expected to occur over the lifetime of existing fossil fuel infrastructure already exceeds the remaining 1.5°C carbon budget (IPCC, 2023; Tong et al., 2019; Trout et al., 2022). This leaves no room for new coal mines, oil and gas fields, or fossil-fuel-burning power plants, unless existing infrastructure is retired early (IEA, 2022).

Finally, carbon capture and storage (CCS) technologies — which can be coupled to fossil fuel combustion to reduce CO_2 emissions, or coupled to bioenergy or direct air capture to remove CO_2 from the atmosphere — could play a role in addressing residual emissions for hard-to-transition sectors. However, they are not a free pass to carry on with business as usual. Even if all CCS facilities planned and under development worldwide become operational, only around 0.25 $GtCO_2$ would be captured in 2030 (IEA, 2023a), less than 1% of 2022 global CO_2 emissions (Liu et al., 2023). The track record for CCS deployment has been poor to date, with around 80% of pilot projects ending in failure over the past 30 years (Wang et al., 2021). Counting on these largely unproven and relatively costly technologies being rolled out at scale is thus a potentially risky and dangerous strategy.

Beyond climate, there are many other social, economic, and environmental reasons to accelerate the phase-out of fossil fuel production. The extraction and distribution of coal, oil, and gas are associated with toxic pollution and harms to public health, human rights violations and environmental injustices, and ecosystem degradation and biodiversity loss. The adverse impacts on communities living near oil and gas extraction "sacrifice zones", where they are exposed to routine flaring and other sources of air and water pollution, have been documented from the shale fields of the US to the Niger Delta of Nigeria, with studies showing increased risks of pre-term birth, respiratory and skin diseases, cancer, and premature death (Clark et al., 2022; Cushing et al., 2020; Nwosisi et al., 2021). The communities exposed to these harmful impacts are often Indigenous people, communities of colour, or low-wealth communities (Donaghy et al., 2023; Gonzalez et al., 2023). Over the past decade, at least 1,733 land and environmental defenders, many of whom are from Indigenous communities, have been killed while trying to protect their land from extractive industries (Global Witness, 2022). Furthermore, while fossil fuel extraction can result in economic and development benefits, they are not guaranteed. Dependency on oil and gas production and export has deepened the indebtedness, corruption, and instability of many lower- and middle-income countries (Frynas & Buur, 2020; Gaventa, 2021; Ross, 2012).

While countries have signed on to numerous climate targets and initiatives to reduce emissions and promote clean energy, few have agreed to limit fossil fuel expansion, or supported initiatives to manage its decline, beyond committing to phase down "unabated" coal power. Over 100 countries have now pledged or proposed net-zero emissions targets and also endorsed the Global Methane Pledge to cut methane emissions by 30% from 2020 to 2030, while 48 countries are part of the Powering Past Coal Alliance (Net Zero Tracker, 2023; US Department of State, 2022). Furthermore, the COP28 presidency is advancing new targets, including tripling renewable energy capacity and doubling energy efficiency and hydrogen production by 2030, as well as ending the use of "unabated" fossil fuels by mid-century (Al Jaber, 2023; Civillini, 2023; Reuters & Lo, 2023). To date, only about a dozen countries are members or endorsers of two initiatives to facilitate the managed phase-out of fossil fuel production: the Beyond Oil and Gas Alliance or the Fossil Fuel Non-Proliferation Treaty. Except for Colombia, the world's top 35 fossil fuel producers are not among these countries.

Given the persistence of the production gap, and the urgency of limiting climate damages, now is the time for countries to acknowledge that focusing on emissions alone is insufficient. As this report and other analyses show, the production of fossil fuels must also decline at a rapid pace (see Chapter 2). Planning for a well-managed decline in the production of, and reliance on, fossil fuels is critical to ensuring an effective and equitable energy transition. Key steps in that direction are for countries to increase their investments in renewable energy and to align their fossil fuel production plans and projections with the Paris Agreement's temperature goal, as well as with their own net-zero commitments. As discussed in this report, several major fossil fuel producers have begun to develop such production projections. While still limited to scenario exercises at this stage, they nonetheless signal change and provide a positive example that other countries can follow.

Progress here would pave the way towards implementing ambitious and concrete policies for a just transition away from fossil fuels. Countries can restrict the development of new oil and gas fields and new coal mines, redirect subsidies, adopt near- and long-term targets to reduce the production and use of coal, oil, and gas, and provide support to affected communities and workers. Reduction targets for fossil fuel production can serve as an important complement to existing emissions reduction goals. However, as with tackling climate change itself, phasing out fossil fuels is a collective problem that requires governments to cooperate — a particular challenge given the highly competitive nature of international fossil fuel markets, the incentives to increase production, and countries' differentiated responsibilities and capacities to transition (Kartha et al., 2018; Pye et al., 2020).

As discussed in the 2020 Production Gap Report and elsewhere, not all countries can phase out fossil fuels at the same pace. Countries that have higher financial and institutional capacity and are less dependent on fossil fuel production can transition most rapidly, while those with lower capacity and higher dependence will require greater international support. They will require assistance and finance to pursue alternative development models, which can help break cycles of fossil fuel dependency and indebtedness, and forge new, climate-resilient paths to prosperity (Sokona et al., 2023; Steadman et al., 2023; Winkler et al., 2022). The recently launched JETPs, which span long-time coal-dependent and coal-exporting countries (Indonesia and South Africa) as well as a potential emerging oil and gas producer (Senegal), are an important innovation in this direction (See Box 3.2).

Finally, closing the production gap will require transparent, verifiable, and consistent information on countries' plans and support for fossil fuel production. As underscored in the 2021 Production Gap Report, such information is currently incomplete, inconsistent, and scattered; instead, governments should share this information as part of their regular reporting under the United Nations Framework Convention on Climate Change.

The impacts of climate change, long predicted by scientists, are now manifesting and wreaking havoc in every corner of the planet. The fast-shrinking carbon budget means that all countries must rapidly diversify or leapfrog their energy needs and economies away from fossil fuels (CSO Equity Review, 2021; Dubash, 2023; Sokona et al., 2023). The task is unprecedented but not impossible (IPCC, 2022). It will require political will, determined implementation, and international cooperation, especially to provide support to lower-income countries. As a starting point, governments should name and confront the challenge at COP28 and beyond: the need to phase out all fossil fuels, starting now.

The remainder of this year's report is split across two chapters. Chapter 2 provides an updated assessment of the global production gap and explores the global coal, oil, and gas reduction pathways that would be consistent with the Paris Agreement's long-term temperature goal. Chapter 3 homes in on 20 major fossil-fuel-producing countries, profiling their governments' climate ambitions and existing plans, policies, and strategies that support fossil fuel production or the transition away from it.

While forgoing fossil resources will not be easy — and for many countries there is disappointingly little to report on transition plans — it will be essential if we are to avoid the worst impacts of the climate crisis.

2

The Production Gap

Key Messages

In aggregate, governments plan to produce, in 2030, around 110% more fossil fuels than would be consistent with limiting warming to 1.5°C (i.e. more than double), and 69% more than would be consistent with limiting warming to 2°C. These global production gaps grow wider out to 2050.

Government plans and projections would lead to an increase in global coal production until 2030, and in global oil and gas production until at least 2050. These production levels correspond in 2030 to 460% more coal, 29% more oil, and 82% more gas than global levels consistent with limiting warming to 1.5°C.

For each fossil fuel, the combined levels of production being planned by 10 high-income countries alone would already exceed global 1.5°C-consistent pathways by 2040, putting an equitable transition at risk.

Cost-optimized mitigation scenarios suggest that, to limit warming to 1.5°C, global coal, oil, and gas production and use should decline rapidly and substantially, starting now, alongside other key mitigation strategies such as expanding renewable energy and reducing methane emissions from all sources.

There is a strong need for governments to establish near- and long-term reduction targets for fossil fuel production and use to complement other climate mitigation benchmarks and reduce the risks of stranded assets. Countries with greater transition capacity should aim for faster reductions than the global average.

Given risks and uncertainties of carbon capture and storage and carbon dioxide removal, countries should at a minimum aim for a near total phase-out of coal production and use by 2040 and a combined reduction in oil and gas production and use by three-quarters by 2050 from 2020 levels. The potential failure of these measures to develop at scale calls for an even more rapid global phase-out of all fossil fuels.

2. The Production Gap

Since the release of the 2021 Production Gap Report, the political landscape for fossil fuels has begun to shift. After decades of negotiations, the first direct call to address fossil fuels made it into a cover decision text of the Conference of Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC). At COP26 in late 2021, governments committed to accelerate efforts towards "the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies", though they did not agree to address oil and gas or the production of fossil fuels (UNFCCC, 2021).

The 2022–2023 global energy crisis subsequently highlighted the geopolitical risks of fossil fuel dependence, helping to fast-track the deployment of renewable technologies and to bring peak coal, oil, and gas demand into sight (IEA, 2023c). At the same time, global fossil-fuel-derived carbon dioxide (CO_2) emissions reached a record high in 2022 (Friedlingstein et al., 2022). And although the disconnect between the continued expansion of fossil fuels and climate mitigation ambition is gaining increasing visibility and attention, few national governments are committing to and planning for a managed reduction of coal, oil, and gas production in line with a net-zero future.

This chapter assesses the collective implications of governments' national outlooks for fossil fuel production between now and 2050 at a global level. Section 2.1 quantifies the fossil fuel production gap: the discrepancy between the global levels of fossil fuel production implied by government plans and projections and the levels consistent with limiting global warming to 1.5°C or 2°C. This represents a comprehensive re-analysis of the production gap that incorporates updated government projections as well as new mitigation scenarios assembled in the Working Group III (WGIII) contribution to the Intergovernmental Panel on Climate Change (IPCC)'s Sixth Assessment Report (AR6) (IPCC, 2022). Section 2.2 discusses the major trends and drivers of the gap and how it has changed compared to the 2021 assessment. Explored next in Section 2.3 are the global reduction pathways of coal, oil, and gas production that would be consistent with limiting warming to 1.5°C, including their sensitivity to the success of other climate mitigation measures. Section 2.4 then explores the policy implications of these findings and other lines of evidence to derive recommended global reduction targets for fossil fuel production. Section 2.5 ends with a discussion of why an equitable transition away from fossil fuel production is at risk.

2.1 The fossil fuel production gap

The analysis of the global production gap rests on the determination of two elements. The first is the pathway of fossil fuel production implied by the plans and projections of national governments. The second is the pathway of fossil fuel production consistent with the Paris Agreement's goal of "holding the increase in global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C" (Paris Agreement, 2015, art. 2.1).

The first element relies on a compilation of government plans and projections for future fossil fuel production, featuring the most recent national outlooks from 19 of the 20 major fossil-fuel-producer countries individually profiled in Chapter 3 (outlooks for South Africa were not available) as of August 2023. Together, these 19 countries accounted for around 80% of global fossil fuel production, on a primary energy basis,[1] in 2021. Their combined production trajectories are scaled up to a global estimate, based on these countries' projected future shares of global production (see Section 2.2 and the report's Appendix, available online). The result is the estimated global "government plans and projections" (GPP) pathway.[2] This updated GPP pathway therefore reflects — to the varying

[1] Coal, oil, gas production can be quantified in terms of physical units (e.g. barrels of oil), the amount of contained energy (e.g. exajoules), or the amount of greenhouse gases released during production activities and combustion. Primary energy represents the amount of energy that can be harvested directly from fossil fuels prior to any conversion.

extent captured within each of the underlying projections — how these governments have adjusted their fossil fuel production targets in light of the evolving global energy landscape, national and international fossil fuel demand expectations, climate mitigation policies and pledges, and other factors.[3]

The second element — pathways for global fossil fuel production consistent with the Paris Agreement's temperature goal — is derived from long-term greenhouse gas (GHG) mitigation scenarios generated by process-based integrated assessment models (IAMs).[4] This analysis relies on the mitigation scenarios compiled by the IPCC AR6 WGIII, focusing on two scenario categories: "C1", which limits warming to 1.5°C in 2100 with a likelihood greater than 50%, with no or limited overshoot throughout the 21st century;[5] and "C3", which limits peak warming throughout the 21st century to 2°C with a likelihood greater than 67% (Byers et al., 2022 ; IPCC, 2022). One of the modelled outputs of these scenarios is "primary energy supply" from coal, oil, and gas. Since this variable typically accounts for both energy and non-energy uses of fossil fuels (see Appendix), it is interpreted as total fossil fuel production intended for all uses.

There are a wide variety of modelling approaches and assumptions underlying different C1 and C3 scenarios, which have important implications for the resulting fossil fuel reduction pathways (Achakulwisut et al., 2023). Consequently, a three-step scenario-selection approach has been developed and applied here.

First, the majority of the AR6-assessed scenarios rely on extensive carbon dioxide removal (CDR), mostly through bioenergy combined with carbon capture and storage (BECCS) and afforestation/reforestation (A/R) (Creutzig et al., 2021; Fuss et al., 2018). Based on a systematic literature review, Fuss et al. (2018) estimated upper "sustainable" limits of 5 billion tonnes of CO_2 per year ($GtCO_2$/yr) for BECCS and 3.6 $GtCO_2$/yr for A/R by mid-century, due to their negative side-effects such as competition for land and loss of biodiversity. Thus, C1 and C3 scenarios relying on BECCS and A/R exceeding these levels were excluded.

Second, most IAMs do not adequately capture real-world constraints on regional CO_2 storage potential and injection rates, which influence model reliance on CCS coupled to fossil fuel use (fossil-CCS), BECCS, and direct air carbon capture and storage (DACCS) (Grant et al., 2022). Therefore, a mid-century limit of 8.6 $GtCO_2$/yr for total CCS has also been imposed, based on the "investable" CCS potential as estimated by Grant et al. (2022) when accounting for real-world financial, contractual, and institutional constraints.

Finally, scenarios have been selected only if they feature immediate rather than delayed climate action,[6] and if they are compatible with achieving net-zero GHG emissions by 2100. Reaching net-zero GHGs will lead to declining long-term temperatures, which can limit the long-term impacts of climate change (IPCC, 2023). The selected 36 C1 scenarios are classified as "1.5°C-consistent" and the 64 C3 scenarios as "2°C-consistent", in keeping with previous editions of the Production Gap Reports to define pathways consistent with two different temperature outcomes (SEI et al., 2019, 2020, 2021). (See detailed methods in the Appendix; and see Box 2.1 for CCS, CDR, and abatement terminology.)

The "1.5°C-consistent" set is arguably most aligned with the Paris Agreement's long-term temperature goal and its other objectives based on the rationale and interpretation proposed by Schleussner et al. (2022), while the "2°C consistent" set is arguably not compatible with limiting warming to "well below" 2°C and does not align with the 1.5°C temperature limit.[7] Given this, the 2021 Glasgow Climate Pact's emphasis on the 1.5°C limit, and the significant amplification of adverse climate impacts at 2°C

[2] The GPP pathway was called the "countries' plans and projections (CPP)" pathway in the 2021 Production Gap Report.

[3] There are varying levels of detail, certainty, and intent associated with fossil fuel production targets published by governments and affiliated institutions. These targets are collectively referred to here as "plans and projections". Governments take a variety of factors into consideration in assembling these plans and projections, including the state of each country's fossil fuel reserves, the evolution of technologies and costs of extraction, the presence of subsidies and regulations, foreseeable dynamics of domestic and international demand, and/or national and international climate mitigation ambitions. Where available, the over-arching assumptions underlying a given country's projections are described in each of the country profiles featured in Chapter 3 or in the Appendix.

[4] Process-based IAMs project cost-optimized mitigation pathways under what-if assumptions or subject to pre-defined outcomes such as carbon budget constraints consistent with limiting global warming to 1.5°C with a certain likelihood, through modelling linkages and trade-offs between energy, land use, climate, economy, and development (Wilson et al., 2021).

[5] C1 scenarios also limit peak warming to 2°C throughout the 21st century with close to, or more than, 90% likelihood (IPCC, 2022). C2 scenarios, which limit warming to 1.5°C in 2100 with a likelihood greater than 50% but exhibit high overshoot (i.e. exceeding 1.5°C by 0.1°C–0.3°C for up to several decades), are excluded from this analysis, given their extensive reliance on long-term carbon dioxide removal; see Section 2.4.

[6] Some scenarios in the AR6 database are designed to follow current policies or NDCs out to 2030 before starting globally coordinated mitigation. These scenarios therefore do not truly explore cost-effective pathways to limit warming to a given temperature with action starting as soon as possible. Such "delayed action" scenarios are excluded, leaving only scenarios that give the models full flexibility on the timing and extent of reductions in fossil fuel production.

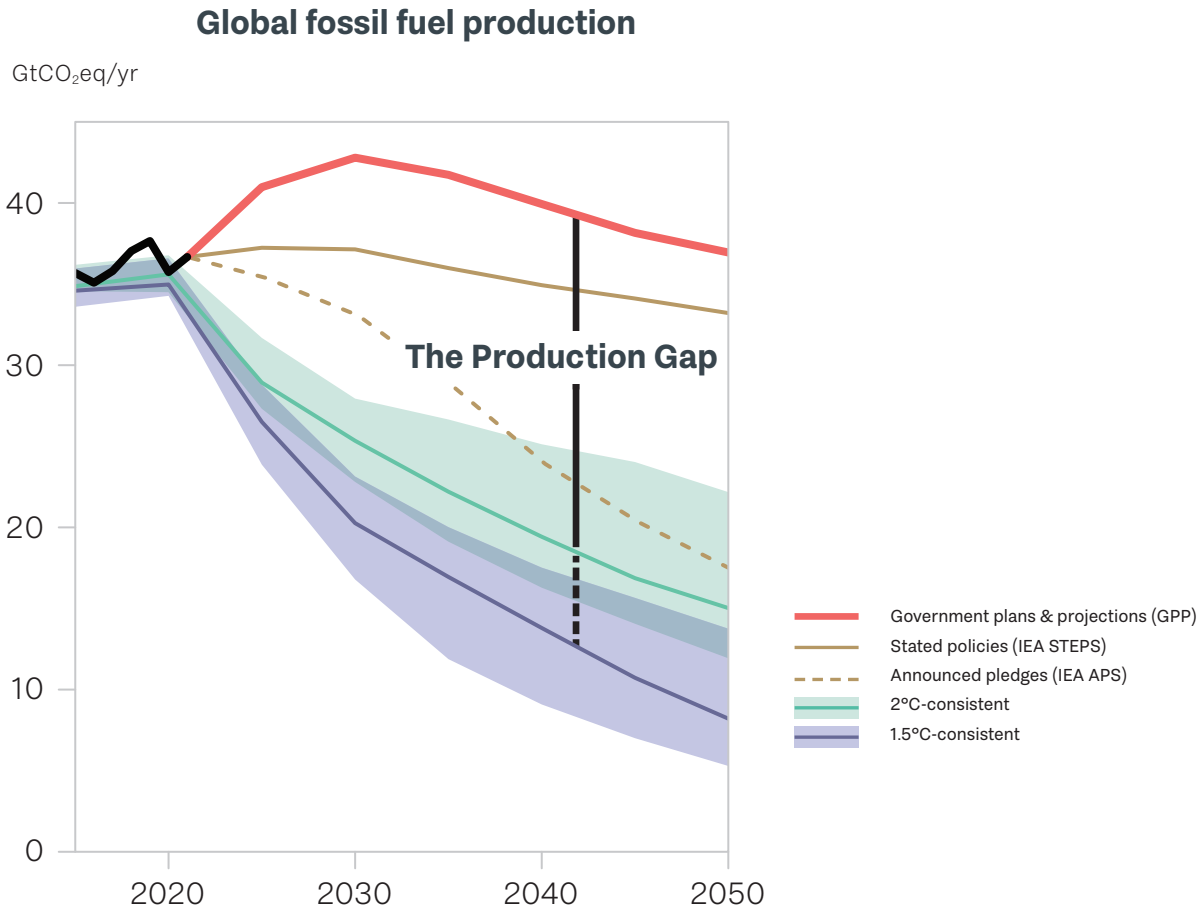
relative to 1.5°C of warming (IPCC, 2018; UNFCCC, 2021), this report primarily focuses on results with respect to the 1.5°C-consistent pathways.

The production gap is the difference between the global level of fossil fuel production under the GPP pathway and that under the 1.5°C- or 2°C-consistent pathway in any given year, as shown in Figures 2.1 and 2.2 and summarized in Table 2.1. Two other global production pathways are shown in these figures: the pathway implied by governments' stated climate mitigation policies and the pathway implied by governments' announced climate pledges, both as of September 2022, as modelled by the International Energy Agency (IEA, 2022c).[8]

In Figure 2.1, the production gap is denominated in billions of tonnes of CO_2 equivalent ($GtCO_2eq$), representing the amount of GHG emissions expected to be released from the production and combustion of extracted coal, oil, and gas.[9,10] As shown, governments are planning on producing, in 2030, more than double the amount of fossil fuels than would be consistent with the median 1.5°C pathway

Figure 2.1

Global fossil fuel production under five pathways from 2015 to 2050, denominated in units of billion tonnes of CO_2 equivalent per year ($GtCO_2eq/yr$) — the amount of GHG emissions expected to be released from the production and combustion of extracted coal, oil, and gas. For the 1.5°C- and 2°C-consistent pathways, the median and 25th–75th percentile range (shaded) of all selected scenarios are shown. The black trend line shows historical 2015–2021 annual production; all other pathways are plotted at 5-year resolution.



[7] The Paris Agreement does not provide a precise definition of what "well below 2°C" means and how these temperature limits should be used in climate policymaking (Rogelj et al., 2017; Schleussner et al., 2016). However, it has been interpreted as limiting peak warming to below 2°C with >90% likelihood (Schleussner et al., 2022), which translates to being "very likely" to limit warming to 2°C in IPCC uncertainty language. This is higher than the 67% probability that the 2°C-consistent scenarios achieve.

[8] The IEA's Stated Policies Scenario (STEPS) is "based on a detailed sector-by-sector review of the policies and measures that are actually in place or under development". The Announced Pledges Scenario (APS) "assumes that governments will meet, in full and on time, all of the climate-related commitments that they have announced, including longer term net-zero emissions targets and pledges in nationally determined contribution (NDCs), as well as commitments in related areas such as energy access".

(i.e. around 110% more), and 69% more than would be consistent with the median 2°C pathway. These percentages translate to production gaps of 22 $GtCO_2eq$ and 17 $GtCO_2eq$, respectively. The magnitude of the production gap is projected to increase over time, reaching around 29 $GtCO_2eq$ and 22 $GtCO_2eq$, respectively, in 2050.

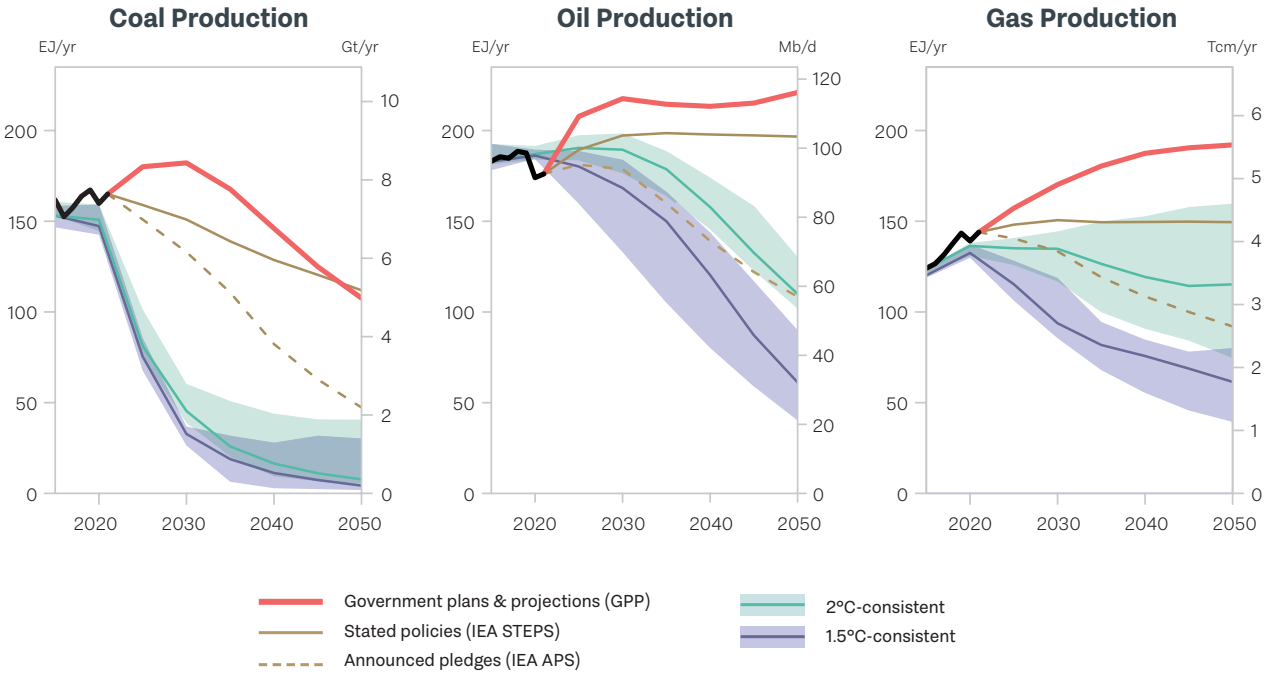
Governments' fossil fuel production plans and projections also exceed the global levels of production implied by their stated climate mitigation policies (solid gold line) by around 11–16% between 2030 and 2050 (Figure 2.1). Compared with the global production pathway implied by governments' announced climate pledges (dashed gold line), the GPP pathway is 29% higher in 2030, and 110% higher in 2050.[11]

The production gap can also be quantified in terms of its component fuels, as shown in Figure 2.2, given that each mitigation scenario outputs primary energy supply from coal, oil, and gas explicitly. In this figure, the amounts of fossil fuel production under the five different pathways are calculated and shown in energy-based units. This enables a direct comparison of the levels of production under the GPP pathway and those under mitigation pathways as originally reported in exajoules by the latter.

Among the selected 1.5°C-consistent pathways, there is strong consensus that global coal, oil, and gas production decline rapidly and substantially between now and mid-century under society-wide decarbonization efforts and falling fossil fuel demand. As a result, the median 1.5°C-consistent pathway shows an almost total phase-

Figure 2.2

Global coal, oil, and gas production under five pathways from 2015 to 2050, denominated in exajoules (EJ) per year. Physical units for each fossil fuel are displayed as secondary axes: billion tonnes per year (Gt/yr) for coal, million barrels per day (Mb/d) for oil, and trillion cubic meters per year (Tcm/yr) for gas. For the 1.5°C- and 2°C-consistent pathways, the median and 25th–75th percentile range (shaded) of selected mitigation scenarios are shown. The black trend lines show historical 2015–2021 annual production; all other pathways are plotted at 5-year resolution.



[9] Here, top-down emission factors for each fuel are calculated as the ratio of the global annual sum of GHG emissions from fuel production and combustion to the global annual sum of fuel production based on IEA statistics for 2016–2020 (the most recent five years of data available) (IEA, 2023b, 2023d). These factors account for total GHG emissions from fuel combustion plus CO_2, CH_4, and N_2O emissions from production processes; the IEA uses 100-year Global Warming Potentials (GWPs) from the IPCC's Fourth Assessment Report to calculate CO_2-equivalent emissions (see Appendix for details).

[10] While methodological differences mean that the production gap quantification cannot be directly compared to the "emissions gap" assessments (UNEP, 2022), the production gap effectively represents the portion of the emissions gap attributable to fossil fuels.

[11] The IEA estimates that GHG emissions from all sources under its STEPS and APS scenarios would lead to a long-term temperature rise of around 2.5°C and 1.7°C by 2100, respectively (each with a 50% probability) (IEA, 2022c, p. 107). Assuming all other GHG emission sources are equivalent, the levels of fossil fuel production under this report's GPP pathway are higher than those in the STEPS scenario and therefore would likely imply greater warming (unquantified here).

out of coal and deep reductions in oil and gas production in this period. These reductions, and the relative contributions of different fossil fuels, are also contingent on the success of other mitigation strategies, including CDR and fossil-CCS deployment. As explored further in sections 2.3 and 2.4, even deeper fossil fuel reductions would be required if these methods fail to deliver at scale.

In stark contrast, governments are in aggregate planning to increase oil and gas production out to at least 2050, creating ever-widening production gaps (Figure 2.2). The production gap for oil is 26 million barrels per day (Mb/d) in 2030 and 84 Mb/d in 2050. The gap for gas is 2.2 trillion cubic meters (Tcm) in 2030 and 3.8 Tcm in 2050. This translates to oil and gas under the GPP pathway being around 29% and 82% higher than their respective levels under the median 1.5°C-consistent pathway in 2030. By 2050, the respective percentages grow to 260% and 210%.

For coal, the GPP pathway show a short-term increase out to 2030 before a decline (Figure 2.2). Given that all of the selected 1.5°C-consistent pathways show very rapid and deep reductions in coal between now and 2030, the production gap for coal is largest in magnitude in the near-term: 6.9 billion tonnes of coal in 2030 and 4.8 billion tonnes in 2050. In relative terms, global coal production under the GPP pathway is around 460% higher in 2030 and 2400% higher in 2050 than the median 1.5°C-consistent pathway.

As shown in Figure 2.2, global coal, oil, and gas production levels under the GPP pathways also each exceed levels implied by governments' stated climate mitigation polices and announced pledges as modelled under the IEA's STEPS and APS scenarios, respectively.

As detailed in Chapter 3, only a few countries have begun to consider the alignment of their fossil fuel production and export targets with national and international climate goals. Given that governments' production plans and targets help to influence, legitimize, and justify continued investments in fossil fuel infrastructure, there is a real risk that current production plans are undermining the energy transition by exacerbating "carbon lock-in" and entrenching fossil fuel dependence (Seto et al., 2016). At the same time, many of these planned production projects could also become stranded assets as the world decarbonizes and fossil fuel extraction targets fail to reflect falling demand and changing sociopolitical realities (Kemfert et al., 2022; Semieniuk et al., 2022). This is especially true given that the committed emissions of CO_2 expected to occur over the lifetime of existing fossil-fuel-production

Table 2.1

The fossil fuel production gaps in 2030, 2040, and 2050. Shown values represent the differences between global production levels under the GPP pathway and the median (and interquartile range, IQR, shown in brackets) levels under the selected 1.5°C- and 2°C-consistent pathways. Values are rounded to two significant figures.

Year	Coal		Oil		Gas		Total	
	EJ/yr	%	EJ/yr	%	EJ/yr	%	$GtCO_2eq/yr$	%
Production gap relative to 1.5°C-consistent pathways								
2030	150 (150–160)	460 (390–590)	49 (38–84)	29 (19–62)	76 (52–85)	82 (43–99)	22 (20–26)	110 (85–150)
2040	130 (120–140)	1200 (420–5100)	93 (70–130)	77 (49–160)	110 (100–130)	150 (120–240)	26 (22–31)	190 (130–340)
2050	100 (77–110)	2400 (260–5800)	160 (130–180)	260 (150–440)	130 (110–150)	210 (140–390)	29 (23–32)	350 (170–600)
Production gap relative to 2°C-consistent pathways								
2030	140 (120–140)	300 (200–370)	28 (20–40)	15 (10–23)	53 (26–170)	26 (18–46)	17 (15–20)	69 (53–87)
2040	130 (100–140)	790 (230–1500)	56 (40–67)	35 (23–46)	97 (35–190)	57 (23–110)	20 (15–24)	110 (59–150)
2050	100 (67–100)	1300 (160–1900)	110 (92–120)	100 (71–120)	120 (32–190)	67 (20–160)	22 (15–25)	150 (67–210)

infrastructure already exceed the remaining carbon budget for a 50% chance of limiting warming to 1.5°C by 2100 (IPCC, 2023; Trout et al., 2022). Moreover, according to the latest IEA projections, global coal, oil, and gas demand are expected to peak within this decade even without any new climate policies (IEA, 2023c).

2.2 A breakdown of the government plans and projections (GPP) pathway

This section discusses the individual plans and projections of major fossil fuel producer countries that underlie the global coal, oil, and gas GPP pathways, and explores how the overall production gap has changed compared to the 2021 assessment.

The 2023 GPP pathways are informed by the plans and projections of 19 of the 20 major producer countries featured in Chapter 3 (data were not available for South Africa; new countries compared to the 2021 production gap assessment are denoted with an asterisk): Australia, Brazil, Canada, China, Colombia*, Germany, India, Indonesia, Kazakhstan, Kuwait*, Mexico, Nigeria*, Norway, Qatar*, the Russian Federation, Saudi Arabia, the United Arab Emirates (UAE), the United Kingdom of Great Britain and Northern Ireland (UK), and the United States of America (US). Among these 19 countries, government plans and projections are available for nine producer countries for coal (accounting for 93% of global production in 2021 on an energy basis), 17 countries for oil (74% of global production), and 18 countries for gas (72% of global production).

Figure 2.3 shows the individual contributions of these 19 countries to the global coal, oil, and gas GPP pathways. The global values shown by the red lines are equivalent to the GPP pathways shown in Figure 2.2 and sum up to the total GPP pathway shown in Figure 2.1. These are estimated by scaling the aggregated production levels of the 19 countries shown, based on their future shares of global coal, oil, and gas production as modelled in IEA STEPS (IEA, 2022c) (see Appendix for further details).[12]

The global GPP pathways show that, compared with 2020 levels, annual oil and gas production are projected to increase by 27% and 25% by 2030, and by 29% and 41% by 2050, respectively. Annual coal production is projected to increase by 10% between 2020 and 2030, before falling by 41% between 2030 and 2050. Under the GPP pathways for each fuel, the planned/projected production levels by two to five major producer countries would account for around half of the global total between now and 2050.

The near-term increase in coal production is led by India, Indonesia, and the Russian Federation. Other countries (Australia, Colombia, and Kazakhstan) project relatively flat or slightly increasing levels of coal production between 2021 and 2030. The long-term decline in global coal production is led by China, whose domestic coal production is estimated to decrease steeply between 2030 and 2050 in alignment with the country's 2060 carbon-neutrality goal (see China's country profile in Chapter 3).

The projected near-term increase in oil is led by Brazil, Canada, the Russian Federation, Saudi Arabia, and the US. Of the 17 countries assessed, seven foresee relatively flat or increasing levels of annual oil production from 2021 until 2040–2050. For gas, the near-term increase is led by China, Nigeria, Qatar, the Russian Federation, and the US, while eight countries foresee relatively flat or increasing levels of annual gas production from 2021 until 2035–2050. Projected long-term declines in oil and gas production in certain countries, such as Norway and the UK, are primarily due to resource depletion, rather than an active transition (see Chapter 3).

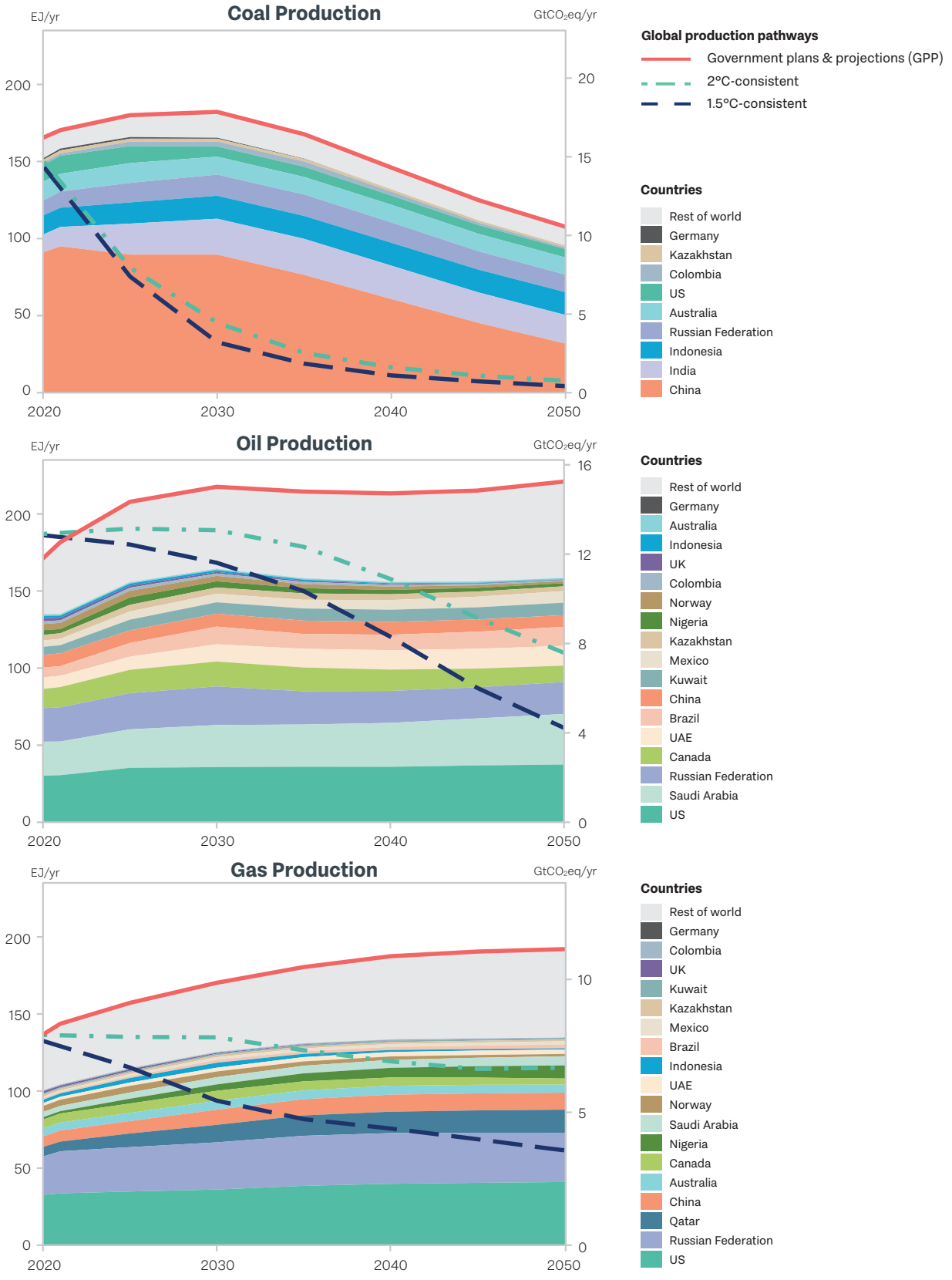
It is challenging to directly compare the 2023 production gap to previous assessments for several reasons. This year's assessment of global GPP pathways is more comprehensive, since it is informed by the plans and projections of four additional countries and now extends to 2050 compared to 2040 previously. The lack of regular, standardized reporting of fossil fuel production projections by countries is another confounding factor.[13] Furthermore, the mitigation scenarios assessed in AR6 represent a largely different ensemble and are therefore not directly comparable to those assessed in the IPCC Special Report on Global Warming of 1.5°C (SR1.5) (Huppmann et al., 2019), which were used in previous production gap analyses. Additional criteria applied in the mitigation scenario selection, as described above, also have implications for the resulting 1.5°C- and 2°C-consistent median pathways, especially for the latter. Given these considerations, only broad comparisons are drawn below for changes in the production gap with respect to the 1.5°C-consistent pathway (see Appendix for details).

[12] For some countries and fuels, government plans and projections end before 2050. To extrapolate all countries' projections to 2050, this analysis uses the percentage change for a given country and fossil fuel as modelled under the IEA's STEPS. This scenario reflects existing policies as of 2022; thus, this is likely a conservative extrapolation approach, given that estimated global production under the GPP pathway is higher than under the STEPS (as shown in Figures 2.1 and 2.2).

[13] For example, some governments issue long-term national energy outlooks annually, which enables a direct, year-to-year comparison of their projections. However, many countries do not. In some cases, countries provide projections in different government documents and/or create new scenarios, which makes comparison over time difficult.

Figure 2.3

Individual countries' contributions (stacked area charts) to global production estimated under the GPP pathways (red lines). For each fuel, countries are plotted in order of decreasing cumulative 2020–2050 production, from bottom to top. The median 1.5°C- and 2°C-consistent global production pathways are overlaid (dashed blue and green lines). Annual coal, oil, and gas production are shown in energy units (exajoules, or EJ) on the primary axes, and in units of extraction-based CO_2-equivalent emissions on the secondary axes ($GtCO_2eq/yr$). (Throughout this report, globally averaged emission factors are applied for each fuel in all countries. See the Appendix for details.)



Compared with the 2021 assessment, the global production gap with respect to the median 1.5°C-consistent pathway for coal is wider by 2030 and remains roughly the same for 2040. Almost half of the increase in the 2030 gap is due to an increase in the underlying government projections. The remaining increase can be explained by a reduction in the modelled level of coal supply under the median 1.5°C-consistent pathway due to a faster coal phase-out in the selected AR6 versus SR1.5 mitigation scenarios. For 2040, the coal production gap has remained almost the same due to almost equivalent reductions in both the GPP and median 1.5°C-consistent levels. For oil, the production gap in the 2023 assessment is narrower in both 2030 and 2040 under the 2023 assessment. This is mainly due to the median 1.5°C-consistent pathway allowing a slightly slower oil decline, which is balanced by a much faster phase-out for coal and a slightly faster near-term reduction for gas. Meanwhile, the gas production gap widens for 2030 and slightly decreases for 2040. The small increase in the 2030 gap is mainly because of the larger near-term gas reduction modelled in the median 1.5°C-consistent pathway. The small decline for 2040 is mainly due to a decrease in the underlying government projections. In sum, these changes largely cancel each other out to leave the overall production gap largely unchanged for both 2030 and 2040 (i.e. differing by no more than 1–3 $GtCO_2eq/yr$).

2.3 Global coal, oil, and gas reduction pathways consistent with limiting warming to 1.5°C

As previously described, governments' plans and projections, taken together, would lead to global oil and gas production rising out to 2050, while coal increases out to 2030. This section explores in detail the global reduction pathways of coal, oil, and gas production that would be consistent with limiting long-term warming to 1.5°C, including their sensitivity to the success of other climate mitigation strategies and other model assumptions.

Mitigation scenarios generated by process-based IAMs, like those assembled for AR6 and analysed here, have become widely used to provide policy-relevant insights for how the world's energy and land-use systems can be transformed in the most cost-effective way to limit global warming to a given temperature outcome (Kikstra et al., 2022; McLaren & Markusson, 2020; Riahi et al., 2022; van Beek et al., 2020). Such scenarios generally model different combinations and extents of the following mitigation strategies to achieve net-zero CO_2 emissions: (1) reducing coal, oil, and gas supply and demand; (2) transforming agricultural and other land-use practices; (3) reducing energy and material consumption in end-use sectors; and (4) deploying fossil-CCS and CDR (see Box 2.1). Reducing non-CO_2 GHGs such as methane (CH_4) is another important mitigation lever (UNEP & CCAC, 2021). The relative contributions of these mitigation options reflect differences in the underlying model framework, scenario design, and input parameters and assumptions such as technological performance and adoption, economic relationships, and cost optimization (Achakulwisut et al., 2023; Harmsen et al., 2021).

Figure 2.4 shows the global pathways for coal, oil, and gas production and six other variables modelled under different subsets of or individual scenarios within the selected 1.5°C-consistent set. The pathways plotted in each figure panel are as follows: (1) the median pathway (and percentile ranges) calculated using all of the 36 selected 1.5°C-consistent scenarios; (2) the median pathway calculated from three scenarios that do not rely on CDR beyond their cumulative "feasible potential" based on expert consensus (Grant et al., 2021b),[14] representing a low-CDR-reliance perspective; and (3) three "illustrative mitigation pathways" (IMPs) chosen by IPCC AR6 WGIII to reflect different prominent mitigation strategies for limiting warming to 1.5°C with no or limited overshoot (Riahi et al., 2022).[15] Additionally, given its prominence in energy policy discourses, the figure also features the IEA's 2023 update of its net-zero emissions by 2050 (NZE) scenario (IEA, 2023c). Key statistics from Figure 2.4 are highlighted in Table 2.2, and detailed in Table A.5 in the Appendix.

[14] The cumulative 2020–2100 limits are 224 $GtCO_2$ for afforestation, 196 $GtCO_2$ for BECCS, and 320 $GtCO_2$ for DACCS. Surveyed experts were asked to consider the technical potential for each CDR method (e.g. geological CO_2 storage capacity) as well as non-technical constraints such as sustainability (e.g. large-scale conversion of land to bioenergy crops) and societal and governance considerations (Grant et al., 2021b).

[15] IMP-LD features a strong emphasis on energy demand reduction (Grubler et al., 2018), IMP-Ren relies heavily on renewables deployment and electrification (Luderer et al., 2022), while IMP-SP achieves net-zero emissions in alignment with other sustainable development goals (Soergel et al., 2021).

[16] In this figure, methane (CH_4) emissions from the energy sector are converted to CO_2-equivalent emissions using 100-year time horizon Global Warming Potential values provided in Table 7.15 of the Working Group I contribution to the IPCC AR6: 29.8 for fossil-CH_4 (IPCC, 2021).

Figure 2.4

2010–2050 global pathways of nine variables modelled under subsets of or individual 1.5°C-consistent scenarios (see text for scenario descriptions): (a–c) coal, oil, and gas production; (d) primary energy supply from non-biomass renewables; (e) CO_2 emissions from the energy sector; (f) methane emissions from the energy sector; (g) CO_2 emissions captured and stored from fossil fuel combustion (fossil-CCS); (h) CO_2 captured and stored from bioenergy use (BECCS); and (i) CO_2 removed and sequestered by land use practices. The units and number of scenarios ("n") reporting each variable are shown inset (not all scenarios report each of the variables shown). In panels a–c, global coal, oil, and gas production under historical (black line) and GPP pathways (red line) are also shown.

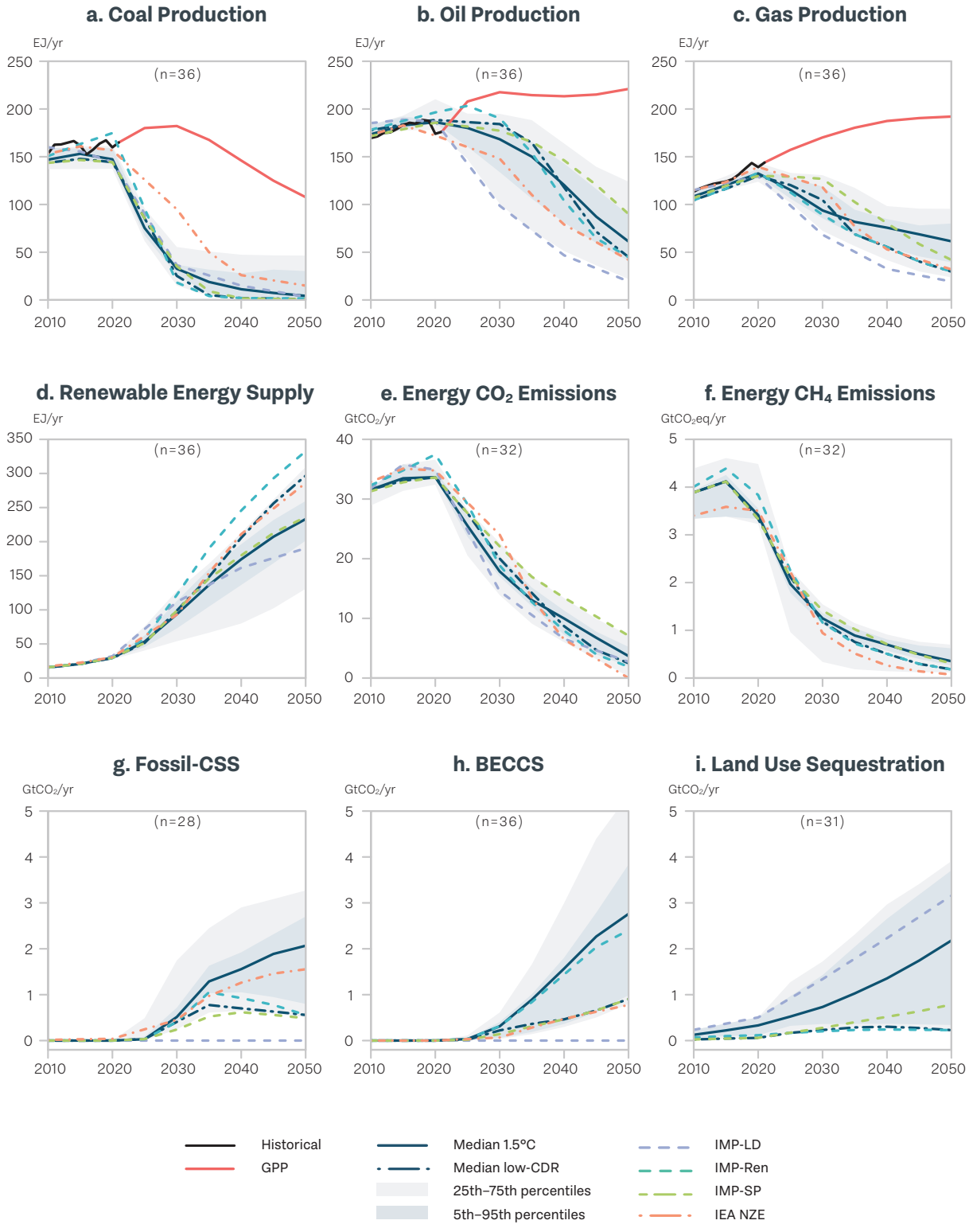


Table 2.2

Summary of values for variables under 1.5°C-consistent pathways shown in Figure 2.4. Values are rounded to two significant figures. (For values from IMP-Ren and IMP-SP, see the Appendix, Table A.5.)

Variable	2030				2040				2050			
	Median pathway	Median low-CDR pathway	IMP-LD	IEA NZE	Median pathway	Median low-CDR pathway	IMP-LD	IEA NZE	Median pathway	Median low-CDR pathway	IMP-LD	IEA NZE
Percent change relative to 2020												
Coal production	-78%	-83%	-75%	-39%	-92%	-99%	-90%	-83%	-97%	-99%	-98%	-90%
Oil production	-10%	-2%	-47%	-14%	-35%	-37%	-75%	-54%	-67%	-76%	-90%	-76%
Gas production	-29%	-19%	-47%	-15%	-43%	-57%	-75%	-62%	-54%	-77%	-85%	-77%
Combined oil and gas production[a]	-18%	-9%	-47%	-15%	-38%	-46%	-75%	-58%	-62%	-77%	-88%	-76%
Renewable energy supply	220%	240%	250%	210%	490%	600%	410%	590%	690%	910%	500%	840%
Energy CO_2 emissions	-47%	-40%	-58%	-31%	-70%	-74%	-81%	-81%	-89%	-93%	-92%	-100%
Energy CH_4 emissions	-63%	-65%	No data	-73%	-79%	-85%	No data	-93%	-90%	-95%	No data	-98%
Annual value ($GtCO_2$/yr)												
Fossil-CCS	0.51	0.41	0	0.45	1.6	0.70	0	1.3	2.1	0.56	0	1.6
BECCS	0.31	0.22	0	0.067	1.6	0.46	0	0.47	2.8	0.91	0	0.78
DACCS[a]	0.0029	0	0	0.069	0.043	0	0	0.30	0.25	0	0	0.62
Land use sequestration	0.73	0.23	1.3	N/A[b]	1.4	0.30	2.2	N/A[b]	2.2	0.23	3.2	N/A[b]

[a] Not plotted in Figure 2.4.
[b] The IEA NZE does not model land-use systems, focusing only on energy. As such, it does not incorporate carbon sequestration via conventional land-based methods.

Also shown in panels a–c of Figure 2.4 are the global coal, oil, and gas production estimated under the GPP pathways, illustrating the sensitivity of the production gap estimate relative to the chosen reference 1.5°C-consistent pathway for each fuel.

Under the median 1.5°C-consistent pathway, global production of coal, oil, and gas — intended for all uses — decreases by 97%, 67%, and 54%, respectively, between 2020 and 2050. These reductions are contingent upon the assumption that, by 2050: 1) fossil fuel abatement technologies will be available and cost-effective at scale, resulting in 2.1 $GtCO_2$ emitted annually from fossil fuel combustion being captured and stored; 2) conventional and novel CDR measures (see Box 2.1) will remove and sequester around 5.2 $GtCO_2$/yr from the atmosphere; and 3) roughly 20% of oil and 35% of gas produced will go towards non-energy uses.[17] In parallel, between 2020 and 2050, coal use without CCS is effectively phased out by 2040, while oil and gas use without CCS each decrease by close to 70%. Energy supply from non-biomass renewables increases almost eight-fold, making up 88% of the electricity mix by 2050. Global annual methane emissions are reduced by 58% for all sources, and by 90% from fossil fuel production activities, by 2050 from 2020 levels.

Three key insights emerge from this analysis of different 1.5°C-consistent pathways. First, to stay on track to achieve net-zero CO_2 emissions by mid-century and limit long-term warming to 1.5°C, global production of all three fossil fuels needs to decline substantially between now and 2050, in parallel with other key climate mitigation strategies such as reducing fossil fuel demand, increasing renewable energy generation, and reducing methane emissions from all sources, including oil and gas production activities. In particular, as can be seen from the pathways plotted in Figure 2.4, global coal, oil, and gas production each decrease from 2020 onwards regardless of whether a given pathway deploys fossil-CCS or not.

Second, the extent of the modelled reductions in global coal, oil, and gas production are particularly sensitive to assumptions around fossil-CCS and CDR potential. For example, the IMP-LD (low-energy demand) scenario does not rely on any CCS (coupled to fossil fuels, bioenergy, or direct air capture) due to concerns over innovation failure, investment risks, and public opposition, and consequently charts out one of the fastest coal, oil, and gas reduction trajectories among the selected 1.5°C-consistent scenarios (though it does rely extensively on conventional CDR). Similarly, imposing "feasible potential" limits on the cumulative 2020–2100 levels of afforestation, BECCS, and DACCS (see footnote 14) would see much larger reductions in coal, oil, and gas between 2020–2050 than the median of all selected 36 scenarios, especially for gas (Figure 2.4 and Table 2.2).

Third, reduction targets for coal, oil, and gas depend on and influence one another. For example, in the near-term out to 2030, the IEA NZE models relatively slower coal and gas reductions than the median 1.5°C-consistent pathway, but faster for oil. In the longer-term, the IEA NZE models relatively larger reductions in oil and gas but a more gradual coal phase-out. Therefore, it is important to establish near- and long-term reduction targets for all three fossil fuels — rather than focusing on coal alone, as in prior COP decision texts (UNFCCC, 2021, 2022) — to stay on track to limiting warming to 1.5°C.

Ultimately, the pace and extent of the required reductions in global coal, oil, and gas production will also depend on many normative and values-based choices, which cannot be adequately informed by scenarios generated by cost-optimized IAMs alone (Smith et al., 2023; Stern et al., 2022; Stoddard et al., 2021). The global reduction targets in coal, oil, and gas production presented in this section, especially under the median 1.5°C-consistent pathway, should be viewed as general guidelines for minimum-ambition-setting rather than definitive benchmarks. Decision makers should also consider other lines of scientific evidence and weigh other factors. The latter include, for example, considering which decarbonization roadmaps may be more feasible to attain given real-world constraints, more desirable with respect to other important societal and environmental outcomes, and more precautionary in terms of safeguarding public and planetary health, as well as how to fairly share the remaining carbon budget in terms of fossil fuel extraction. The next two sections explore these issues further in order to derive recommended targets for reductions in global fossil fuel production.

[17] These estimates are a rough approximation since the relevant variables are inconsistently reported by the scenarios. Non-energy uses can lead to either long-term carbon storage in stable physical products or eventual combustion. For example, up to 40% of discarded plastics are burned globally (OECD, 2022). Estimates suggest that around 0.02% of coal, 8.02% of oil, and 1.86% of gas produced do not lead to eventual carbon emissions (Heede, 2014).

Box 2.1 Carbon dioxide removal (CDR), carbon capture and storage (CCS), and fossil fuel abatement

Following the State of Carbon Dioxide Removal report (Smith et al., 2023), CCS coupled to fossil fuel combustion is referred to in this report as fossil-CCS to distinguish it from the novel CDR methods of CCS coupled to bioenergy (BECCS) or direct air capture (DACCS).

- To count as CDR, a method must be an intervention which captures CO_2 from the atmosphere (Principle 1) and stores it for a long period of time (Principle 2).
- CCS and carbon capture and utilization (CCU) are a set of industrial methods for the chemical capture of CO_2 and its concentration into a pure stream, followed by its subsequent geological storage (CCS) or conversion into products (CCU). Where the CO_2 comes directly from fossil fuels, this process does not meet Principle 1 and counts as an emissions reduction rather than CDR. CCS can, however, also be applied to CO_2 streams generated from biomass or directly from the air, in which cases the overall process meets both Principle 1 and Principle 2, and counts as CDR. Currently, carbon capture, utilization, and storage (CCUS) costs vary greatly by CO_2 source, ranging from USD 13 to USD 342 per tonne of CO_2 (Baylin-Stern & Berghout, 2021).
- Almost all current CDR of about 2 $GtCO_2$/yr comes from conventional management of land (e.g. afforestation/reforestation, peatland and wetland restoration); only a tiny fraction — 0.002 $GtCO_2$/yr — results from novel methods (e.g. BECCS, DACCS, ocean alkalinization) (Smith et al., 2023).

Following the IPCC AR6 WGIII definition, fossil fuel abatement in this report refers to human interventions that reduces the release of GHGs from activities during the fossil fuel lifecycle. This includes, for example, capturing 90% or more CO_2 from coal- or gas-fired power plants, or 50–80% of fugitive methane emissions from fossil-fuel-based energy supply (IPCC, 2022).

2.4 Policy implications I: why a global fossil fuel phase-out is needed to limit warming to 1.5°C

There are reasons to phase out all three fossil fuels even more quickly than modelled under the median 1.5°C-consistent pathways plotted in Figures 2.1–2.2. This section explores four key reasons why an accelerated phase-out may be necessary and desirable.

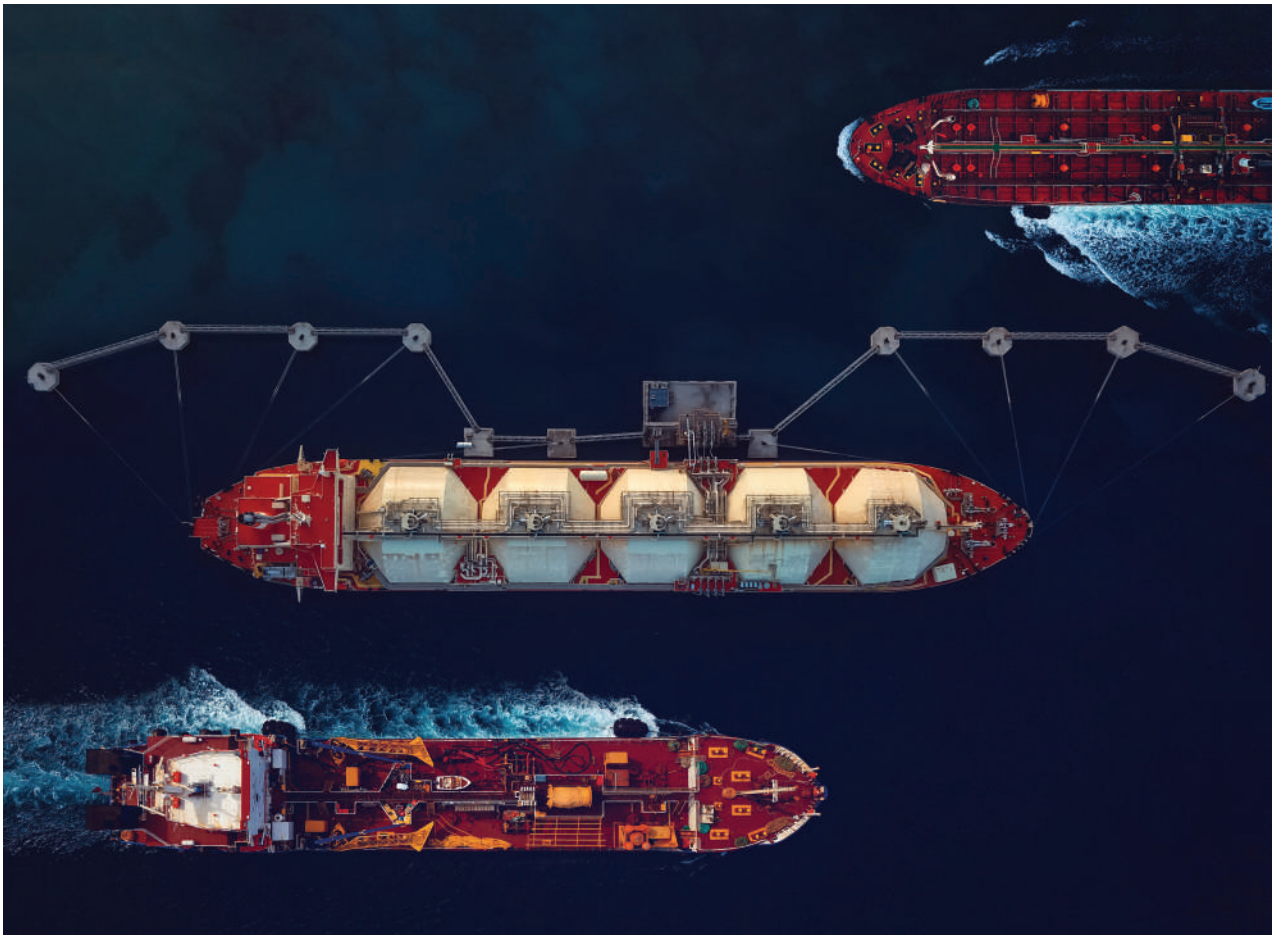
First, even after applying the selection criteria described in Section 2.1 aimed at avoiding excessive CCS and CDR reliance, the majority of the 1.5°C-consistent scenarios analysed in this report still assume that fossil-CCS and CDR can be deployed at significant levels from 2030 onwards (Table 2.2). However, it remains highly uncertain whether these new technologies will become viable at scale (IEA, 2022b; Smith et al., 2023).

As described in the previous section, under the median 1.5°C-consistent pathway, around 2.1 $GtCO_2$/yr of fossil-fuel-combustion emissions are captured and stored by 2050. However, the track record for CCS deployment has been very poor to date, with around 80% of pilot projects over the last 30 years ending in failure (Wang et al., 2021). The annual capacity from operational CCS projects that result in dedicated CO_2 storage currently sum up to less than 0.01 $GtCO_2$/yr (IEA, 2023a). There is concern that a range of institutional, technical, and financial barriers will constrain CCS deployment (Grant et al., 2022; Lane et al., 2021), and rates of CCS deployment continue to fall below expectations and remain far below those modelled in IAMs (IPCC, 2023). Many of the scenarios modelling higher gas levels in the long-term are generated by IAMs that do not impose sufficient constraints on CO_2 storage potential and injection rates (Achakulwisut et al., 2023). If fossil-CCS fails to scale to the levels envisaged by these scenarios, reductions in fossil fuel production and use need to be even faster.

Likewise, if CDR deployment fails to scale to the levels envisaged by these scenarios, deeper cuts in fossil fuels would be required. In particular, the level of long-term gas production modelled in 1.5°C-consistent scenarios is

particularly sensitive to assumptions around fossil-CCS and CDR (see figure A.3 in the Appendix). Under the median 1.5°C-consistent pathway, around 2.2 $GtCO_2$/yr is sequestered by conventional land-based methods and around 3.0 $GtCO_2$/yr by novel methods (e.g. BECCS, DACCS) by 2050. Currently, almost all CDR comes from conventional methods (2 $GtCO_2$/yr), with novel methods contributing 0.002 $GtCO_2$/yr (Smith et al., 2023). A precautionary approach would involve minimizing CDR reliance, given both the uncertainty in the feasibility of its large-scale deployment (Grant et al., 2021b; Smith et al., 2023) and potential negative impacts including land degradation, food insecurity, biodiversity loss, and water scarcity (Calvin et al., 2021; Fuss et al., 2018; IPCC, 2022). As shown in Table 2.2, if only 1.5°C-consistent scenarios that do not exceed the "feasible potential" limits of A/R, BECCS, and DACCS are considered (see footnote 14), the modelled 2020–2050 reductions become 99%, 76%, and 77% for coal, oil, and gas, respectively. Even if CDR does successfully scale, using CDR to enable continued fossil fuel combustion is arguably a risky and sub-optimal climate mitigation strategy, and CDR should be viewed as a tool to address emissions from hard-to-transition sectors, rather than as an alternative to actual emission reductions (Grant et al., 2021a; Smith et al., 2023).

Second, AR6-assessed mitigation scenarios generally do not adequately capture real-world technology innovation, adoption, diffusion, and path-dependencies. However, the energy transition will be highly path-dependent, with the cost of key fuels and technologies changing as the energy transition develops (Aghion et al., 2019; Mercure et al., 2016). In particular, economies of scale mean that the cost of low-carbon technologies will continue to fall as their deployment expands. This could drive a virtuous cycle of coupled cost reductions and accelerated deployment, which few models account for (Grubb et al., 2021; Way et al., 2022). At the same time, fossil fuels will likely experience diseconomies of scale as the infrastructure required for fossil fuel extraction, distribution, and consumption shrinks (Grubert & Hastings-Simon, 2022; IMF, 2023). This will likely increase the costs of maintaining fossil fuel infrastructure during what some researchers have called the "mid-transition" (20–80% penetration of renewable systems), which could further accelerate the transition towards renewables and increase the economic desirability of phasing out coal, oil, and gas (Grubert & Hastings-Simon, 2022).



Some AR6-assessed mitigation scenarios that model relatively high levels of gas supply in the long term exhibit a gas-rebound trajectory, in which gas supply declines in the near term followed by a revival after around mid-century, enabled by high fossil-CCS and CDR (Achakulwisut et al., 2023). However, such a rebound seems highly questionable given energy system inertia, and is likely partly due to inadequate model representation of technology path-dependencies and lack of constraints on regional CO_2 storage capacity. Omitting such pathways from the selected 1.5°C-consistent set would imply an even larger 2020–2050 reduction in gas production of 68% rather than 54% under the median pathway.

Third, the mitigation scenarios analysed here explore how society can achieve net-zero CO_2 emissions in the most cost-effective way without accounting for the localized and near-term non-climatic harms of coal, oil, and gas extraction and burning. As such, scenarios that rely on CCS and CDR to enable continued fossil fuel production and use, in effect, ignore these harms. For example, exposure to outdoor fine particulate matter pollution from fossil fuel combustion leads to around 8.7 million premature deaths worldwide each year (Vohra et al., 2021). In addition, continued fossil fuel extraction perpetuates toxic air and water pollution and associated health harms (Buonocore et al., 2023; Donaghy et al., 2023; Raimi et al., 2022), human rights violations (Temper et al., 2018), and biodiversity loss and ecosystem degradation (Harfoot et al., 2018) in affected regions. The benefits of an accelerated and complete phase-out of fossil fuels are therefore even more compelling when the non-climatic harms of continued fossil fuel dependence are also accounted for (Achakulwisut et al., 2022).

Finally, other research has shown that the emissions of CO_2 expected to occur over the lifetime of existing fossil-fuel-production (and -combustion) infrastructure already exceed the remaining carbon budget for a 50% chance of limiting warming to 1.5°C by 2100 (IPCC, 2023; Tong et al., 2019; Trout et al., 2022). This leaves no room for new coal mines and oil and gas fields, unless existing infrastructure is retired early. Indeed, the IEA NZE scenario foresees no need for new coal mines or oil and gas fields after 2021 amid declining fossil fuel demand (IEA, 2021, 2023c).

In summary, when real-world constraints are considered for potential fossil-CCS and CDR development and energy system phase-out path-dependencies, cost-optimized scenarios suggest that countries should strive to phase out fossil production even faster than in the median pathways displayed in Figures 2.1–2.2.

For example, as detailed in Table 2.2., the median low-CDR pathway sees combined oil and gas production reducing by 77% by 2050 from 2020 levels, which is similar to the 76% reduction modelled by the IEA NZE. Meanwhile, one mitigation scenario, the so-called IMP-LD, which relies only on conventional CDR and no CCS coupled to fossil fuels, bioenergy, or direct air capture, sees reductions in global oil and gas production of 90% and 85%, respectively, between 2020 and 2050. In the case of coal production, the median low-CDR pathway shows a reduction of 99% by 2040.

These results altogether suggest that countries should be aiming for a near total phase-out of global coal production and use by 2040, and to reduce oil and gas combined by around three-quarters by 2050 from 2020 levels. In light of escalating climate impacts and the considerable non-climatic and near-term harms of fossil fuels, as well as the possibility for fossil-CCS and CDR to not reach their estimated total feasible potential, these reductions should be seen as minimum targets, with countries striving to phase out the production and use of all fossil fuels as soon as possible.

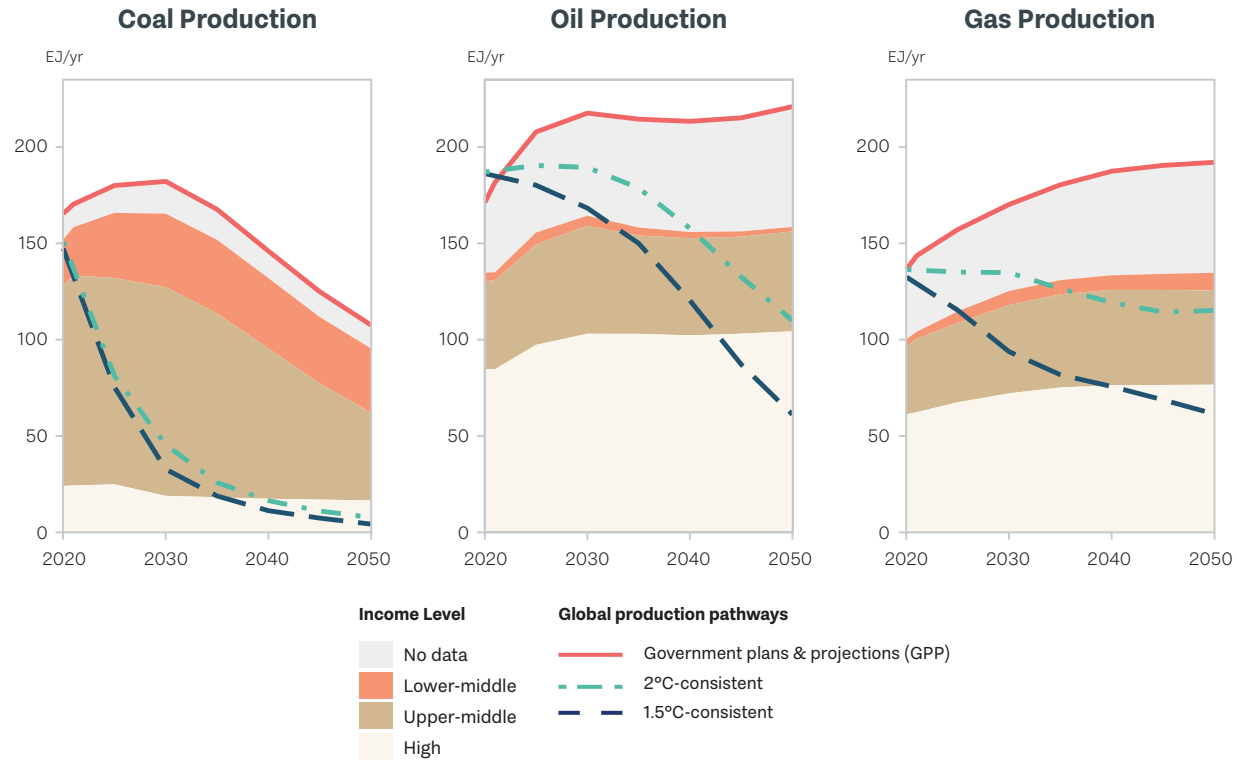
2.5 Policy implications II: why an equitable transition away from fossil fuels is important but at risk

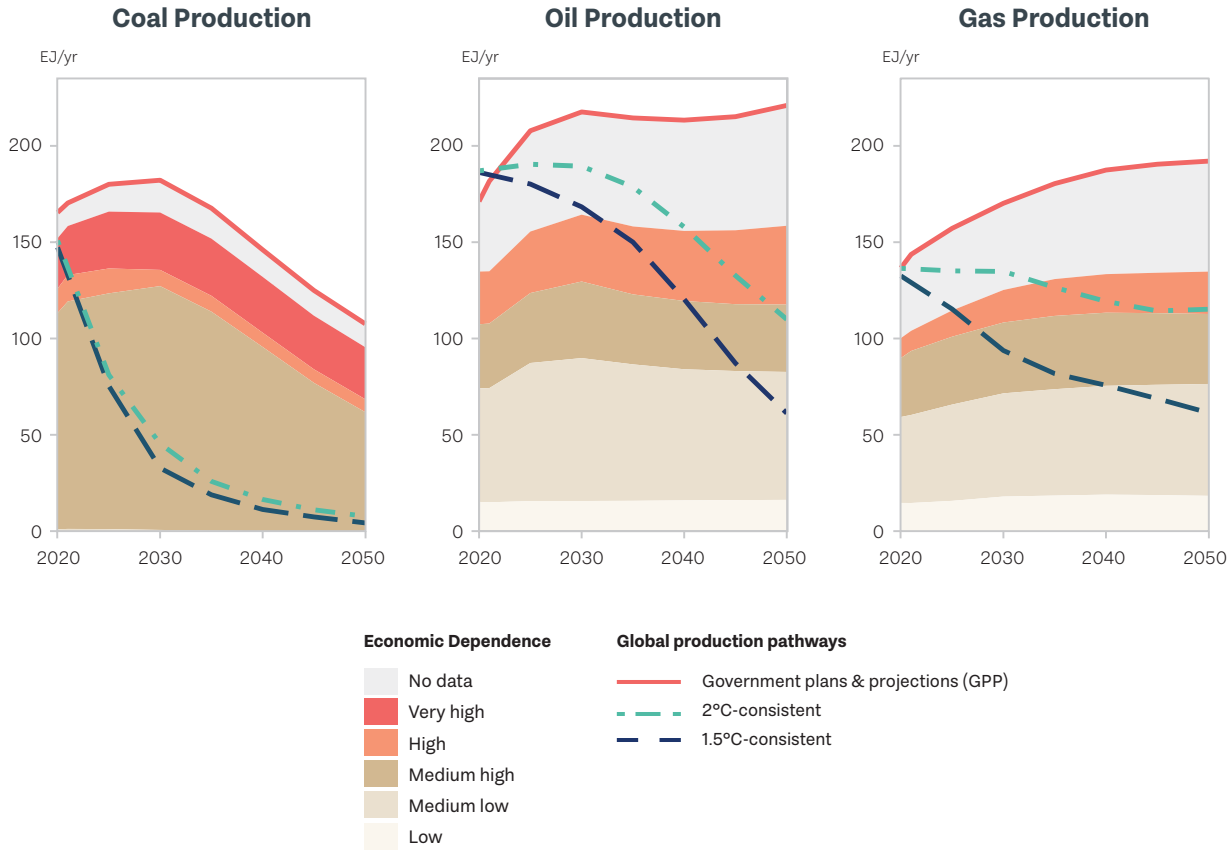
Under the UNFCCC, countries acknowledge that "the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions" (United Nations, 1992). The vast misalignment between governments' planned and projected fossil fuel production and levels consistent with the Paris Agreement's temperature goal raises questions about how countries might cooperate to facilitate a managed and equitable transition.

There is an emerging and growing literature on the principles, approaches, and allocation mechanisms that could be considered for sharing the limited 1.5°C-aligned fossil fuel extraction budget (Armstrong, 2020; Caney, 2016; Kartha et al., 2016, 2018; Le Billon & Kristoffersen, 2019; Lenferna, 2018; Muttitt & Kartha, 2020; Pye et al., 2020). Two factors are predominantly featured: the extent of a country's socioeconomic dependence on fossil fuel production, and the country's financial and institutional capacity to transition away from it (Muttitt & Kartha, 2020). It is also important to note that, while fossil fuel

Figure 2.5

The stacked area charts show global 2020–2050 coal, oil, and gas production in exajoules per year (EJ/yr). Production under government plans and projections are aggregated by countries' income level (top row) or relative level of economic dependence on fossil fuel production (bottom row). The median 1.5°C- and 2°C-consistent global production pathways are overlaid (dashed blue and green lines).





production can result in some anticipated development benefits, these are by no means assured, nor is it guaranteed that adverse local impacts will be modest and manageable. The extraction and processing of coal, oil, and gas can deepen existing inequities and indebtedness, is often associated with local pollution, ecological damage, and human rights violations, and comes with long-term liabilities for the public to fund labour and environmental rehabilitation and remediation costs for abandoned coal mines and oil and gas wells (Achakulwisut et al., 2021; Amnesty International, 2017; Gaventa, 2021; Grubert & Hastings-Simon, 2022).

It might be expected that higher-income countries and those less dependent on the fossil fuel economy phase out their domestic production more quickly, while lower-income countries will need international support to achieve a just energy transition (SEI et al., 2020). However, as shown in Figure 2.5, based on government plans and projections assessed in this year's report, the trajectories of coal, oil, and gas production in 10 or fewer high-income countries (Australia, Canada, Germany, Kuwait, Norway, Qatar, Saudi Arabia, the UAE, the UK, and the US) would already exceed the global 1.5°C-consistent pathways for each fuel by around 2040. Similarly, the trajectories of oil and gas production being planned/projected by 12 countries (Australia, Brazil, Canada, China, Colombia, India, Indonesia, Kazakhstan, Mexico, Nigeria, the UK, and the US) with the lowest levels of relative economic dependence on their production would exceed global levels under the respective 1.5°C-consistent pathways by 2040.[18] Note that in Figure 2.5, the order of the stacked area charts representing each group's production trajectories is intended to illustrate the equity implications of existing production plans and projections and not to suggest that the above specific countries are alone responsible for exceeding the 1.5°C-consistent pathways.

Existing mitigation scenarios, including those analysed here, rarely incorporate equity and environmental justice considerations (IPCC, 2023), and so it is beyond the scope of this report's analysis to derive national fossil fuel production phase-out trajectories reflecting equity principles based on the global 1.5°C-consistent pathways identified. Future work will be needed to identify differentiated phase-out timelines for different countries. Nevertheless, the findings in this section emphasize the critical role that high-income and less-dependent countries should play in leading a global fossil fuel phase-out, and the extent to which they are currently falling short. Without proactive engagement and discussion between parties, there is a risk that a global fossil fuel phase-out will be highly inequitable, fail to support vulnerable communities, and further erode trust in global cooperation on climate action.

Another danger is that governments' existing net-zero pledges will not be fulfilled, with their credibility and implementation being increasingly called into question (Rogelj et al., 2023). As this chapter shows, to limit long-term warming to 1.5°C, fossil-fuel-producing countries need to rapidly decline both the emissions and production of coal, oil, and gas (while fossil-fuel-importing countries also need to rapidly transition to clean energy sources). The lack of attention to a coordinated phase-in of zero-carbon and phase-out of fossil-fuel-based energy systems represents a major risk to a successful, non-disruptive, and just energy transition (Grubert & Hastings-Simon, 2022; Kemfert et al., 2022). Combining targets and policies to actively phase out fossil fuel supply with policies to reduce fossil fuel demand, expand renewable energy, and implement other important mitigation measures can reduce the cost of emissions reduction, promote policy coherence, and directly confront fossil fuel interests who continue to delay and undermine decarbonization efforts (Blondeel et al., 2021; Green & Denniss, 2018; IPCC, 2022; Stoddard et al., 2021). Moreover, it will be important for governments to plan and create support for a managed and just transition away from fossil fuel production to minimize negative social and economic impacts for affected communities and workers (Diluiso et al., 2021; Sanchez et al., 2023).

[18] Fossil-fuel-producing countries are assigned an income level based on their World Bank classification (World Bank, 2022). Relative economic dependence for coal follows the IEA's Coal Transition Exposure Index categorization, which is based on the share of coal in national goods exports and the degree of coal self-sufficiency (IEA, 2022a, Table 5.1). For oil and gas, relative dependence is categorized based on the percentage of GDP from the oil and gas sector (Calverley & Anderson, 2022, Table 7). See the Appendix for details.

2.6 Conclusions

Since the first assessment of the global production gap in 2019, its size has remained largely unchanged. Despite an emerging clean energy transition and peak coal, oil, and gas demand now in sight, global levels of fossil fuel production being planned and projected by governments remain vastly misaligned with levels consistent with achieving the Paris Agreement's long-term temperature goal. The lack of commitments and actions towards reducing coal, oil, and gas production in line with achieving global net-zero CO_2 emissions by 2050 is failing to reflect changing sociopolitical realities and is putting a safe and livable present and future at risk.

There is a clear imperative for governments to adopt national and develop international reduction targets for coal, oil, and gas production and use, and pursue them alongside other climate mitigation strategies. This can help to promote policy coherence and coordinate the phase-in of zero-carbon technologies and phase-out of fossil fuels to guide the mid- to longer-term energy transition, including maximizing the transition of a skilled fossil-fuel workforce into new jobs.

This chapter's analysis suggests that, to stay on track to limiting long-term warming to 1.5°C, governments should strive for a near total phase-out of coal production and use by 2040 and for cutting combined oil and gas production and use by three-quarters by 2050 from 2020 levels, with reductions for all fossil fuels beginning now. These targets should be viewed as minimum ambitions towards achieving a global phase-out of fossil fuel production and consumption. Higher-income countries with greater financial and institutional capacity could go further than the global average, which would contribute to making the required transition more equitable.

3

Government plans and policies for fossil fuel production

Key Messages

Seventeen of the 20 fossil-fuel-producing countries profiled in this chapter have pledged to achieve net-zero emissions, but most continue to support, invest in, and plan on the expansion of fossil fuel production.

Many governments are promoting gas as an essential “bridge” or “transition” fuel but with no apparent plans to transition away from it later.

Many of the countries profiled have launched initiatives to reduce emissions from fossil fuel production activities, but none have committed to reduce coal, oil, and gas production in line with limiting warming to 1.5°C.

There are some encouraging signs of change. Four countries have begun to develop scenarios for domestic fossil fuel production consistent with national or global net-zero targets.

Support for a just energy transition is growing, although such discourses and policies are still mostly limited to coal-fired power generation.

All governments should be more transparent in their plans, projections, and support for fossil fuel production and how they align with climate goals.

3. Government plans and policies for fossil fuel production

This chapter provides an overview of the climate ambitions and the plans, perspectives, and policies for fossil fuel production of 20 of the world's largest producer countries: Australia, Brazil, Canada, China, Colombia, Germany, India, Indonesia, Kazakhstan, Kuwait, Mexico, Nigeria, Norway, Qatar, the Russian Federation, Saudi Arabia, South Africa, the United Arab Emirates (UAE), the United Kingdom of Great Britain and Northern Ireland (UK), and the United States of America (US). Altogether, these countries accounted for 82% of production and 73% of consumption of the world's supply of primary fossil fuels in 2021 (IEA, 2023a, 2023b).[19]

Under an accounting method that allocates the total GHG emissions from fossil-fuel-production and -combustion processes to the producer country (see online Appendix for details), these 20 countries represent 84% of global extraction-based greenhouse gas (GHG) emissions in 2021, as illustrated in Figure 3.1. Among them, three countries account for about half of global extraction-based GHG emissions: China, the US, and the Russian Federation. China produces, as well as consumes, about half of the world's coal supply (IEA, 2023a). In turn, the US, the Russian Federation, and Saudi Arabia produce about 40% of the world's oil, while the US and the Russian Federation are, by a wide margin, the world's largest gas producers (IEA, 2023a). Other countries profiled here have been major contributors to the growth in coal, oil, and gas production over the past decade, while all but three (Germany, Norway, and the UK) are also poised to maintain or increase production of at least one of the three fossil fuels between now and 2030.

Taken together, governments' plans and policies that support expanding production pose a major challenge to achieving the Paris Agreement's long-term goal to hold the increase in the global average temperature to "well below 2°C above pre-industrial levels" and pursue efforts to limit the increase to 1.5°C (Paris Agreement, 2015). They can undermine efforts and pledges to reduce fossil fuel consumption and emissions, by sending mixed signals about countries' intentions and priorities, as well as by locking in new production infrastructure that will make the energy transition more difficult and more disruptive (Pellegrini & Arsel, 2022). They also pose the risk of stranding assets and investments worth more than USD 1 trillion should countries succeed in reducing global fossil fuel demand in line with net-zero emissions targets (Semieniuk et al., 2022). These are among the key reasons why the

long-standing, almost-exclusive focus of climate policy on the demand for fossil fuels and on the territorial emissions associated with their use is insufficient (Stoddard et al., 2021). A well-managed energy transition will require plans and actions to reduce both supply and demand in a coordinated fashion (Green & Denniss, 2018; Grubert & Hastings-Simon, 2022).

The country profiles in this chapter review governments' climate pledges and their plans and support for fossil fuel production, as well as the status of discourses and policies towards a just and equitable transition away from fossil fuels. The profiles draw heavily on national energy plans and forecasts released by government and affiliated institutions — on which Chapter 2's global gap analysis is also based — along with studies conducted by intergovernmental, government, and other research institutions, as well as other publicly available information as of August 2023.[20] Each county profile also includes an infographic with relative rank and share of global fossil fuel produc-

[19] Primary fuels refer to the amount of fuels produced prior to any energy conversion or transformation processes.

[20] In cases where the original sources are not in English, quotations that appear throughout this chapter have been translated.

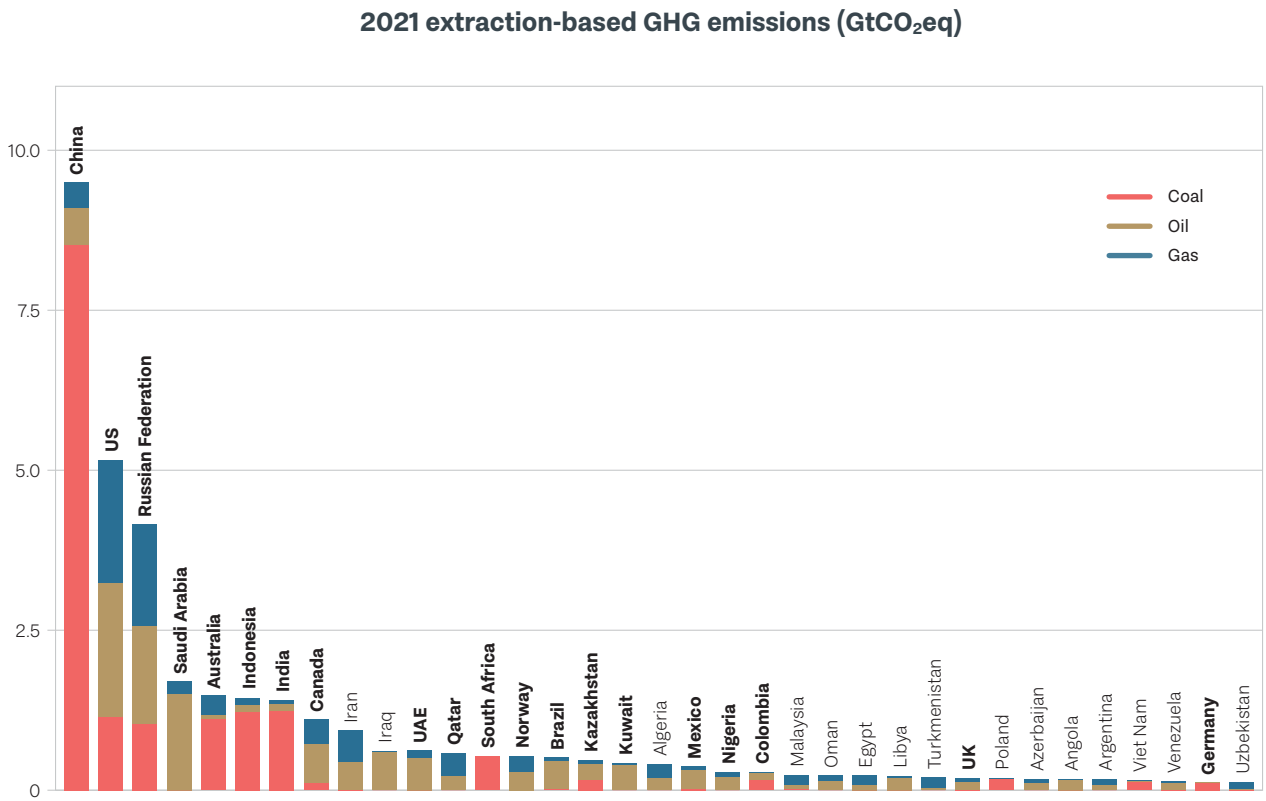
tion, net trade status, and indicators of transition capacity and economic dependence on fossil fuels.[21] As additional context, Table 3.1 provides further information on production, imports, exports, and net supply for domestic use of fossil fuels by country. Some countries profiled here are net exporters of fossil fuels, with significantly greater production than domestic use. Others are net importers, using more fossil fuels than produced domestically. The country profiles are arranged in decreasing order of extraction-based GHG emissions; in the case where a country exports much more fossil fuels than it consumes domestically, its territorial fossil fuel emissions would be much lower than its extraction-based emissions shown in Figure 3.1.

It is important to underscore that many governments provide very limited public information on plans, projections, subsidies, and other forms of support for fossil fuels. As a result, this report must often rely on other sources, such as research or media reports. Ideally, all governments would make this information publicly available. Indeed, governments should strengthen transparency by disclosing fossil fuel production plans, projections, and support through their reporting under the Paris Agreement, as well as in other forums. (See Chapter 5 of the 2021 Production Gap Report for a fuller discussion of the role of transparency in addressing the production gap.)

In the run-up to the COP26 climate talks in Glasgow in November 2021, most countries profiled here updated their nationally determined contributions (NDCs) for 2030 and announced net-zero targets for mid-century or thereabouts. Since then, few countries have increased the ambition of their climate goals, which together fall well short of what is needed to achieve the Paris Agreement's temperature goal; the 2022 Emissions Gap Report estimated that countries' collective mitigation plans will lead to a 66% chance of limiting warming to around 2.6°C by the end of the century (Fransen et al., 2022; UNEP, 2022b).

Figure 3.1

Top 35 countries in terms of extraction-based GHG emissions (billion tonnes of CO_2 equivalent, $GtCO_2eq$) in 2021.[21] The top 10 account for 75% of the global total, while the top 35 account for 96%. Countries in bold are profiled in this chapter. See the online Appendix for sources and methods.



[21] See the online Appendix for corresponding data sources and notes.

Table 3.1

Production, import, export, and net supply for domestic consumption of primary fossil fuels in exajoules (EJ) by country in 2021. (Values are rounded to one decimal place. Exports are shown as negative values.)

Country	Production	Import	Export	Net supply for domestic consumption
Australia	17.4	0.7	-14.2	3.8
Brazil	7.8	1.5	-2.7	6.6
Canada	19.4	2.5	-12.2	9.8
Colombia	3.6	0.0	-2.8	0.8
Germany	1.4	7.5	-0.1	8.9
India	15.2	14.7	0.0	29.8
Indonesia	16.0	1.1	-10.9	6.2
Kazakhstan	6.3	0.3	-3.9	2.7
Kuwait	6.3	0.3	-3.9	2.7
Mexico	5.4	2.5	-2.4	5.6
Nigeria	4.4	0.0	-3.5	0.9
Norway	8.3	0.1	-7.4	1.1
China	102.3	33.5	-0.3	135.4
Qatar	9.4	0.0	-6.4	3.0
Russian Federation	60.0	0.9	-24.0	36.9
Saudi Arabia	25.3	0.0	-13.3	11.9
South Africa	5.5	0.5	-1.8	4.2
UAE	9.2	1.2	-5.2	5.2
UK	3.0	3.8	-1.7	5.0
US	75.3	17.4	-16.1	76.5

Sources: IEA (2023a, 2023b).

Many fossil-fuel-producing countries mention fossil fuel production in their NDCs and long-term low emission development strategies (LT-LEDSs), though in most cases, they point to continued or increased production (Jones et al., 2023). At the same time, several governments have enacted climate policies such as Australia's Safeguard Mechanism and the US's Inflation Reduction Act that could ultimately constrain emissions from, or potentially limit the future development of, fossil fuel resources.

Many countries have launched or joined efforts aimed at reducing the upstream GHG emissions of fossil fuel production activities, often termed Scope 1 and 2 or "operational" emissions, which result from the on-site use of fossil fuels and the leakage, flaring, and venting of methane. Six countries (all profiled in this chapter) are part of the Net-Zero Producers Forum. One hundred and fifty countries, including 14 of those assessed here, have signed on to the Global Methane Pledge to collectively reduce global methane emissions by at least 30% from 2020 levels by 2030 (Global Methane Pledge, n.d.). However, neither initiative mentions the need to reduce fossil fuel production itself.

Therefore, while most producer countries have committed to reducing — many quite steeply — GHG emissions from upstream fossil-fuel-production activities and from the downstream combustion of fossil fuels, few have acknowledged in their plans and strategies that fossil fuel production must also decline rapidly if climate goals are

to be met. Seventeen of the 20 countries profiled in this chapter have pledged to achieve net-zero emissions. Yet, at the same time, as shown in Table 3.2 and the profiles that follow, most continue to promote, subsidize, invest in, and plan to expand fossil fuel production destined for domestic use and/or export (See Table 3.1 and the country profile infographics for more information on net trade status and import/export amounts).

India, Indonesia, and the Russian Federation all plan significant increases in coal production through 2030. The Russian Federation aims to boost coal production and exports to Asia-Pacific and Atlantic regions. India seeks self-reliance and views the coal industry as currently being of paramount importance for income and employment generation. Indonesia and Kazakhstan plan to continue producing coal with the aim of developing high-value-added coal-based products.

China and the US each foresee declines in annual coal production of about 5 exajoules (EJ) (200 million tonnes, or Mt) by the end of the decade. For China, this represents a 15% drop below 2022 (when coal production reached a record high of 4,500 Mt), whereas for the US it represents more than a 40% decline from current levels. However, these drops in coal production will be more than offset by increases across other major coal-producing countries through 2030, as shown in Table 3.2 and, globally, in Figure 2.2.

In general, countries with significant proven oil and gas reserves plan to increase their near- and long-term production. Only four of the 17 oil-producing countries surveyed here anticipate overall decreases (of 0.1–0.7 EJ/yr) from 2021 to 2030. Government projections for two of these countries — Norway and the UK — have tended to underestimate resource growth and future production (see profiles). In fact, both countries, which are situated in the maturing North Sea basin, have implemented measures to support fossil fuel production in response to recent crises (the pandemic and the war in Ukraine) (Sanchez et al., 2023). The other two countries — Colombia and Indonesia — are smaller oil producers (each accounting for less than 1% of global production) with limited proven reserves.

Meanwhile, three countries — Brazil, Saudi Arabia, and the US — each anticipate growth in annual oil production of over 5 EJ, or 2 million barrels per day (Mb/d), by the end of the decade (Table 3.2); together this would amount to an increase in global oil production of nearly 10% relative to 2021 levels (IEA, 2023a). Despite ambitious climate commitments, many countries express intentions to expand their share of global oil markets. For example, Brazil aims to become the fourth-largest oil producer in the world, up from eighth in 2021 (IEA, 2023a; MME, 2023c).

The war in Ukraine and the ensuing disruption in gas supplies, including record high prices on international markets, have spurred plans for and investments in liquefied natural gas (LNG) infrastructure by exporters and importers alike. As shown in Table 3.2, four net gas exporters (Nigeria, Qatar, the Russian Federation, and the US) and China, a net importer, are together expected to increase gas production by about 16 EJ by 2030, which is equivalent to around 10% of the 2021 global production level. Qatar, Nigeria, and the US are all targeting exports to Europe to make up in part for Europe's reduced imports from the Russian Federation. The US became the world's largest LNG exporter in 2022, authorized 450 billion cubic meters (Bcm) per year of new LNG export capacity, and is on course to double liquefaction capacity by 2027 (see US profile).

Many gas producers and importers are promoting gas as a "bridge" or "transition" fuel to facilitate a transition away from coal and support greater adoption of solar and wind energy (ADNOC, 2023b; Pinheiro, 2020), or as a "destination fuel you will need for a very long time" (Atlantic Council, 2023). Some emerging or developing economies view their gas resources as important for supporting their national development. The Government of Nigeria, for example, declared 2020–2030 as the "decade of gas" for this purpose (GECF, 2021). Meanwhile, some European governments have invested in gas supply infrastructure and pushed to secure long-term contracts with African nations (Moore & Moss, 2022).

Yet, as discussed in Box 3.1, which considers the challenges facing many gas- and oil-rich developing countries with a focus on sub-Saharan Africa, benefits are not guaranteed and may be difficult to capture due to inadequate governance systems. Investments in gas production may also expose countries to future stranding risks and clean-up liabilities as well as immediate social and environmental harms. Furthermore, gas could hinder or delay renewable energy transitions by locking in fossil-fuel-based technological systems and related institutions (Kemfert et al., 2022). Despite some local air pollution benefits when substituting for coal, gas still leads to high GHG emissions and associated climate impacts, especially when accounting for the estimated methane leakage along the gas supply chain (Kemfert et al., 2022). Indeed, improvements in data and understanding of methane leakage from gas systems have narrowed the expected climate benefits of

Table 3.2

Net-zero commitments and relative changes in planned/projected fossil fuel production for the 20 countries profiled in this chapter.

Country	Status of national net-zero commitment	Net-zero target year	Planned change in annual fossil fuel production for 2030 relative to 2021 (EJ)		
			Coal	Oil	Gas
Australia	In law	2050	▲ 0.2	■ 0[b]	▲ 0.7
Brazil	NDC objective	2050	No data	▲ 5.2	▲ 1.0[d]
Canada	In law	2050	No data	▲ 3.0	▲ 0.6
China	NDC objective	2060	▼ 5.3	■ 0	▲ 2.6
Colombia	In law	2050	▲ 1.7	▼ 0.1	■ 0
Germany	In law	2045	▼ 0.5	■ 0	▼ 0.1
India	NDC objective	2070	▲ 10.7	No data	No data
Indonesia	In strategy document	2060	▲ 2.5	▼ 0.2	▲ 1.1
Kazakhstan	In strategy document	2060	▼ 0.2	▲ 0.4	▲ 0.1[d]
Kuwait	Political pledge	2050 (oil & gas sector) 2060 (rest of economy)	No production	▲ 2.1	▲ 0.1
Mexico	No commitment	—	No data	▲ 1.4	▲ 0.6
Nigeria	In law	2060	No data	▲ 1.3	▲ 2.6[d]
Norway	No commitment[a]	—	No data	▼ 0.5	▼ 0.3
Qatar	No commitment	—	No production	No data	▲ 3.9[c]
Russian Federation	In strategy document	2060	▲ 3.2	▲ 2.9	▲ 3.3
Saudi Arabia	Political pledge	2060	No production	▲ 5.5	▲ 1.3
South Africa	In strategy document	2050	No data	No data	No data
UAE	NDC objective	2050	No production	▲ 1.8[c]	▲ 0.4[b]
UK	In law	2050	No data	▼ 0.7	▼ 0.6
US	In policy document	2050	▼ 5.1	▲ 5.2	▲ 2.5

[a] Norway has committed to a "low-emission society" by 2050 in its 2018 Climate Change Act, with 90-95% emission reduction targets.
[b] Planned change for 2028, furthest year for which data is available.
[c] Planned change for 2027, furthest year for which data is available.
[d] Excluding gas that is re-injected, consumed by producers, and/or flared.

Sources: Net Zero Tracker (2023) and own analyses (see country profiles).

replacing coal with gas (Gordon et al., 2023; Kemfert et al., 2022). Among fossil fuels, gas accounted for the largest increase in CO_2 emissions in the last decade (Climate Analytics, 2021), and as Chapter 2 shows, plans for gas expansion far exceed those consistent with limiting global warming to 1.5°C.

Governments play a central role in setting the direction of future fossil fuel production. State-owned enterprises (SOEs) control half of global production for oil and gas (NRGI, 2022) and over half for coal.[22] Governments influence the decision-making of private fossil fuel companies and investors through their regulatory approaches, as well as through their plans, targets, and projections for fossil fuel production. Governments also provide direct financial support to fossil fuel producers. As part of COP26's Glasgow Climate Pact, parties (i.e. Member States) to the UNFCCC agreed on "accelerating efforts towards the... phase-out of inefficient fossil fuel subsidies", reiterating a commitment first articulated by the G20 in their 2009 Pittsburgh Summit Leaders' Statement (G20, 2009; UNFCCC, 2021). However, in 2021, governments sharply increased support for fossil fuel producers to USD 64 billion, 17% more than in 2019 and the highest level since the Organization for Economic Co-operation and Development (OECD) began tracking subsidies, while a more recent assessment put the 2021 total at USD 78 billion (OECD, 2022b; OECD and IISD, 2023). Australia, Canada, Colombia, and Mexico saw some of the largest increases in production subsidies between 2019 and 2021. When also accounting for fossil fuel consumption subsidies, total support for fossil fuels doubled between 2020 and 2021 (OECD, 2022b).

In addition to supporting domestic production, many countries provide financial support for international fossil fuel development, as detailed in the profiles. At the same time, 34 countries, including Canada, Germany, the UK, and the US, signed onto the Glasgow Statement on International Public Support for the Clean Energy Transition to end international public financing for unabated fossil fuel projects by the end of 2022 and to redirect investments into clean energy (UK Government, 2021a). Indeed, international public finance for fossil fuels has been on a declining trajectory — down 35% from 2016–2018 levels in the 2019–2021 period — but still stood at twice the level provided to clean energy (O'Manique et al., 2022). However, it is not yet clear that the Glasgow Statement is being fulfilled by all signatory countries (Hodgson & Kazmin, 2023; McGibbon et al., 2023; New Climate Institute & Climate Analytics, 2023). Moreover, while the term "unabated" (see Box 2.1 in Chapter 2) is being increasingly used in policy commitments related to fossil fuel reductions (e.g. the Glasgow Statement and the decision texts of COP26 and COP27), it is often highly contested, poorly defined, and open to interpretation regarding the required rate of carbon capture for abatement (Civillini, 2023a; IISD, 2022).

At the same time, support for a just energy transition is growing, although such discourses and policies are still mostly limited to coal power generation. As described in Box 3.2, Just Energy Transition Partnerships (JETPs) have been established with Indonesia, Viet Nam, South Africa, and Senegal, with developed nations pledging billions of dollars in climate finance focused on supporting moves away from coal dependence (European Commission, 2023; The White House, 2022c; US Department of the Treasury, 2022; US Embassy Viet Nam, 2022). Official policies or discourses related to just transitions in the oil and gas industry are more limited (Linde et al., 2022).

Some countries, driven by concerns over climate-related risk, have sought to slow further fossil fuel development and to direct support to affected communities. In Colombia, a new administration elected in 2022 announced its intention to cease licensing of new fossil fuel exploration projects, though the government has given mixed signals since, as discussed in the Colombia profile in this chapter. In the US, under a new president, the government paused oil and gas development on federal lands pending comprehensive review of the programme (US DOI, 2021a). However, due to legal challenges and political pushback, lease sales have resumed, and the administration approved the largest single oil project ever on federal lands (The White House, 2023c; US DOI, 2021c, 2022; US BLM, 2023a).

Among the countries profiled here, Colombia is the only country to have signed on to an international initiative targeted at phasing out fossil fuel production (Table 3.3). A mix of smaller and non-oil-and-gas-producing countries, as well as sub-national governments from several major producing countries, have joined the Beyond Oil and Gas Alliance (BOGA), "an alliance of 'first-mover' governments and stakeholders that are working together to facilitate the managed phase-out of oil and gas production" (BOGA, n.d.-a). BOGA has recently launched a fund to help countries in the Global South to explore development pathways that avoid dependence on oil and gas production (BOGA, n.d.-a). As noted in Box 3.1, developing countries

[22] SOEs account for almost all of China's coal production, 90% of India's, and smaller shares of Indonesia's (IEA, 2019, p. 242). These countries respectively account for 50%, 10%, and 7% of global coal production (IEA, 2022c).

with major unexploited oil and gas resources face significant economic and other risks as potential late-comers to fossil fuel development. The Fossil Fuel Non-Proliferation Treaty (FFNPT) offers another example of an international initiative to promote a coordinated phase-out of fossil fuel production, endorsed by six Small Island Developing States and 84 city and sub-national governments as of August 2023 (FFNPT, 2023). In August 2023, Colombia joined BOGA as a "friend" but not yet a "core member" (MME, 2023d).

There is now growing interest in what Paris-aligned fossil fuel production pathways might look like at the national level and how they can be made fair and equitable (BOGA, n.d.-b; Calverley & Anderson, 2022; Nacke et al., 2022; United Nations Secretary-General, 2023). Providing country-specific, Paris-aligned fossil fuel decline pathways is beyond the scope of this year's Production Gap Report. Doing so would require a values-based determination of an equitable distribution of the remaining amount of fossil fuels that could be extracted under the remaining carbon budget, taking into account factors such as countries' relative capacity to transition away from fossil fuel production, relative economic dependence on fossil fuel production, relative costs of production, and historical responsibility (Caney, 2016; Muttitt & Kartha, 2020; Pye et al., 2020). Nevertheless, as explored in the 2020 Production Gap Report, countries with higher capacity and lower dependence on fossil fuel production are equipped for a faster transition than the global average (SEI et al., 2020, Chapter 4). However, as Chapter 2 of this report details, the combined planned/projected production trajectories of fossil fuels in 10 high-income countries or in 12 countries with relatively lower economic dependence on fossil fuel production, alone, would already exceed global levels under the 1.5°C-consistent pathways by 2040.

The country profiles that follow show that a transition away from coal is now underway in many parts of world. Some countries, such as Germany, Canada, South Africa, and the US are planning for a continuing or future decline in coal production or exports and are investing domestically and internationally to support alternative development pathways for historically coal-dependent communities. Other countries still anticipate continued and growing domestic and international markets for their coal production, with India aiming to nearly double production this decade (with just transition also emerging on the agenda), and the Russian Federation seeking to increase exports to Asia-Pacific markets.

In contrast, there are few indications that major oil and gas producers are tempering their plans for expansion or preparing oil- and gas-dependent communities for a transition. Most are instead focusing on reducing GHG emissions from production activities, though only slightly over 30% of global production is under comprehensive, measurement-based, reporting systems such as UNEP's Oil and Gas Methane Partnership 2.0, and companies have thus far reported less than 1% of estimated global methane emissions from oil and gas (UNEP, 2022a). Many are also counting on future large-scale deployment of fossil fuel abatement technologies and/or carbon dioxide removal methods (see Box 2.1) to enable continued or growing oil and gas production. However, even with the successful implementation of these mitigation strategies, global production and use of all fossil fuels must still decline rapidly and substantially by 2050 to limit warming to 1.5°C, starting now, as Chapter 2 shows.

As described above and in the country profiles, there are some encouraging developments compared to the 2021 Production Gap Report. In addition to Germany and Indonesia, more countries (i.e. Canada and China) have begun to develop scenarios for domestic fossil fuel production that are consistent with their national or global net-zero or carbon-neutrality targets. Meanwhile, discourses on just transitions for fossil-fuel-dependent workers and economies are advancing in many countries, though implementation and investments are still lacking. And, as illustrated in Table 3.3, most major fossil-fuel-producing countries have committed to reducing the emissions intensity of their fossil fuel production. However, except for Colombia, these countries have not yet acknowledged, committed to, or prepared for an active transition away from coal, oil, and gas production consistent with national, let alone global, climate goals.

Table 3.3

Membership and signatory status of the 20 countries profiled in this chapter in international climate initiatives related to fossil fuels, as of August 2023.

Country	Net-Zero Producers Forum member	Global Methane Pledge participant	Glasgow Statement signatory	Powering Past Coal Alliance member	Fossil fuel phase-out alliance or treaty[a]
Australia		✓			
Brazil		✓			
Canada	✓	✓	✓	✓	
China					
Colombia		✓			"Friend" of BOGA[b]
Germany		✓	✓	✓	
India					
Indonesia		✓			
Kazakhstan					
Kuwait		✓			
Mexico		✓			
Nigeria		✓		✓	
Norway	✓	✓			
Qatar	✓				
Russian Federation					
Saudi Arabia	✓	✓			
South Africa					
UAE	✓	✓			
UK		✓	✓	✓	
US	✓	✓	✓		

[a] Examples include membership in the Beyond Oil and Gas Alliance (BOGA) or endorsement of the Fossil Fuel Non-Proliferation Treaty (FFNPT)
[b] Colombia signed on to the BOGA Declaration but is not yet a "Core Member"; see https://beyondoilandgasalliance.org/who-we-are/

Sources: Global Methane Pledge (n.d.); Powering Past Coal Alliance (n.d.); UK Government (2021a); US DOE (2022b)

Box 3.1 Challenges for oil and gas resource holders in Africa: achieving energy access and development in a carbon-constrained world

African governments must make tough and far-reaching decisions as they seek to close energy availability, access, and equity gaps that have hampered social and economic development (ADB, 2022a; Sokona et al., 2023). On one hand, many countries in Africa possess an abundance of both fossil fuel and renewable energy resources that could help meet domestic demand and generate export revenue. On the other hand, their access to the finance needed to develop those resources is limited, and global efforts to reduce GHG emissions create stranding risks for investing in new fossil fuel projects. Under a rapidly shrinking carbon budget to limit global warming to 1.5°C and intensifying climate impacts, achieving global net-zero emissions by mid-century means that African countries will have to develop and diversify away from dependence on long-lived fossil fuel infrastructure (ADB, 2022a; Sokona et al., 2023).

Yet, between 2010 and 2020, 40% of all the gas discovered worldwide was in Africa, largely concentrated in Tanzania, Mozambique, Egypt, Senegal, and Mauritania (IEA, 2022a; UNU-INRA, 2019). Today, over 200 companies are actively pursuing fossil expansion in 48 out of the 54 African countries, exploring or developing new fossil fuel reserves or developing new fossil infrastructure such as liquefied natural gas (LNG) terminals and pipelines or gas- and coal-fired power plants in Africa (Schücking, 2022).

Moreover, in the wake of the war in Ukraine, European governments have looked to Africa and its fossil fuel resources as they seek alternative ways to meet their energy needs, even as they doubled down on their own clean energy transitions (Kemfert et al., 2022; Mulugetta et al., 2022; Sokona et al., 2023). While countries in North Africa are well-placed to benefit in the short-term given their existing export infrastructure, new oil and gas producers must carefully consider the risk of asset-stranding in the long run.

Developing fossil gas infrastructure, if managed by strong multi-stakeholder institutions, has the potential to yield some short- to medium-term economic returns and societal benefits. However, despite the need to improve energy access across the continent, much of the gas produced on the continent could be destined for export (Sokona et al., 2023). In the case of Mozambique, expected economic benefits from gas production and exports have not materialized; its gas discovery a decade ago has instead been linked to increased domestic conflict, alleged corruption, and economic distortion (Gaventa, 2021).

Energy debates in countries that face critical decisions about development of their fossil fuel resources risk being driven by short-term considerations and transient geopolitical interests that might lock in long-term economic risks and state liabilities for rehabilitation and clean-up of abandoned coal mines and oil and gas wells. The near-term social, environmental, and public health harms of oil and gas development and associated water and air pollution are also significant, as documented in Nigeria and Mozambique (Gaventa, 2021; Obi et al., 2021; Raimi et al., 2022).

Many African economies have yet to craft economic diversification strategies to facilitate structural transformation and break away from primary commodity dependence. In the absence of such strategies, oil and gas extraction will be based on economic rents, creating structural dependence, tied to the fluctuations of the world market and inscribed in global value relations (Greco, 2020).

This comes with a number of inherent risks, including lower prices and revenue if and as countries transition away from oil and gas, and higher exposure to significant asset-stranding by newer producers (Geuskens & Butijn, 2022; Leke et al., 2022). African oil and gas assets are, on average, 15–20% more costly to develop and operate and 70–80% more carbon-intensive than global oil and gas assets, due to heavy crudes and the need for high-cost extraction technologies (Leke et al., 2022). Higher production costs thus could make many African producers less competitive in global markets and their assets more likely become stranded sooner.

Box 3.1 Challenges for oil and gas resource holders in Africa: achieving energy access and development in a carbon-constrained world (cont.)

In addition, many non-African countries are implementing carbon pricing mechanisms, including border carbon prices, that could have negative impacts on African countries dependent on oil and gas exports, giving further reason to invest early in clean energy systems to avoid long-term trade-related barriers (Leke et al., 2022).

In summary, the pursuit of oil and gas resources poses considerable risks for African countries and is misaligned with efforts needed to meet the Paris Agreement's long-term temperature goal. African countries, like many others, face the need to ensure energy access and prosperity, while leapfrogging or diversifying away from fossil fuels to create cleaner and fairer energy systems (Sokona et al., 2023). The success of such diversification efforts will depend on access to technology, means of implementation, debt relief, and finance at a fair price (Sokona et al., 2023).

Box 3.2 Just Energy Transition Partnerships (JETPs)

JETPs are long-term multilateral partnerships between wealthier and emerging economies that launched in 2021 and have become a focus of international climate finance policy. The partnerships use diplomatic and political engagement to support emerging countries in achieving low-carbon development objectives, including the accelerated retirement of coal-fired power stations, and providing tools and funds to catalyse the public and private finance needed for a clean energy transition. As of March 2023, donor countries include Canada, Denmark, France, Germany, Italy, Japan, Norway, the European Union (EU), the UK, and the US, with additional private sector and finance institution commitments through the Glasgow Financial Alliance for Net Zero (Kusuma, 2023).

Two of the four recipient countries — South Africa and Indonesia — are major coal users and producers. A third, Viet Nam, is also a major coal user, while the fourth JETP in Senegal, an emerging oil and gas producer, is focused on support for renewable energy. The goal of the JETP process is to support countries' self-defined development pathways as they move away from high-emitting fossil fuel production and consumption, while mitigating the impacts of reduced production by supporting a just transition for affected groups (Kramer, 2022).

South Africa's JETP emerged first, with the announcement at COP26 of an initial USD 8.5 billion of additional, concessional and market rate finance from donor countries (Burton, 2022). In 2022, South Africa produced an investment plan which estimated the needs for mitigation (in electricity, coal, transport, and industry) and just transition activities at USD 98 billion from 2023 to 2027, with investment beyond the initial USD 8.5 billion to be raised from the private sector (Presidency of Republic of South Africa, 2022).

Since then, JETPs have been agreed for Indonesia with an initial USD 20 billion, Viet Nam with an initial USD 15.5 billion, and Senegal with an initial EUR 2.5 billion (USD 2.6 billion) in commitments from G7 countries (European Commission, 2022, 2023; US Department of the Treasury, 2023).

While the scope of the JETPs varies between countries, most have focused on reducing emissions from the power sector by accelerating coal retirements, ramping up renewable energy deployment, and upgrading grid infrastructure to enable high renewables penetration. The 'J' in JETP is a result of South Africa being the first JETP announced, reflecting the prominence of just transition in the country's mainstream political discourse (Connolly, 2022).

The success of JETPs will depend on four developments: 1) maintenance of high-level political buy-in from both focus countries and donors (Burton, 2022); 2) provision of genuinely concessional public international finance; 3) better involvement of civil society and labour voices in consultations to increase transparency and ensure pathways reflect the interests of workers and communities, particularly those affected by the transition (Wemanya et al., 2022); and 4) recognition of context-specific development and diversification needs of different countries.

China

Announced climate ambitions

China's updated NDC, submitted in October 2021, "aims to have CO_2 emissions peak before 2030 and achieve carbon neutrality before 2060" (Government of China, 2021, p. 2).

Government views on domestic fossil fuel production

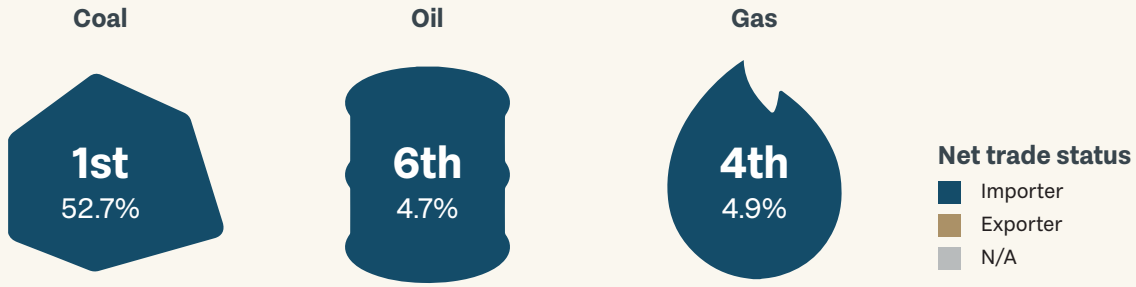
In recent years, the "clean and efficient" development of fossil fuels and bolstering China's energy security have emerged as central themes in government discourse for achieving the "dual-carbon" goals (i.e. peak emissions and carbon neutrality) (Li, 2023; Xi, 2022; NDRC, 2022b; NEA, 2023). For example, at the 20th National Congress of the Chinese Communist Party in October 2022, the President of China stated: "We will advance initiatives to reach peak carbon emissions in a well-planned and phased way in line with the principle of building the new before discarding the old … Coal will be used in a cleaner and more efficient way, and greater efforts will be made to explore and develop petroleum and natural gas, discover more untapped reserves, and increase production" (Xi, 2022, pp. 44–45). Narratives around ensuring energy security through self-sufficiency, along with maximizing domestic coal production and expanding domestic oil and gas production to achieve this goal, appear in many government decrees and publications (NDRC & NEA, 2022; NEA, 2022).

The "green and low-carbon transition" strategy laid out by the National Energy Administration in 2023 similarly aspires to "improve the ability to guarantee the supply of clean coal and oil and gas", including through CCUS, alongside plans to develop renewable energy (NEA, 2023). (The world leader in renewable power, China has doubled its installed wind and solar capacity since 2017 and is set to meet its 2030 targets five years ahead of schedule (Mei et al., 2023)). In recent corporate reports, the fully state-owned China National Petroleum Corporation (CNPC) labels gas as a "clean" fuel, and sees it "as a critical contributor in the future energy system" (CNPC, 2021, p. 20, 2022, pp. 14–15).

Plans and projections for domestic fossil fuel production

China's fossil fuel production is dominated by several large SOEs (G20 Peer-review Team, 2016). Since no official government projections of fossil fuel production are publicly available for China, this report relies on outlooks provided by its SOEs, whose energy scenarios are now all aligned with China's 2060 carbon-neutrality goal. As shown in Figure 3.2, CNPC projects that national gas production will increase by 56% between 2020 and 2030, and by 13% between 2030 and 2050; oil production is expected to remain flat between 2020 and 2030, before declining by 10% between 2030 and 2050 (CNPC ETRI, 2022). Currently, around 7% of China's coal consumption is met by imports; this figure is expected to reach zero by 2030 and remain so through 2060, according to Sinopec, a fully state-owned petroleum and chemical company (Sinopec EDRI, 2022). Based on coal import projections by Sinopec and different consumption projections by CNPC and Sinopec, coal production is estimated to reach around 3.7–3.9 billion tonnes in the 2025–2030 period before declining (CNPC ETRI, 2022; Sinopec EDRI, 2022). However, the China Coal Industry Association has set a 2025 coal production target of 4.1 billion tonnes (CCIA, 2021), and China's domestic coal and gas production reached record highs in 2022 of around 4.5 billion tonnes and 220 billion cubic meters, respectively (National Bureau of Statistics of China, 2023).

Rank of country in, and share of, global production, and net trade status



Fossil fuel transition capacity and dependence indicators

Income level
Upper-middle income

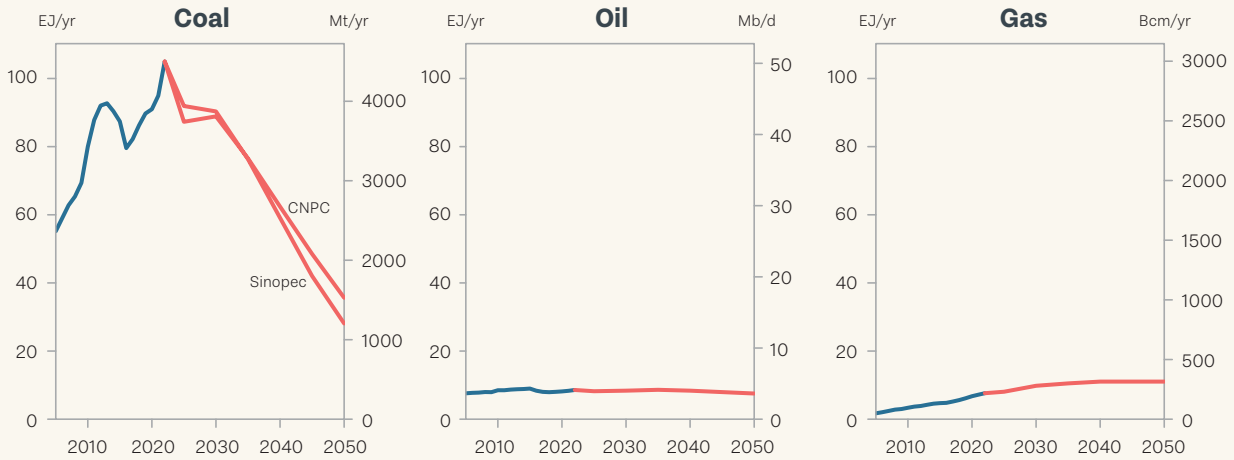
Coal direct employment
3.9 coal miners per 1,000 workers

Coal economic dependence
Low | Medium | High | Very high

Share of GDP from oil & gas production
3%

Figure 3.2

Historical (2005–2022) and projected coal, oil, and gas production for China. Sources: Coal production projections are based on consumption and import projections from the Sustainable Transition Scenario (STS) in CNPC's 2060 World and China Energy Outlook (2022 Edition) (CNPC ETRI, 2022) and the Coordinated Development Scenario from Sinopec's 2060 China Energy Outlook (Sinopec EDRI, 2022). Oil and gas production projections are from the STS in CNPC's 2060 World and China Energy Outlook. Historical data are from China's National Bureau of Statistics (2023).



Government support for domestic fossil fuel production

- In 2021, China's central, provincial, and local governments provided — in the form of direct budgetary transfers and tax expenditures — CNY 9.1 billion (USD 1.4 billion) for coal production and CNY 8.1 billion (USD 1.3 billion) for oil and gas production (OECD, 2023b).
- As described above, the Government of China is promoting the concept of "clean" fossil fuel production and use. In 2021–2022, China's central bank issued state-backed loans totalling around CNY 300 billion (USD 46 billion) to support the "clean and efficient use of coal" and enhance coal production and stockpiling (People's Bank of China, 2022).
- In February 2022, the National Development and Reform Commission (NDRC) approved three new coal mine projects that will together require CNY 24.1 billion (USD 3.6 billion) in investments (Bloomberg News, 2022).

Government support for international fossil fuel production

The majority state-owned Bank of China pledged to end financing for new coal mines and coal-fired power plants overseas in late 2021, following an announcement by the President of China at the UN General Assembly in September 2021 that China will stop building coal-fired power plants overseas (Xie, 2021).

China does not release official data on its overseas development finance. According to an independent assessment, the state-owned Chinese Development Bank (CDB) and Chinese Export-Import Bank (CHEXIM) — the two main financial institutions funding overseas projects — provided no new energy finance commitments to foreign governments in 2021, the first time this happened since 2000 (Global Development Policy Center, 2022). Nevertheless, CDB and CHEXIM have provided more energy sector loans to public entities than any other lender in the world, providing at least USD 235 billion to international fossil fuel projects in 2000–2020, including USD 61.3 billion for coal, oil, and gas exploration and extraction (Global Development Policy Center, 2022). About 35% of this amount was provided through China's Belt and Road Initiative. CNPC is also involved in the operation and management of 52 oil and gas projects in 20 countries through this initiative (CNPC, 2021).

Policies and discourses on a managed wind-down of fossil fuel production

No specific policies were identified. Many recent government discourses on energy strategies have reiterated themes centred on achieving the "dual-carbon" goals in a "scientific and orderly manner" (e.g. NDRC & NEA, 2022; Xi, 2022), with emphasis mainly placed on the carbon-peaking goal. For example, the State Council has introduced an "Action Plan to Achieve Carbon Peak Before 2030", but no equivalent plan exists for the 2060 carbon-neutrality goal (State Council, 2021).

Policies and discourses supporting a just and equitable transition away from fossil fuel production

No specific policies were identified. The NDRC and NEA have highlighted the need to "study and improve support policies for the withdrawal and transformation development of coal enterprises, as well as placement of employees" (NDRC & NEA, 2022).

United States of America (US)

Announced climate ambitions

In early 2021, the US updated the GHG emissions reduction target in its NDC to 50–52% below 2005 levels by 2030 and announced a goal of net-zero emissions by 2050 (The White House, 2021b, 2021c).

Government views on domestic fossil fuel production

The US continues to be the top oil and gas producer in the world, and is fourth in coal production (on an energy basis) (IEA, 2023a). Soon after taking office, the current US administration revoked the permit for the Keystone XL oil pipeline, citing concerns that it would undermine the country's leadership role in global climate action (The White House, 2021a), and paused the leasing of federal lands and offshore waters for oil and gas extraction until a comprehensive review of the leasing programme was completed (US DOI, 2021a, 2021b). Following a legal challenge by 13 states in 2021, a federal judge ordered the federal government to resume oil and gas leasing on federal lands and offshore waters until a final ruling is made, resulting in a significant increase in drilling permits issued (US BLM, 2023b; US DOI, 2021c). In light of increasing energy prices and concerns over energy security due to the war in Ukraine, the current US administration encouraged oil and gas companies to boost investment and ramp up domestic production (The White House, 2022a, 2022b).

Energy Secretary Jennifer Granholm has reiterated the country's need for fossil fuels through 2050, and for fossil fuel emissions to be "abated" with carbon management technologies (US DOE, 2023b). The recently enacted Inflation Reduction Act (IRA) is considered by the White House as "the most significant action Congress has taken on clean energy and climate change in the nation's history" (The White House, 2023a). While the IRA places a USD 900 per tonne fee on methane emissions from oil and gas facilities that exceed a specified emissions threshold, it also includes concessions to the oil and gas industry as noted below (117th Congress, 2022).

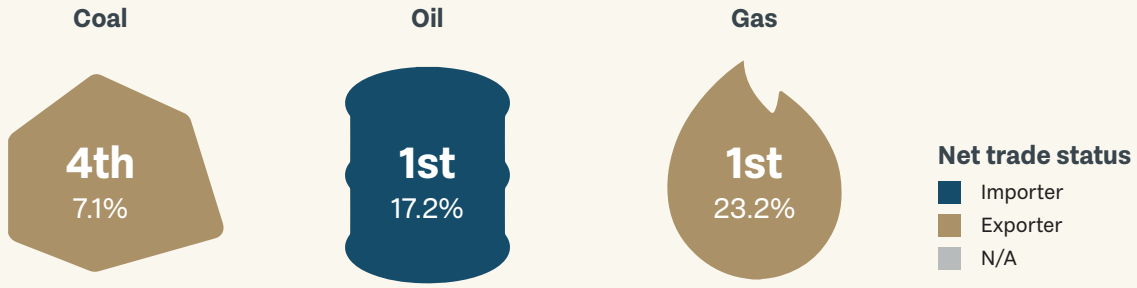
Plans and projections for domestic fossil fuel production

The US Energy Information Administration (EIA) forecasts that oil production will reach and remain at record high levels of 19–21 Mb/d from 2024 to 2050, while gas production is projected to continually increase, reaching 1.2 trillion cubic meters in 2050, as illustrated in Figure 3.3 (US EIA, 2023a). The additional oil and gas volumes are largely destined for exports. Conversely, coal production is projected to drop by 43% between 2021 and 2030, followed by a more gradual long-term decline.

Government support for domestic fossil fuel production

- In July 2022, the US became the world's leading exporter of LNG, and further major expansion is planned, including a doubling of liquefaction capacity by 2027 (BloombergNEF, 2023; US EIA, 2022). As of March 2023, the US Department of Energy had authorized 18 large-scale LNG export projects totalling 450 billion cubic meters per year of capacity, with nearly half of that capacity awaiting final investment decisions (US DOE, 2022a, 2023a).
- The IRA mandates the Department of Interior (US DOI) to conduct four oil and gas lease sales in the Gulf of Mexico Outer Continental Shelf by the end of 2023. It also makes wind and solar development on federal lands contingent on further oil and gas lease sales over the next decade (117th Congress, 2022).

Rank of country in, and share of, global production, and net trade status



Fossil fuel transition capacity and dependence indicators

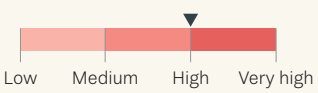
Income level

High income

Coal direct employment

0.3 coal miners per 1,000 workers

Coal economic dependence

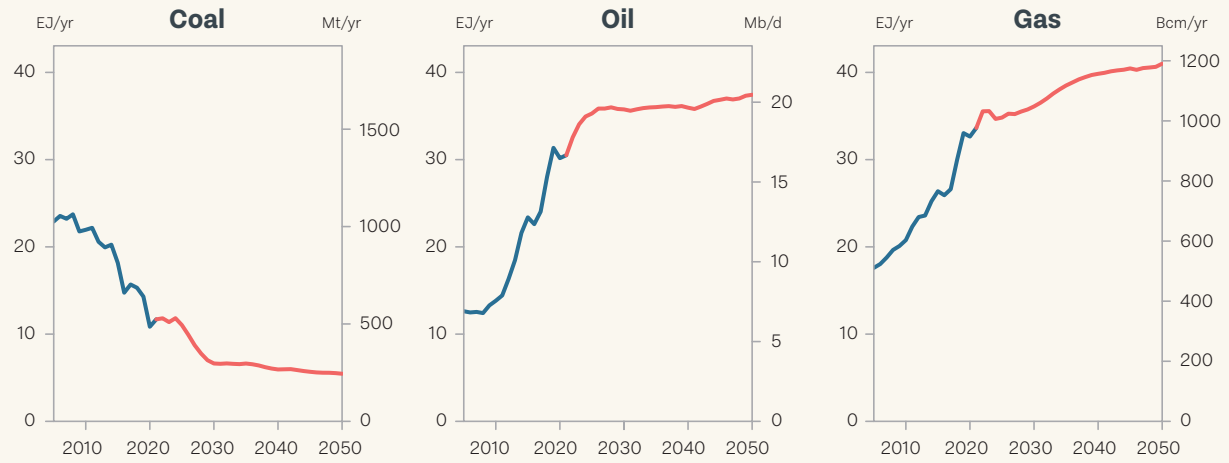


Share of GDP from oil & gas production

8%

Figure 3.3

Historical (2005–2021) and projected coal, oil, and gas production for the US. Sources: Reference scenario from the EIA Annual Energy Outlook 2023 (US EIA, 2023a).



- In March 2023, the federal government approved the largest single oil project on federal lands, the ConocoPhillips Willow project in Alaska, which is projected to produce up to 180,000 barrels of oil a day as early as the late 2020s (US BLM, 2023c; US DOI, 2023).
- Federal and state governments continue to provide over 60 subsidies to coal, oil, and gas producers, with a total worth of nearly USD 4 billion in 2021 (OECD, 2023b). In its 2023 budget, the US government proposed the elimination of tax subsidies for major oil and gas companies (The White House, 2023b), though the proposal has yet to be passed by the US Congress.
- Several exemptions from federal environmental regulations remain in place for fossil fuel producers, including for hazardous waste clean-up requirements (Achakulwisut et al., 2021; Brady & Crannell, 2012; Congressional Research Service, 2020; Goldman et al., 2013; Simms, 2017). The US Congress recently reduced the scope and powers of the National Environmental Policy Act, which serves as the main environmental review process for many large fossil fuel projects (118th Congress, 2023).

Government support for international fossil fuel production

In 2021, the US government spent over USD 90 million on fossil fuel production abroad via the US Export-Import Bank (EXIM) and a further USD 25 million in 2022 (EXIM, 2023a; OCI, 2023). Additionally, up to USD 1.5 billion was allocated by the US International Development Finance Corporation in 2021 in political risk insurance for a new natural gas liquefaction facility in Mozambique (DFC, 2021; OCI, 2023). During COP26, the US and 39 other countries signed onto the Glasgow Statement, pledging to halt public financing for unabated fossil fuel energy projects abroad by the end of 2022 and spend on clean energy instead (UK Government, 2021a). EXIM has since approved USD 99.7 million for a refinery expansion in Indonesia (EXIM, 2023b).

Policies and discourses on a managed wind-down of fossil fuel production

The current US administration has proposed restricting future oil and gas leasing on 5.3 million hectares in the Alaskan National Petroleum Reserve and designated 1.1 million hectares of the Arctic Ocean off limits for future oil and gas leasing, in perpetuity (The White House, 2023c; US DOI, 2023). The State of California, the seventh-largest oil-producing state (US EIA, 2023b), is an associate member of BOGA, which aims to facilitate a managed phase-out of oil and gas production (BOGA, n.d.-a).

Policies and discourses supporting a just and equitable transition away from fossil fuel production

Domestically, USD 22 billion has been allocated by the US government towards communities impacted by the closure of coal mines or power plants. Projects in these "energy communities" include, for example, redeveloping power plant sites and pilot testing the extraction of critical minerals from abandoned coal mine waste streams (The White House, 2023d).

To support coal miners affected by black lung disease, the IRA set higher excise tax rates on coal producers to fund the Black Lung Disability Trust Fund, which ensures affected miners and their dependents receive health, disability, and survivor's benefits (Environmental and Energy Law Program, 2022; Szymendera et al., 2023). US states including Colorado, New York, and New Mexico have created state-level just transition plans to support affected workers in the oil and gas sector (Aklin & Urpelainen, 2022).

Russian Federation

Announced climate ambitions

The Russian Federation's NDC aims to reduce net GHG emissions to 30% below 1990 levels by 2030 (Government of the Russian Federation, 2022a), a goal unchanged since 2015. The Russian Federation has also announced its intention to achieve carbon neutrality (a balance between emissions and sequestration) by 2060 (Government of the Russian Federation, 2022b; President of the Russian Federation, 2021).

Government views on domestic fossil fuel production

The Government of the Russian Federation adopted its existing energy strategy to 2035 in June 2020 (Government of the Russian Federation, 2020b), prior to the announcement of its net-zero 2060 goal, the war in Ukraine, associated sanctions, and other geopolitical developments. As of August 2023, a new energy strategy to 2050 is under development (Ministry of Energy, 2023a). The President of the Russian Federation indicated that the new strategy may include a reorientation of fossil fuel exports towards Asia-Pacific markets and accelerated monetization of oil reserves (President of the Russian Federation, 2022).

The Government of the Russian Federation has highlighted the significance of boosting coal exports from the Russian Federation to the Asia-Pacific and Atlantic regions, reducing dependence on imported mining technologies, and developing a bulk carrier fleet (Government of the Russian Federation, 2022c). In March 2023, the President of the Russian Federation noted energy cooperation with China was expanding and that Russian gas exports to China will reach at least 98 billion cubic meters by 2030 (not including another 100 million tonnes of liquefied natural gas). They also stated that agreement had been reached on most of the parameters for a new pipeline across Mongolia with the capacity to export 50 billion cubic meters of Russian gas to China (President of the Russian Federation, 2023).

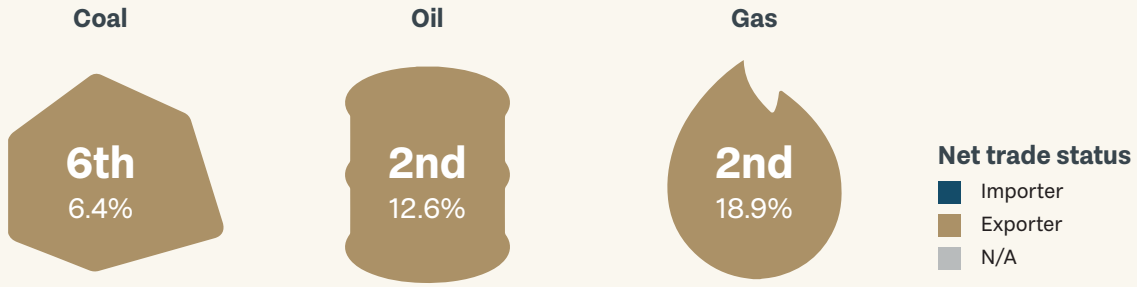
Plans and projections for domestic fossil fuel production

The Government of the Russian Federation projects fossil fuel production for "low" and "high" scenarios. As illustrated in Figure 3.4, the most recent plans, adopted in 2020 and 2021, foresee increases in production by 2035 relative to 2021 levels of 11% (low) and 53% (high) for coal, and 6% (low) and 32% (high) for gas (Alifirova, 2021; Government of the Russian Federation, 2020a, 2020b). In contrast, the potential growth in oil production is more limited, ranging from a decline of 12% (low) to an increase of 6% (high) by 2035 relative to 2022 levels (Alifirova, 2021; Central Dispatch Department of the Fuel and Energy Complex, 2021), due to the depletion of deposits and the imposition of high taxes (Kozlov, 2021).

Government support for domestic fossil fuel production

- Tax breaks and budget expenditures for fossil fuel production totalled RUB 884 billion (USD 12 billion) in 2020, with most support associated with exemptions from or reductions of extraction taxes for oil and gas (OECD, 2023b).
- As part of the reorientation of fossil fuel exports from Europe to Asia, the Government of the Russian Federation incentivizes the creation of corresponding pipeline, railway, seaport, LNG terminal, and power grid infrastructure, as well as the construction or purchase of oil tankers and bulk carriers (Xu & Nazarov, 2022). For example, state-owned

Rank of country in, and share of, global production, and net trade status



Fossil fuel transition capacity and dependence indicators

Income level
Upper-middle income

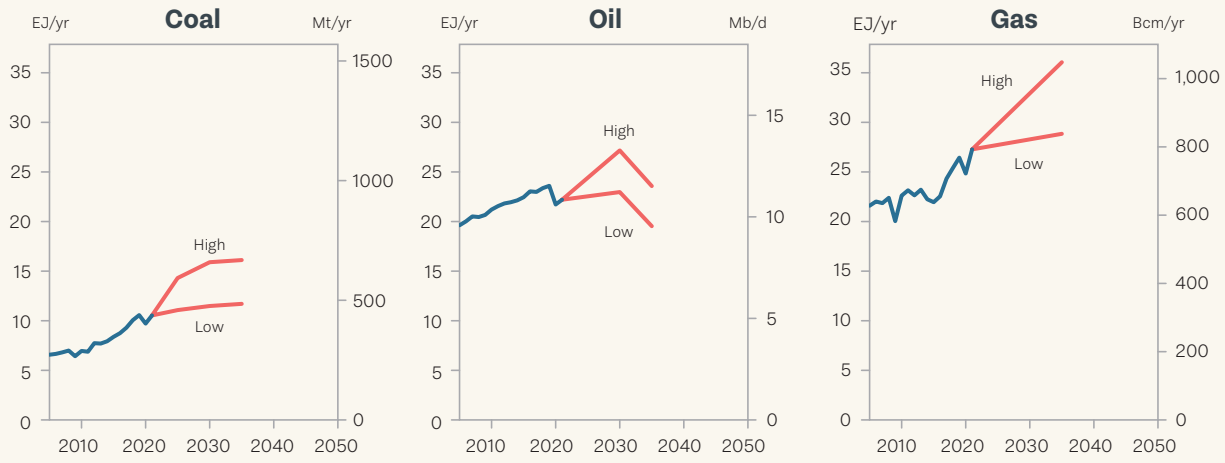
Coal direct employment
2.0 coal miners per 1,000 workers

Coal economic dependence
Low | Medium | High | Very high

Share of GDP from oil & gas production
19%

Figure 3.4

Historical (2005–2021) and projected coal, oil, and gas production for the Russian Federation. Sources: Coal projections are from the Energy Strategy and the Development of the Coal Industry until 2035 (Government of the Russian Federation, 2020b, 2020a); oil and gas projections are from General Scheme for the Development of the Oil and Gas Industries until 2035 (Alifirova, 2021; Central Dispatch Department of the Fuel and Energy Complex, 2021). All projections contain two scenarios, "High" and "Low". Historical data are from the IEA (2023a).



railway and grid companies are investing RUB 2 trillion (USD 27 billion) in a project that will expand coal transportation and exports through the eastern part of the Russian Federation (Ministry of Energy, 2023a; TASS, 2022a). Additionally, a development plan for the Northern Sea Route has been approved, with a goal to transport up to 30 million tonnes of cargo per year by 2035, mainly consisting of oil, LNG, gas condensate, and coal (TASS, 2022b).

- Oil and gas companies continue to receive government preferences for the mineral extraction tax due to the implementation of new fossil fuel production projects, including in the Arctic, and are claiming new tax breaks due to the increased costs (Dyatel, 2023).

Government support for international fossil fuel production

The Government of the Russian Federation and state-owned companies are involved in international fossil fuel production projects, including Gazprom investments in gas development in Bolivia, and oil and gas sector investments in Uzbekistan backed by the Russian Development Bank and Export Insurance Agency (OCI, 2023). Sanctions have affected international activity (Edovina, 2022); in 2020, Russian state-controlled company Rosneft sold all of its assets in Venezuela, including five oil-producing companies, to a company wholly owned by the Government of the Russian Federation due to US sanctions on Venezuela (Tétrault-Farber & Astakhova, 2020). Russian state-owned company Zarubezhneft is developing oil and gas fields in Viet Nam (Interfax, 2022) and Indonesia (Evans, 2022).

Policies and discourses on a managed wind-down of fossil fuel production

There is no public discussion indicating that the Government of the Russian Federation agencies or SOEs have considered the need or are planning to wind down fossil fuel production or consumption.

Policies and discourses supporting a just and equitable transition away from fossil fuel production

No specific just transition policies or discourses were identified. However, there are initiatives to diversify the economy in some fossil-fuel-dependent regions. For example, in November 2022, the Government of the Russian Federation approved the creation of a special economic zone in Kuzbass, the country's main coal-mining region, to incentivize the development of other industries, such as mineral fertilizers, lime, medical furniture, and food products (Government of the Russian Federation, 2022d).

Saudi Arabia

Announced climate ambitions

Saudi Arabia updated its NDC in late 2021 with the aim to reduce, avoid and remove GHG emissions of 278 million tonnes of CO_2 equivalent per year ($MtCO_2eq/yr$) by 2030, up from 130 $MtCO_2eq/yr$ as pledged in its first NDC (Kingdom of Saudi Arabia, 2021), though the baseline is not specified. Together with its NDC update, Saudi Arabia announced a 2060 net-zero target (Saudi & Middle East Green Initiatives, 2021).

Government views on domestic fossil fuel production

Aramco, a state-owned enterprise that holds 17% of global proven petroleum reserves, administers all oil and gas exploration and extraction in Saudi Arabia. Aramco has announced a 2050 net-zero GHG target across owned and operated assets though only for its operational emissions (Aramco, 2021c). Aramco has indicated its intention to continue being a major producer, owing to its position as "one of the lowest-cost lowest-carbon producers globally" and its expectations that "the world will likely continue to need oil and gas for the foreseeable future" (Aramco, 2023a).

Plans and projections for domestic fossil fuel production

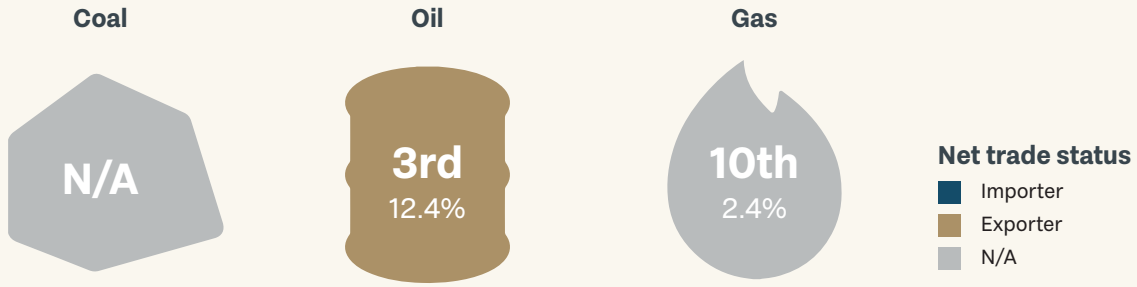
In 2022, Aramco's average fossil fuel production was 13.6 million barrels of oil equivalent per day, including 11.5 Mb/d of liquids (Aramco, 2023a). In early 2023, Aramco indicated it will continue its investments in future growth projects, including the expansion of its maximum sustainable capacity from 12 Mb/d in 2022 to 13 Mb/d by 2027 as well as growing its gas production capacity, to meet future demand (Aramco, 2023a).

There are few publicly available government documents that reveal planning assumptions or government intentions for future domestic oil and gas production. An exception is Aramco's updated Base Prospectus (Aramco, 2021a). As illustrated in Figure 3.5, it forecasts that Saudi Arabia's domestic oil production will increase at an annual rate of 1% from 2015 to 2050 under a scenario where global oil demand levels off by 2037, and by 0.7% over the same period under a more rapid transition scenario where demand declines after 2019 (Aramco, 2021a, p. 159). This represents total growth of 47% or 26%, respectively, between 2015 and 2050. The prospectus also projects that gas production will increase by 40% between 2019 and 2030, primarily driven by domestic demand for power generation, and the refining and industrial sectors (Aramco, 2021a, p. 163).

Government support for domestic fossil fuel production

- Aramco's capital expenditure in 2022 was USD 37.6 billion, an increase of 18% from 2021 (Aramco, 2023b). Aramco expects its capital expenditure to grow in 2023 to USD 45–55 billion, including external investments, and again through the middle of the decade (Aramco, 2023a, p. 42). Aramco has forecast that oil and gas will "remain essential for the foreseeable future" and warned that underinvestment could lead to higher energy prices. "To leverage our unique advantages at scale and be part of the global solution, Aramco has embarked on the largest capital spending program in its history," the company noted (Aramco, 2023a).
- No other information is publicly available on tax expenditures other measures that support fossil fuel production in Saudi Arabia.

Rank of country in, and share of, global production, and net trade status

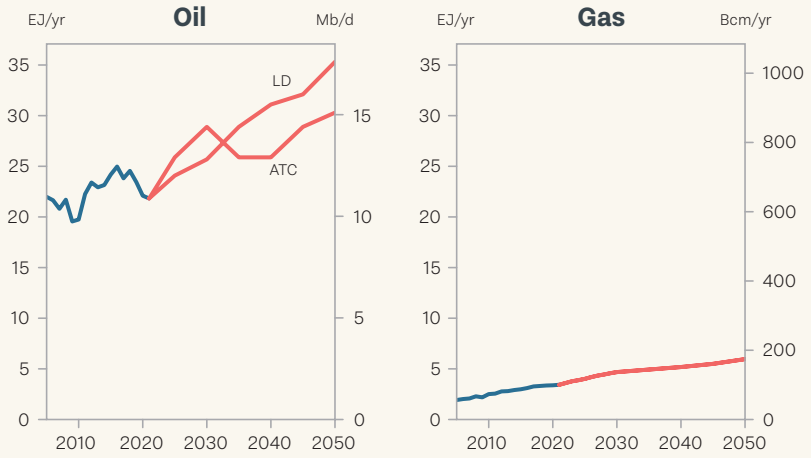


Fossil fuel transition capacity and dependence indicators

Income level	Coal direct employment	Coal economic dependence	Share of GDP from oil & gas production
High income	N/A	N/A	50%

Figure 3.5

Historical (2005–2021) and projected oil and gas production for Saudi Arabia. Sources: Oil and gas projections are from Saudi Aramco's Base Prospectus 2021 (Aramco, 2021a). For oil, two scenarios — "levelling of demand" (LD) and "accelerated transition case" (ATC) — are provided. Historical data are from the IEA (2023a).



Government support for international fossil fuel production

While Aramco has expanded its international presence with 14 subsidiary offices and several overseas refining and chemical joint ventures, it is not involved in fossil fuel production overseas (Aramco, 2021b).

Policies and discourses on a managed wind-down of fossil fuel production

No government policies or discourses to support a managed wind-down of fossil fuel production were identified. Saudi Arabia has a long history of engaging in international climate negotiations around issues related to oil and the impact of climate change mitigation on economies that are highly dependent on fossil fuel revenues (Depledge, 2008; IEA, 2021). Saudi officials have advocated for managing GHG emissions through measures including cleaner production processes, energy efficiency, expanding renewables, and CCUS (Krane, 2022).

Policies and discourses supporting a just and equitable transition away from fossil fuel production

While no direct policies or discourses regarding a just transition from fossil fuels were identified, the Government of Saudi Arabia is conscious that climate change mitigation measures might adversely impact the economy, should demand for oil and gas export products fall in a carbon-constrained future (Aramco, 2021a, p. 117). In 2022, Aramco established a USD 1.5 billion Sustainability Fund "to support a stable and inclusive energy transition" (Aramco, 2023b), though none of the investment categories target a transition away from fossil fuel production (Aramco Ventures, 2022).

Australia

Announced climate ambitions

In June 2022, Australia updated its NDC, raising its emission reduction target to 43% below 2005 levels by 2030, up from the prior target of 26–28%. New legislation codifies Australia's emissions targets, including net-zero emissions by 2050, requires the government to account for progress, and mandates the independent Climate Change Authority to advise on strengthened targets for future NDC updates (Parliament of Australia, 2022).

Government views on domestic fossil fuel production

Australia is one of the world's top two LNG and coal exporters, and its coal and gas industries have strong influence in political debate, diplomacy, economic strategy, and policy development, both nationally and in fossil-fuel-exporting states (Disavino, 2021; Hamilton et al., 2023; IEA, 2023a). In March 2023, the Minister for Resources noted to Parliament that "Australia's coal and gas resources are essential for energy security, stability and reliability both domestically and across the Asia-Pacific and will be needed for decades" (King, 2023). Ministers have rejected calls to ban new fossil fuel projects (Thompson, 2023).

A government list of "major projects" showed 69 coal projects and 49 new oil and gas projects in the pipeline (Department of Industry, Science and Resources, 2022a). These together represent nearly 5 $GtCO_2eq$ of potential emissions, though not all are expected to materialize, as some of the projects are at announcement or feasibility stage (Campbell et al., 2023).

A small number of projects have been cancelled by government decisions to rescind licenses or reject approvals, and through legal challenges under environmental laws. Some state governments have imposed regional bans on some forms of production. For example, the state of Victoria has banned hydraulic fracturing (Parliament of Victoria, 2022), though still allows conventional gas production.

Fossil fuel production is a major source of Australia's domestic emissions, accounting for 19% of the total in 2021 (DCCEEW, 2023a), and half of the emissions covered by the Safeguard Mechanism, a baseline-and-credit scheme that covers large industrial facilities and ensures that absolute aggregate emissions covered by the scheme fall over time. Covered facilities, including coal mines and gas projects, will need to reduce emissions or acquire and surrender offsets; new facilities, including gas projects, face more stringent emission constraints (DCCEEW, 2023b). The impact of these changes on fossil fuel production remains unclear, though reactions by Australia's gas importers suggest an expectation of material effects on future gas production (Morton, 2023).

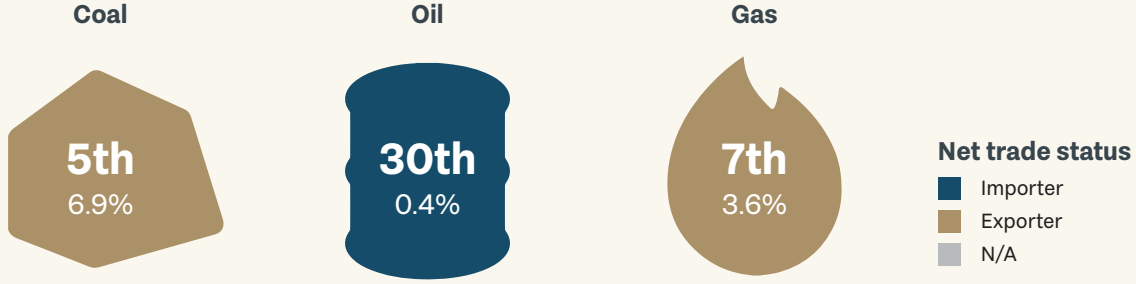
Plans and projections for domestic fossil fuel production

Recent energy trade projections by the government see coal production increasing slightly to 2025, then remaining constant to 2028 (Figure 3.6), with the overall increase shared between metallurgical and thermal coal. Production of gas is projected to slightly decline to 2025, then remain constant to 2028, with the export share constant around 70% (Department of Industry, Science and Resources, 2023). The government's emission projections to 2035 assume a modest decline in coal mining, due in part to reduced domestic consumption, and a small increase in LNG production and exports (DCCEEW, 2022, pp. 45, 47).

Government support for domestic fossil fuel production

■ Fiscal support for fossil fuel production includes the Fuel Tax Credit Scheme, of which coal mining is among the largest beneficiaries (Australian Taxation Office, 2021); tax incentives under the Petroleum Resource Rent Tax (Treasury, 2023b); and direct capital expenditure for infrastructure (The Australia Institute, 2022).

Rank of country in, and share of, global production, and net trade status



Fossil fuel transition capacity and dependence indicators

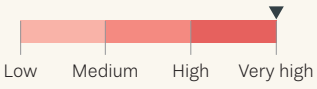
Income level

High income

Coal direct employment

3.8 coal miners per 1,000 workers

Coal economic dependence

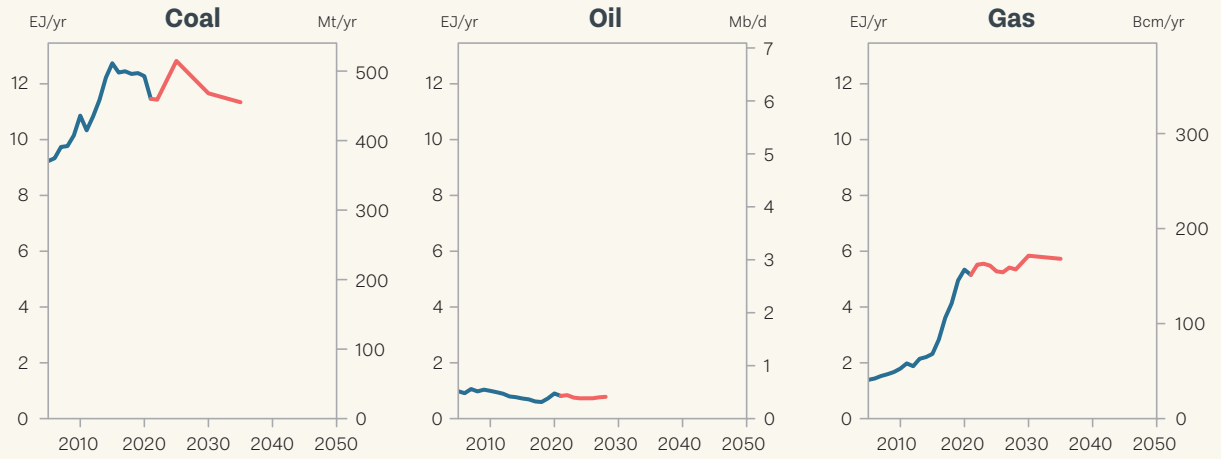


Share of GDP from oil & gas production

3%

Figure 3.6

Historical (2005–2021) and projected coal, oil, and gas production for Australia. Sources: Historical data and 2022–2028 projections for oil and gas are from the Resources and Energy Quarterly, March 2023 (Department of Industry, Science and Resources, 2023), and 2030 and 2035 gas projections are estimated from the LNG production projections provided in Australia's emissions projections 2022 (DCCEEW, 2022); 2025, 2030, and 2035 coal projections are taken from this document.



- Australia's fiscal regime for oil and gas production have allowed many operators of major projects to pay little or nothing in royalties or resource rent taxes (Bruce, 2019; Butler, 2021; Campbell, 2020). Despite being highly profitable, to date no LNG project has paid Petroleum Resource Rent Tax (Commonwealth of Australia, 2023).
- Changes to the Petroleum Resource Rent Tax announced in May 2023 will increase taxation of the gas industry somewhat, but fall short of earlier proposals for reform (Janda et al., 2023).
- The new government has removed some of its predecessor's subsidies for gas exploration and infrastructure. The government is continuing with plans to provide AUD 1.5 billion (USD 1 billion) for a new port in Darwin Harbour that could support the development of shale gas fracking in the Beetaloo Basin (Gibson, 2022). Infrastructure Australia is currently considering proposals for the government to fund gas pipelines and supporting infrastructure in the Beetaloo Basin (Infrastructure Australia, 2022), and large gas extraction projects are planned there (Reuters, 2023d).
- Financing for coal and gas has been banned through some government vehicles, including through the Powering Our Regions Fund (Bowen, 2023) and the Industry Research and Development Act (House of Representatives, 2023). Coal and gas financing is still allowed through other agencies, including Export Finance Australia and the Northern Australia Infrastructure Fund.
- The government owns and expands the rail network that transports thermal coal to the world's largest coal port at Newcastle (ARTC, 2022).

Government support for international fossil fuel production

Export Finance Australia has funded fossil fuel projects overseas and exports from Australia with more than AUD 1.6 billion (USD 1.2 billion) between June 2009 and June 2020 (Rui & Strachan, 2021). As of August 2023, the government has not committed to end overseas government financing of fossil fuel projects.

Policies and discourses on a managed wind-down of fossil fuel production

There is no national policy framework aiming to restrict fossil fuel exploration, production, or infrastructure development. The Treasurer has directed the Treasury to conduct analysis of climate and transition impacts on Australia's national economy and budget (Wright & Foley, 2022). The Treasury is also exploring standardized requirements for financial disclosures of climate risks (Treasury, 2023a).

Independent Australian regulators have begun scrutinizing carbon risk management and greenwashing, including with regards to fossil fuel companies. Actions to date have focused on guidance statements and encouraging voluntary action (APRA, 2021; Hughes, 2023).

Policies and discourses supporting a just and equitable transition away from fossil fuel production

The government has made budget commitments that it frames as enabling regional economic transition, including a Powering the Regions Fund with AUD 1.9 billion (USD 1.3 billion) in grants, a National Reconstruction Fund with AUD 15 billion (USD 10 billion), and a Rewiring the Nation programme with funds of AUD 20 billion (14 USD billion) (Bowen & McAllister, 2022; Department of Industry, Science and Resources, 2022b).

A Net Zero Authority is to be established by legislation, building on an agency within the Department of the Prime Minister and Cabinet. The Authority is to support workers in coal-mining and emissions-intensive sectors, support regions and communities to take advantage of clean energy industries, and help mobilize private investment (Department of the Prime Minister and Cabinet, 2023).

Indonesia

Announced climate ambitions

In its enhanced NDC, Indonesia pledged to reduce emissions by 31.89% by 2030, or by 43.2% with international assistance, slightly higher than the previous targets of 29% and 41%, respectively (Government of Indonesia, 2022). Indonesia has also developed a long-term strategy (LTS) to achieve "the peaking of national GHG emissions in 2030" and "rapidly progress towards net-zero emission in 2060 or sooner" (Government of Indonesia, 2021).

Government views on domestic fossil fuel production

Indonesia was the world's third-largest producer and largest exporter of coal in 2021 (IEA, 2023a). Coal and gas account for nearly 20% of the country's net goods exports, and coal royalties accounted for around 3% of government revenues in 2021 (IEA, 2022b). In 2022, Indonesia exported over 70% of its produced coal, despite a coal export ban announced at the start of the year (Reuters, 2023b). Under Presidential Regulation 112, issued in September 2022, Indonesia plans to phase out unabated coal power generation by 2050 (President of the Republic of Indonesia, 2022). However, this does not necessarily signify a reduction in coal production, as government strategy documents foresee strong government support for the expansion of downstream industries to transform low-grade coal into products for non-energy uses such as dimethyl ether (DME) and methanol (MEMR, 2021, 2022a).

The need to achieve energy independence and energy security, as well as to balance emission reduction against economic development, dominate government discourses and policies on energy (Government of Indonesia, 2021; National Energy Council, 2022). Even under a Paris-aligned scenario described in its LTS, Indonesia sees coal supply and use remaining "significant, especially in power sub-sector which will be equipped with carbon capture and storage (CCS) systems" (Government of Indonesia, 2021, p. 61). A draft law aims to promote the development of "new energy" sources, including fossil fuels produced using new technologies, such as liquefied and gasified coal and coal methane gas (CNN Indonesia, 2023; Sambodo, 2023).

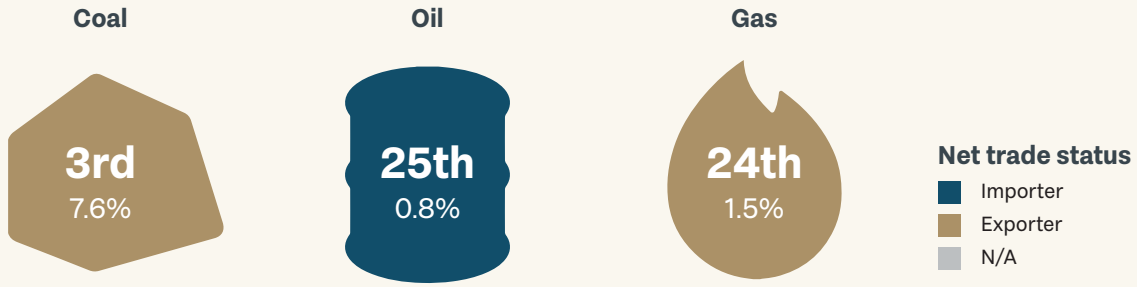
Indonesia is currently exploring goals to reach peak total emissions by 2030 and net-zero emissions by 2050 in its power sector, while ensuring a just and affordable energy transition through international support, including the JETP initiative (see Box 3.2) and the Asian Development Bank's Energy Transition Mechanism (ADB, 2022b). Although both of these mechanisms include funding for the early retirement of coal-fired power plants, Indonesia is still building new coal plants (Simon, 2023). Nothing specific to domestic fossil fuel production is mentioned within these initiatives.

Plans and projections for domestic fossil fuel production

According to Indonesia's 2021 Energy Outlook,[23] coal production is expected to grow by around 18% between 2021 and 2030, before plateauing at around 680 million tonnes out to 2050, under a "business-as-usual" scenario (see Figure 3.7) (PPIPE & BPPT, 2021). Gas production is projected to peak in 2028 at almost 3.5 trillion cubic feet and subsequently decline due to resource depletion. Oil production is also projected to decline starting around 2028 due to resource depletion.

The government has also developed coal production scenarios consistent with its climate ambitions, though has not yet incorporated such scenarios into its national energy outlooks. In its LTS, a "Current Policy Scenario" and a "Low Carbon Scenario Compatible with Paris Agreement target" see coal production peaking around 2025 and declining thereafter out to 2050 at annual rates around 1% and 3%, respectively

Rank of country in, and share of, global production, and net trade status



Fossil fuel transition capacity and dependence indicators

Income level
Lower-middle income

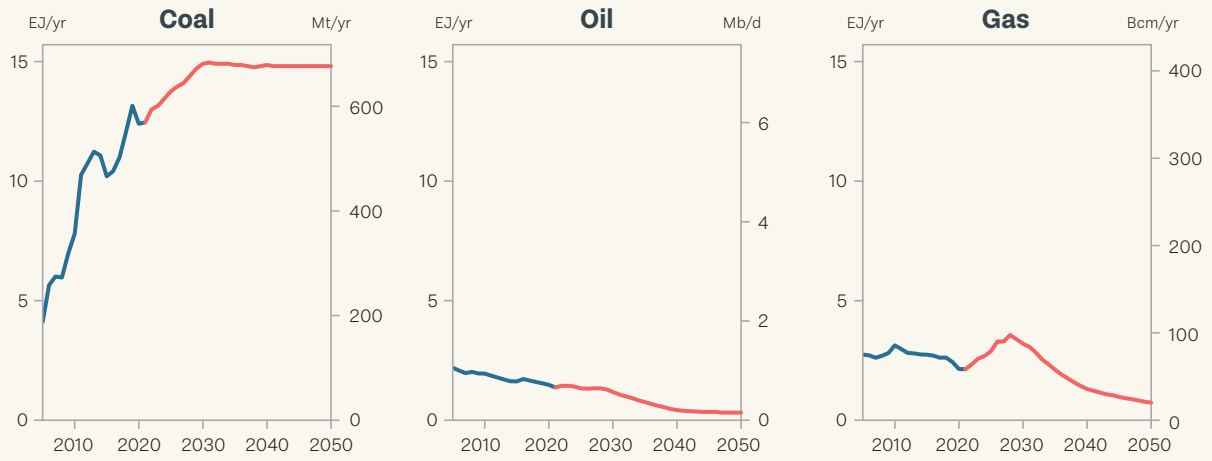
Coal direct employment
1.8 coal miners per 1,000 workers

Coal economic dependence
Low | Medium | High | Very high

Share of GDP from oil & gas production
12%

Figure 3.7

Historical (2005–2021) and projected coal, oil, and gas production for Indonesia. Sources: Projections are from the business-as-usual scenario of the Indonesia Energy Outlook 2021 by the government's Research Center for Industrial Processing and Energy (PPIPE) and Agency for the Assessment and Application of Technology (BPPT) (PPIPE & BPPT, 2021). Historical data are from the IEA (2023a).



(Government of Indonesia, 2021). The government also asked the Ministry of Energy and Mineral Resources (MEMR) and the IEA to develop a "detailed scenario and policy analysis of what [its net-zero] target means for Indonesia's energy sector" (IEA, 2022b). However, the resulting roadmap does not detail pathways for domestic fossil fuel production beyond mentioning that "the government aims to provide continued support to maintain current levels of coal production" (IEA, 2022b, p. 45).

Government support for domestic fossil fuel production

- The government provided budgetary transfers and tax expenditures totalling IDR 51.4 trillion (USD 3.6 billion) for coal and IDR 3.6 trillion (USD 250 million) for oil and gas production in 2021 (OECD, 2023b).
- The government is heavily subsidizing the development of downstream industries to transform low-grade coal into products such as DME and methanol (IEA, 2022b; MEMR, 2022b; Peh, 2023). The government is also preparing regulatory measures to boost coal gasification, including cutting royalties on coal produced for this purpose, tax exemptions on midstream processes, and setting a benchmark price for coal derivatives (MEMR, 2022b).
- In 2023, the Indonesian Parliament approved a Job Creation Regulation with the same features and legal power as the annulled 2020 Job Creation Act, including the loosening of environmental safeguards for coal-mining permits and royalty fee exemptions for companies developing coal derivatives (Shafira, 2023).
- In 2023, the MEMR announced new legislation aimed at boosting the development of CCS and CCUS in the oil and gas sector, in order to reduce emissions from production activities and potentially also for enhanced oil recovery (Sidemen, 2022).

Government support for international fossil fuel production

No support was identified.

Policies and discourses on a managed wind-down of fossil fuel production

No such policies specific to production were identified. Indonesia's LTS noted that "Substitution of fossil energy by renewable energy will cause fossil energy resources [to be] left unexploited… and become stranded assets with some economic implications to the country… The loss would be much bigger if Indonesia's mitigation strategy were in the form of extreme coal elimination (phase out)" (Government of Indonesia, 2021, pp. 66–67). At COP26, Indonesia signed on to Clause 2 (phase-out of unabated coal power by 2030/2040) but not Clause 3 (no new coal-fired power plants) of the Coal Exit Pledge; coal production itself is not addressed (CAT, 2022).

Policies and discourses supporting a just and equitable transition away from fossil fuel production

Although no policies or discourses specific to fossil fuel production were identified, Indonesia has recently started work on just energy transitions with international support, as described above. The concept was previously noted in its LTS as a need for "preparation of migration to green jobs" (Government of Indonesia, 2021), and the Indonesian G20 Presidency also pushed for the concept of an inclusive and just energy transition in the G20 Bali Leaders' Declaration (G20, 2022).

[23] This report uses the latest outlook published by the government's Research Center for Industrial Processing and Energy (PPIPE) and Agency for the Assessment and Application of Technology (BPPT) (PPIPE & BPPT, 2021), as a more recent outlook published by the National Energy Council does not provide projections for fossil fuel production (National Energy Council, 2022).

India

Announced climate ambitions

India's updated NDC, submitted in August 2022, pledges a reduction in "the emissions intensity of its GDP" of 45% by 2030, compared to 2005 levels, and an increase in the share of non-fossil power capacity to 50% by 2030 (Government of India, 2022). The document also states that this updated NDC "is a step forward towards our long term goal of reaching net-zero by 2070".

Government views on domestic fossil fuel production

India's LT-LEDS, released during COP27, commits it to a low-carbon transition "at a pace and scale that is nationally determined, without compromising development futures", and that "should not impact energy security, energy access and employment" (MOEFCC, 2022).

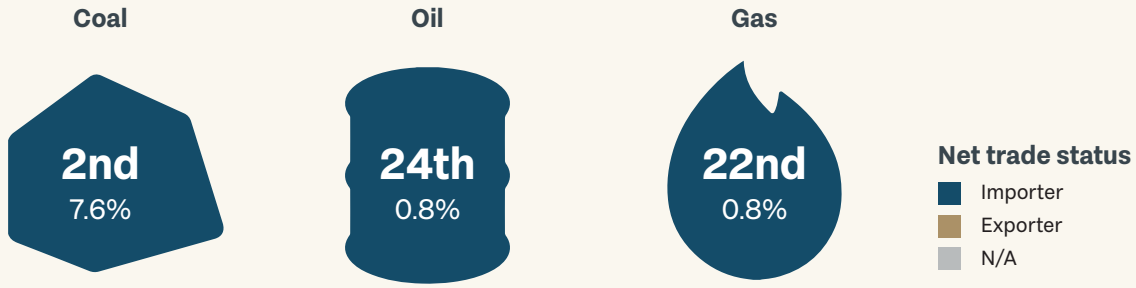
The Ministry of Home Affairs has noted that increasing coal production to make India self-reliant is a priority for the government (PIB India, 2022). It called on mining companies to scale up production and stressed that the government views the coal industry as being integral in generating income for states and creating multiple employment avenues. In 2022, the Ministry of Finance extended support for coal gasification and incentives for commercial mining, and the Ministry of Coal launched the country's largest-ever auction of coal-mining blocks (Ministry of Coal, 2022b). The government also plans to increase domestic oil and gas exploration and production to support growing domestic demand (Mohanty & Ratnajyoti, 2022; Ugal, 2023). The government has forecast that demand for gas will grow by over 500% as it seeks to raise the share of gas in the country's energy mix from 6% to 15% by 2030 (Mohanty et al., 2023). The Union Petroleum and Urban Affairs Minister has stated that the country aims to meet 25% of its crude oil demand from domestic production by 2030 (IANS, 2022).

Despite the Government of India's pursuit of clean energy, including the earmarking of USD 4.3 billion for green energy production in the national budget (Padma, 2023), it remains committed to fossil fuels, in particular coal, to meet rapidly growing energy needs (Pasricha, 2022; PIB India, 2022; Schmall & Krauss, 2022).

Plans and projections for domestic fossil fuel production

In March 2022, the Ministry of Coal announced plans to increase India's overall coal production to 1 billion tonnes in fiscal year 2023–2024, and production by state-owned Coal India Limited (CIL) alone to 1 billion tonnes the following year (PIB India, 2023c). CIL currently accounts for 85% of domestic coal production in India (CIL, 2021). In the longer term, the Ministry projects domestic coal production of 1.5 billion tonnes in 2030, more than double the 2021 level, as shown in Figure 3.8 (Ministry of Coal, 2022a). The ministry has also noted that India aims to become a net thermal coal exporter by 2024–2025 (The Economic Times, 2022); currently India meets about one-fifth of its coal demand with imports, exposing the country to price volatility on the international market and loss of foreign exchange reserves (Singh, 2023). As noted above, recent government statements indicate that India plans to ramp up domestic oil and gas production. However, official projections are not available.

Rank of country in, and share of, global production, and net trade status



Fossil fuel transition capacity and dependence indicators

Income level
Lower-middle income

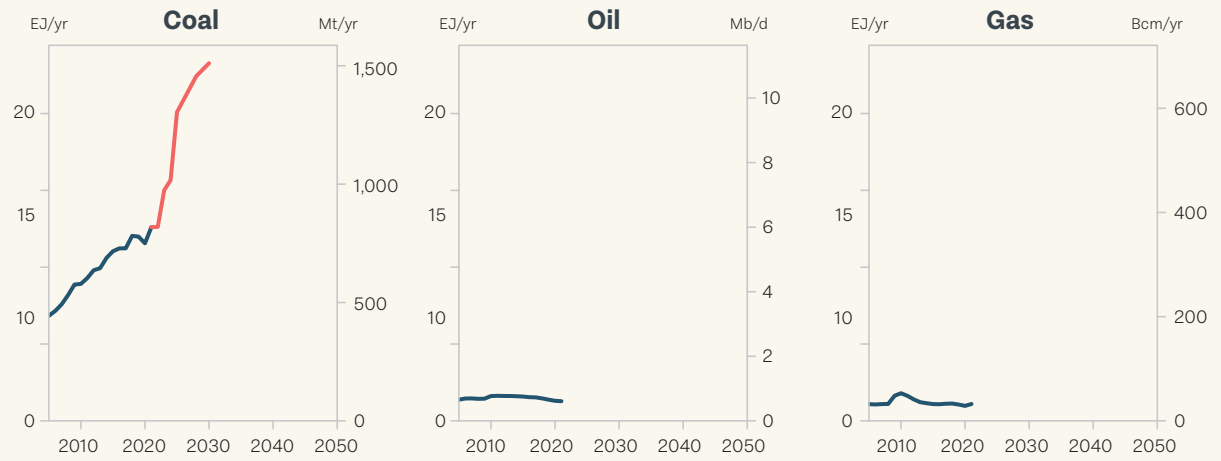
Coal direct employment
0.9 coal miners per 1,000 workers

Coal economic dependence
Low Medium High Very high

Share of GDP from oil & gas production
2%

Figure 3.8

Historical (2005–2021) coal, oil, gas and projected coal production for India. Sources: Coal projections are from India's Ministry of Coal (2022a). Oil and gas projections are not available. Historical data are from the IEA (2023a).



Government support for domestic fossil fuel production

- Producer subsidies through direct budgetary transfers and tax breaks were valued at INR 5.7 billion (USD 77 million) in 2021 (OECD, 2023b).
- The government has set up rolling electronic auctions of mining blocks to increase domestic coal production (PIB India & Ministry of Coal, 2022). In 2021, the government streamlined the process for providing clearances and approvals for coal mines (PIB India, 2023a).
- The government is encouraging foreign direct investment in the oil and gas sector (Chakraborty, 2023). For example, it has opened up an additional 1 million square kilometers of its exclusive economic zone (EEZ) for oil and gas exploration and production (PIB India, 2023b).

Government support for international fossil fuel production

ONGC Videsh Ltd (OVL), a subsidiary of India's national oil company, has stakes in 33 oil and gas projects in 15 countries (ONGC Videsh, 2023). OVL expects to increase investments in its overseas assets from INR 30 billion (USD 410 million) in 2023 to INR 50 billion (USD 680 million) by 2024.

Policies and discourses on a managed wind-down of fossil fuel production

While India has made significant investments and set ambitious targets for renewable energy (Birol & Kant, 2023; REN21, 2023), no government policies or discourses to support a managed wind-down of fossil fuel production were identified.

Policies and discourses supporting a just and equitable transition away from fossil fuel production

Some commentators hold that the idea of a just transition is relatively new in India and is gaining traction (Pai & Ranjan, 2023). In late 2022, an inter-ministerial committee produced a report on enabling a just transition from coal, proposing a funding, action, and implementation framework to help coal-producing regions handle mine closures and manage the transition (NITI Aayog, 2022). In May 2023, the Ministry of Coal organized a seminar on just transitions as a side event at the 3rd Energy Transitions Working Group of the G20 Presidency of India (Ministry of Coal, 2023). Jharkhand (the Indian state with the largest coal production and reserves) has created a task force to assess the dependency of local communities on a coal-based economy and produce a roadmap towards a just transition away from coal (Kumar, 2023; Pai & Ranjan, 2023).

There have also been discussions about the possibility of a JETP between India and funding countries (Nandi, 2022) (see Box 3.2).

Canada

Announced climate ambitions

Canada updated its NDC in 2021, committing the country to reduce emissions to 40–45% below 2005 levels by 2030 and to reach net-zero by 2050 (ECCC, 2021). The Net-Zero Emissions Accountability Act enshrines the 2050 net-zero commitment in law (Government of Canada, 2021). In 2022, the government released the first national Emissions Reductions Plan under the law, outlining measures the government will take to achieve its targets (Government of Canada, 2022c).

Government views on domestic fossil fuel production

The federal government continues to view fossil fuels as an important contributor to Canada's economy (Office of the Prime Minister of Canada, 2021b), and has noted that under its Emission Reductions Plan, oil production could still grow by up to 1 Mb/d (The Canadian Press, 2022). The federal and provincial governments have recently approved new oil and gas developments, such as the Bay Du Nord offshore oil project in 2022 (Impact Assessment Agency of Canada, 2022) and the Cedar LNG export terminal in 2023 (Impact Assessment Agency of Canada, 2023). The federal government stipulated that these projects must have a plan to bring GHG emissions associated with production to net zero by 2050 (Impact Assessment Agency of Canada, 2022, 2023).

The federal government has committed to implementing a cap on emissions from the oil and gas sector, a measure projected to reduce the sector's emissions to 31% below 2005 levels by 2030 (Government of Canada, 2022d). Alongside the emissions cap, the government has introduced a number of other incentives and regulations to reduce emissions from production, such as an investment tax credit for CCUS (Department of Finance Canada, 2021, 2022b), draft guidance for "best-in-class" GHG emissions performance by oil and gas projects (Government of Canada, 2022b), and a target to reduce methane emissions in the sector 75% below 2012 levels by 2030 (ECCC, 2022).

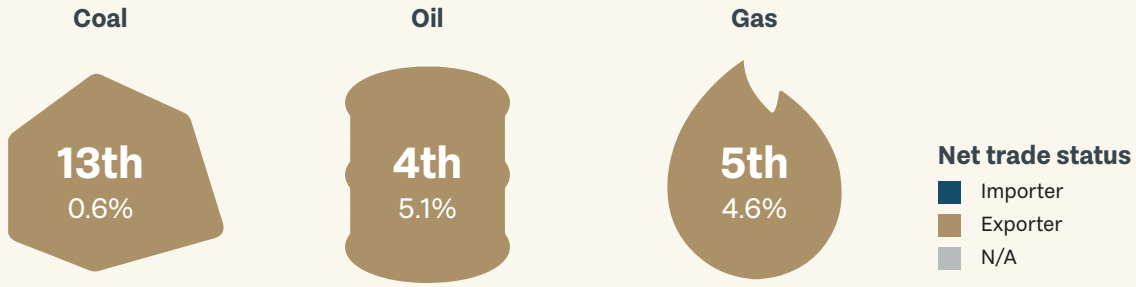
Plans and projections for domestic fossil fuel production

A 2023 energy outlook published by the Canada Energy Regulator (CER) presents three scenarios out to 2050 (Canada Energy Regulator, 2023). Under the "current measures" scenario, which assumes no further action to reduce emissions, Canada's oil production (crude oil plus natural gas liquids) increases by 25% over 2022 levels by 2035 and remains roughly constant through 2050; and gas production rises steadily through 2050, to 24% above 2022 levels (Figure 3.9). In contrast, under the "global net-zero" scenario, with lower global oil and gas prices and demand, Canada's oil production peaks in 2026 and declines to 73% below 2022 levels by 2050, while gas production peaks in 2023 before dropping 68% below 2022 levels by 2050. In the "Canada net-zero" scenario, the rest of the world moves more slowly to decarbonize, and Canada's oil and gas production fall 23% and 37% respectively by 2050, compared to 2022 levels. Following its 2021 report, the CER no longer provides projections for coal production.

Government support for domestic fossil fuel production

- National and sub-national fossil fuel production subsidies totalled CAD 2 billion (USD 1.6 billion) in 2021 with over half going towards deep drilling credits in British Columbia for gas wells (OECD, 2023b).
- Between 2018 and 2021, the government also provided CAD 21.7 billion (USD 16.6 billion) in public finance (i.e. loans,

Rank of country in, and share of, global production, and net trade status



Fossil fuel transition capacity and dependence indicators

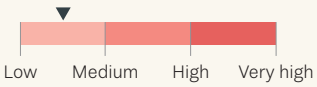
Income level

High income

Coal direct employment

0.4 coal miners per 1,000 workers

Coal economic dependence

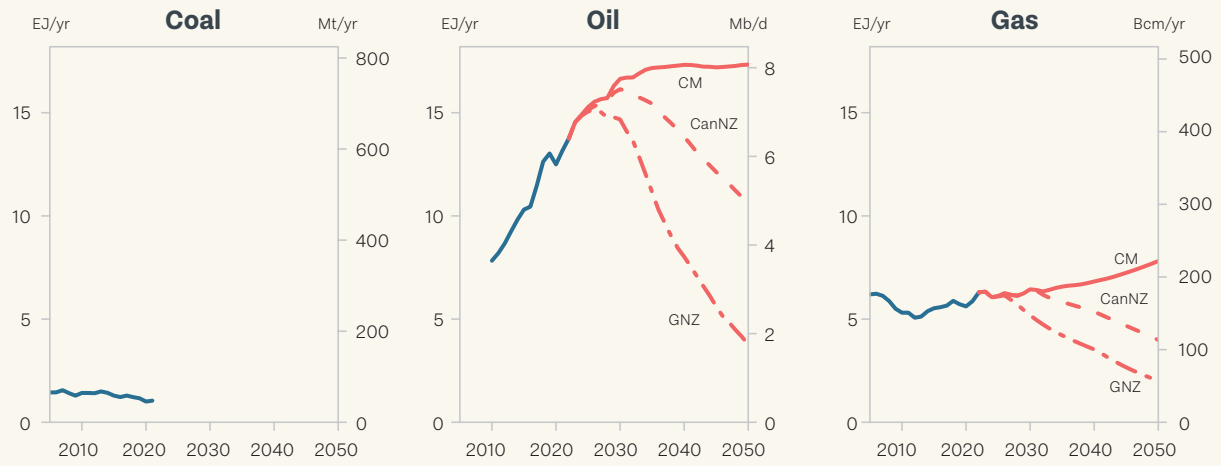


Share of GDP from oil & gas production

10%

Figure 3.9

Historical (2005–2022) and projected coal, oil, and gas production for Canada. Sources: Historical data and projections for oil and gas production are from the "current measures" (CM), "global net-zero" (GNZ), and "Canada net-zero" (CanNZ) scenarios presented in Canada's Energy Future 2023 report (Canada Energy Regulator, 2023). Coal projections are not provided in the report.



grants, and guarantees) for domestic fossil fuel development including pipelines (EDC, 2018, 2019, 2020, 2021; OCI, 2023).

- The federal government has committed to phasing out inefficient fossil fuel subsidies in 2023, and in July published guidelines to determine which subsidies will be removed (ECCC, 2023a). The government has also committed to phasing out public financing for fossil fuels, including by federal corporations, and has partially eliminated flow-through shares for coal, oil, and gas projects (Government of Canada, 2022a; Office of the Prime Minister of Canada, 2021a).
- In 2022, the federal government provided a CAD 10 billion (USD 7.6 billion) loan guarantee for the Trans Mountain Expansion Project, a crude oil pipeline intended to open up additional global markets for Alberta crude oil (Department of Finance Canada, 2022a; Natural Resources Canada, 2020).

Government support for international fossil fuel production

Canada has historically been one of the largest international public financiers of fossil fuels, primarily through Export Development Canada, providing at least USD 2.6 billion from 2018 to 2021 for fossil fuel production and related transportation projects (EDC, 2018, 2019, 2020, 2021; OCI, 2023). At COP26, the federal government signed the Glasgow Statement committing to end international public financing for unabated fossil fuel projects by the end of 2022 and redirect investments into clean energy (UK Government, 2021a). Canada's related policy guidelines include exemptions (e.g. for gas power generation) along with conditions, including that any exempted project is aligned with a 1.5°C pathway (Natural Resources Canada, 2022).

Policies and discourses on a managed wind-down of fossil fuel production

The province of Quebec is a core member of BOGA, which advocates for a managed phase-out of oil and gas production (BOGA, n.d.-a). The Federal Minister of Environment and Climate Change has called for countries to commit to the phase-out of "unabated" fossil fuels at COP28 (ECCC, 2023b).

Policies and discourses supporting a just and equitable transition away from fossil fuel production

The federal government is investing CAD 150 million (USD 120 million) in 2019–2025 towards infrastructure projects in communities affected by the coal power transition (Government of Canada, 2023a). In early 2023, the federal government released an action plan that allocates CAD 960 million (USD 740 million) towards a programme including training and re-skilling for jobs emerging from the decarbonization of oil and gas production and the growth of alternative energy sources. The plan also includes the creation of a Sustainable Jobs Secretariat for implementation, a Sustainable Jobs Training Centre, and a Partnership Council composed of diverse representatives, with CAD 250 million (USD 200 million) committed to the former two bodies so far (Government of Canada, 2023a). The government has tabled draft legislation that aims to enshrine just transition governance bodies and processes in law (Government of Canada, 2023b).

United Arab Emirates (UAE)

Announced climate ambitions

In July 2023, the UAE updated its NDC to set an absolute GHG emissions reduction target of 19% below 2019 levels by 2030, replacing its previous commitment to reduce emissions to 31% below a business-as-usual level for the year 2030 (Government of the United Arab Emirates, 2023a). In the run-up to COP26 in 2021, the UAE announced its intention to achieve net- zero emissions by 2050, a target that is reiterated in its updated NDC (Ibrahim & Hussein, 2021). At COP27 in 2022, UAE announced its net-zero roadmap, which includes a target of reducing emissions from 2019 levels by 60% by 2040 (UAE Ministry of Climate Change and Environment, 2022).

Government views on domestic fossil fuel production

While the government strives to diversify its economy and rely less on oil, with a focus on green and low-carbon development, it acknowledges that oil and gas will continue to play a key role in its socioeconomic development (Government of the United Arab Emirates, 2022, 2023b).

The war in Ukraine has reinforced UAE's approach of boosting domestic oil and gas production while promoting domestic development of renewables, nuclear power, and energy efficiency resources (Ministry of Energy & Infrastructure, 2023; Sim, 2023).

The state-owned Abu Dhabi National Oil Company (ADNOC) set targets of reaching zero methane emissions by 2030 and net-zero emissions by 2045, though only for its operational emissions (ADNOC, 2023a).

Plans and projections for domestic fossil fuel production

ADNOC aims to boost oil production capacity to 5 Mb/d by 2027 from the current 4 Mb/d as part of a USD 150 billion investment plan (Fogarty, 2023; ADNOC, 2022). The company also plans to increase LNG production capacity from the current 6 million tonnes (Mt) (equivalent to 8.2 Bcm) per year to 15.6 Mt (21.2 Bcm) by 2028, and is building a major LNG facility capable of exporting 9.6 Mt (13.1 Bcm) per year, to feed growing demand in Asia and Europe, and to reach national self-sufficiency by 2030 (ADNOC, 2022; Di Paola & Ratcliffe, 2022).

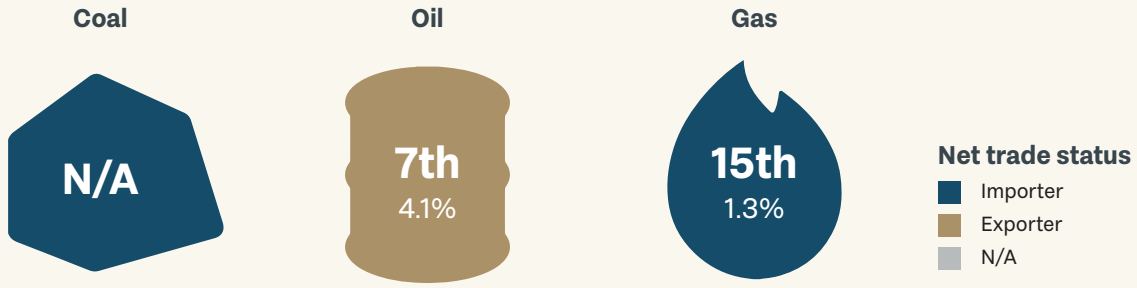
Government support for domestic fossil fuel production

- As noted above, ADNOC and the UAE have made significant investments in the energy sector and expect to continue doing so, with ADNOC announcing in late 2022 its five-year USD 150 billion investment programme (ADNOC, 2022).
- No other information is publicly available on tax expenditures or other measures that support fossil fuel production in the UAE.

Government support for international fossil fuel production

Abu Dhabi's sovereign wealth fund, Mubadala, invests in oil and gas fields abroad, including the USD 1 billion purchase of a 22% stake in Israel's Tamar gas field in 2019 (Glover, 2021).

Rank of country in, and share of, global production, and net trade status

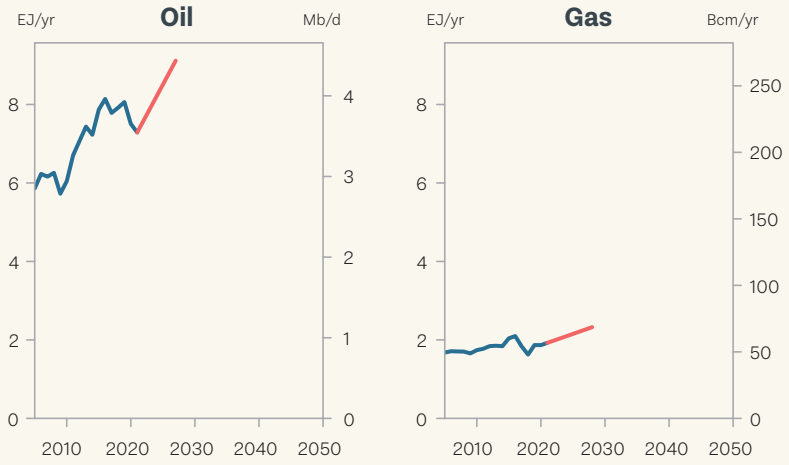


Fossil fuel transition capacity and dependence indicators

Income level	Coal direct employment	Coal economic dependence	Share of GDP from oil & gas production
High income	N/A	N/A	27%

Figure 3.10

Historical (2005–2021) and projected oil and gas production for the UAE (no coal is produced). Sources: 2027 oil production is estimated by assuming that it will scale with the target increase in oil production capacity; 2028 gas production is estimated from the target increase in LNG production (ADNOC, 2022; Di Paola & Ratcliffe, 2022). Historical data are from the IEA (2023a).



Policies and discourses on a managed wind-down of fossil fuel production

While the UAE has made significant investments and set ambitious targets for clean energy (Silverstein, 2023), it has no concrete policies intended to support a managed wind-down of fossil fuel production.

Policies and discourses supporting a just and equitable transition away from fossil fuel production

As integral elements of the UAE's National Climate Change Plan 2017–2050, the government has various human capacity programmes that support sustainability, green growth, and climate goals, though none are specifically oriented to transitioning away from fossil fuels (Al-Sarihi & Mason, 2020).

Qatar

Announced climate ambitions

Qatar submitted a revised NDC in 2021, pledging a 25% reduction in GHG emissions by 2030 relative to a business-as-usual baseline (Ministry of Municipality and Environment, 2021). Qatar has not announced a net-zero strategy.

Government views on domestic fossil fuel production

Qatar holds the third-largest proven reserves of fossil gas, after the Russian Federation and Iran (OPEC, 2022), and in 2022 had the world's second-largest LNG export capacity, after Australia and just ahead of the US (Statista, 2022). In 2005, the Government of Qatar placed a moratorium on new gas projects in the North Field, the world's largest gas field, to allow for technical assessment and in 2017 laid out plans to resume development and significantly expand gas production and exports (Munro, 2017).

The Government of Qatar views LNG exports as the mainstay of its economy and a key element of its international relationships. Earnings from the fossil fuel sector amounted to 80.5% of total government revenues in 2021 (EIA, 2023b, p. 1; IMF, 2022, pp. 28–29). The CEO of QatarGas has stated that "while some see natural gas as a transition fuel, we believe it is a 'destination fuel'." (QatarGas, 2023)

Qatar's oil production has fallen from a 2008 peak of 852,000 barrels per day to 616,000 barrels per day in 2022 (EIA, 2023b). Qatar's withdrawal from OPEC in January 2019 signalled an intent to focus on its standing as a global gas giant rather than a relatively small regional oil producer (Wright, 2019, p. 11).

State-owned QatarEnergy has committed to reducing the GHG intensity of its operations and eliminate routine flaring by 2030 (QatarEnergy, 2022a).

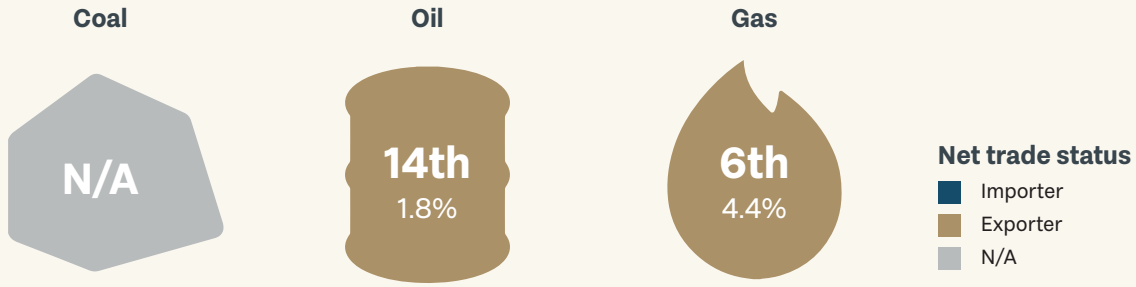
Plans and projections for domestic fossil fuel production

QatarEnergy, which controls all oil and gas operations in the country, is implementing a decade-long expansion of its gas production that will raise liquefaction capacity from 77 Mt/yr in 2021 to 110 Mt/yr by 2025 and 126 Mt/yr by 2027 (ITA, 2021; QatarEnergy, 2022b). Six new LNG trains will be developed at a cost of USD 30 billion (ITA, 2021). This increased capacity will cater to projected demand growth from Europe as well as existing supply agreements in Asia, which took on added geopolitical significance after the outbreak of war in Ukraine in February 2022 (EIA, 2023b). In late 2022, QatarEnergy signed long-term deals with Germany and China to supply them with LNG (15 years for Germany and 27 years for China). Since then, QatarEnergy has made deals with China and Bangladesh (Al Jazeera, 2023; Mills, 2023), with more expected as the production ramp-up nears completion (QatarEnergy, 2022c; Al Jazeera, 2022). Energy officials anticipate that the new supply agreements will lock in international demand for Qatari LNG into mid-century (Dargin, 2022).

Government support for domestic fossil fuel production

No other information is publicly available on tax expenditures or other measures to support fossil fuel production in Qatar.

Rank of country in, and share of, global production, and net trade status

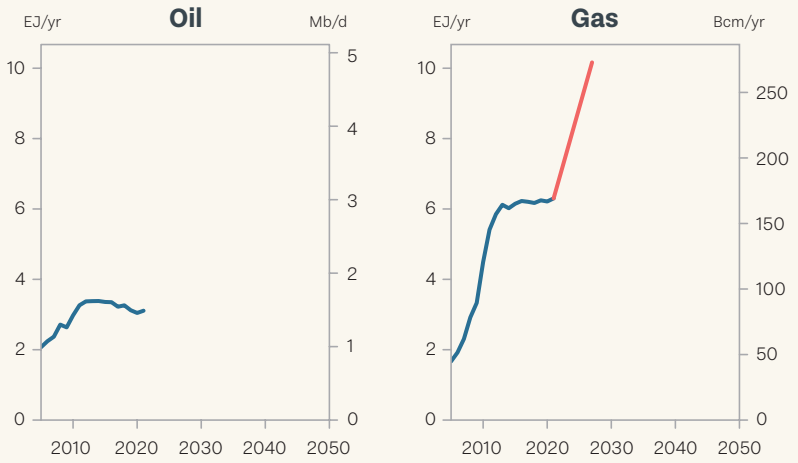


Fossil fuel transition capacity and dependence indicators

Income level	Coal direct employment	Coal economic dependence	Share of GDP from oil & gas production
High income	N/A	N/A	40%

Figure 3.11

Historical (2005–2021) oil and gas and projected gas production for Qatar (no coal is produced, and oil projections are not available). Sources: 2027 gas production is estimated from the target increase in LNG production capacity (QatarEnergy, 2022b). Historical data are from the IEA (2023a).



Government support for international fossil fuel production

Since 2017, QatarEnergy has rapidly expanded and diversified its international portfolio of upstream assets and has acquired stakes in exploration blocks in Argentina, Brazil, Cyprus, Lebanon, Mexico, Mozambique, and Oman, in partnership with major international oil and gas companies (Ulrichsen, 2020).

No other information is publicly available on tax expenditures or other measures to support fossil fuel production outside Qatar.

Policies and discourses on a managed wind-down of fossil fuel production

No such government policies or discourses were identified.

Policies and discourses supporting a just and equitable transition away from fossil fuel production

Environmental development is listed as one of the four pillars of Qatar National Vision 2030, alongside human, social, and economic development (GCO, 2008). However, Qatar has not articulated any policy toward a just and equitable transition away from fossil fuels.

South Africa

Announced climate ambitions

In 2021, South Africa submitted an updated NDC, in which the country tightened its 2030 emissions target from 614 $MtCO_2eq$ to a new target range of 350–420 $MtCO_2eq$ (Government of South Africa, 2021); the country's 2020 emissions were 474 $MtCO_2eq$ (DFFE, 2022).

In its LT-LEDS, South Africa mentioned that it will "ultimately mov[e] towards a goal of net-zero carbon emissions by 2050" (Government of South Africa, 2020). The Just Transition Framework, released by the Presidential Climate Commission in June 2022, also refers to reaching "net-zero greenhouse gas emissions by 2050" (Presidential Climate Commission, 2022).

Government views on domestic fossil fuel production

The Government of South Africa recognizes the socioeconomic risks of a coal phase-down for workers and communities (Presidency of Republic of South Africa, 2022). Coal is also still viewed by some ministries as central to energy security, stable and relatively well-paying jobs, and reliable "baseload" power (Mantashe, 2022). The coal industry advocates for CCS in support of ongoing coal extraction and use (Creamer, 2022; Peyper, 2023).

Offshore oil and gas production has been promoted by the Ministry of Mineral Resources and Energy and related SOEs as a major source of future economic growth (Burton et al., 2022; Comrie, 2022; DMRE, 2021). The government is also encouraging shale gas exploration in the Karoo region (Roelf, 2023).

Plans and projections for domestic fossil fuel production

To date, the government has not published national projections or targets for coal, oil, or gas production. Civil society legal action has compelled the government to announce a commitment to produce an Integrated Energy Plan by early 2024 (Omarjee, 2023).

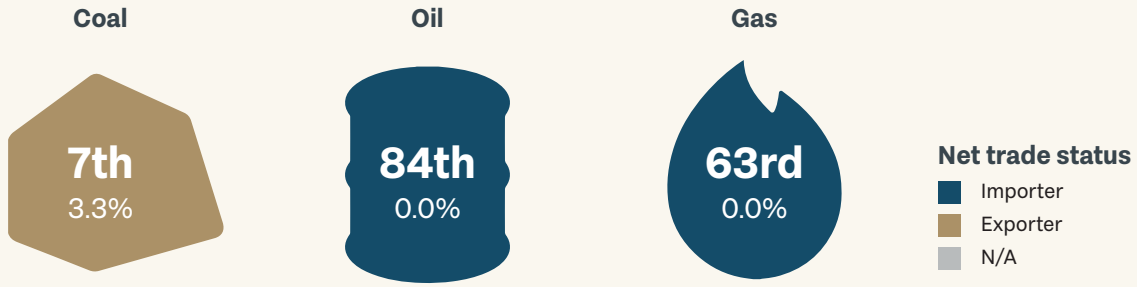
South Africa has over 70 active coal mines, the majority of which are privately owned. Falling exports due to rail logistics barriers and other factors led to a decline in annual coal production in 2022 to around 234 Mt from historical production levels of around 250 Mt (Minerals Council South Africa, 2023, 2021; Reuters, 2023a).

The South African Minerals Council has noted that "global sentiments against coal use have negatively affected long-term investment in the industry" (Minerals Council South Africa, 2023). However, as of May 2023, according to Global Energy Monitor, there are 36 proposed or planned projects in South Africa at different stages of development, of which half are new mines (Global Energy Monitor, 2023). If all are completed, they would account for at least 117 Mt per year of additional production capacity (Global Energy Monitor, 2023).

Government support for domestic fossil fuel production

■ The coal sector has historically received significant direct and indirect support via regulatory measures, SOEs, and subsidies to large users such as Eskom (a state-owned electricity utility) and Sasol (a coal-to-chemicals producer) (Bridle et al., 2022).

Rank of country in, and share of, global production, and net trade status



Fossil fuel transition capacity and dependence indicators

Income level
Upper-middle income

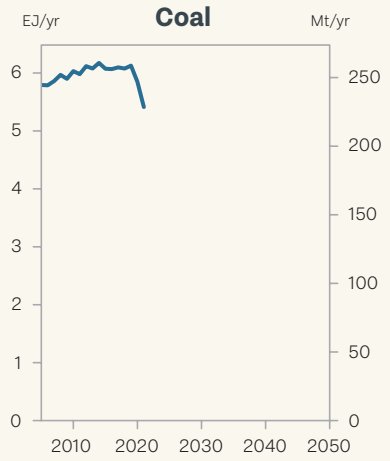
Coal direct employment
3.3 coal miners per 1,000 workers

Coal economic dependence
Low Medium High Very high

Share of GDP from oil & gas production
No data

Figure 3.12

Historical (2005–2021) coal production for South Africa based on data from the IEA (2023a). Government projections are not available. Oil and gas production are small (<0.5 EJ/yr) and not shown.



- While indirect support remains substantial, direct subsidies for coal mining are now smaller than in the past (Burton et al., 2018; Pant et al., 2020). In 2021, the government provided direct budgetary transfers worth an estimated ZAR 760 million (USD 51 million) to projects that supply water to power stations and to coal mines (OECD, 2023b).
- State-owned development finance institutions, the Development Bank of Southern Africa (DBSA), and the Industrial Development Corporation of South Africa (IDC) have supported coal production through their investment holdings as recently as 2019 (Halim & Omar, 2020), but no recent mining investments were identified.

Government support for international fossil fuel production

South Africa has supported gas liquefaction in Mozambique through investments by DBSA and IDC (USD 270 million in 2020) and export guarantees through Export Credit Insurance Company (USD 800 million) (OCI, 2023).

Policies and discourses on a managed wind-down of fossil fuel production

No policies or discourses to support a managed wind-down of fossil fuel production were identified.

Policies and discourses supporting a just and equitable transition away from fossil fuel production

South Africa has a rich and well-developed discourse on just transitions, accompanied by several policy and investment initiatives. The Department of Mineral Resources and Energy in late 2021 released a Framework for the Just Energy Transition in the Minerals and Energy sectors, noting that managing the risks of asset closures for coal regions is a priority (DMRE, 2021).

Coal has been the most successful mining sub-sector in terms of economic transformation of ownership in post-apartheid South Africa (Burton et al., 2022). Its political salience and high contribution to emissions has meant substantial focus on coal as a major sector in just transition policy. Eskom, the monopoly utility that accounts for around 40% of national coal use, created a Just Energy Transition Office in 2020 to manage the transition to net-zero carbon emissions by 2050 while creating sustainable jobs in the power sector, and has started to close some of its oldest units (Eskom, 2023). Sasol, the second-largest user of coal, has created a Just Energy Transition office (Sasol, 2023). Coal mining is explicitly recognized as a priority area in the National Just Transition Framework, released in August 2022, given the extensive potential impacts on livelihoods of an unplanned and unjust transition (Presidential Climate Commission, 2022).

At COP26, South Africa, alongside a group of international partners comprising the European Union, France, Germany, the UK, and the US, announced the first-of-its-kind JETP, with initial financial support of USD 8.5 billion (see Box 3.2). In 2022, South Africa developed the Just Energy Transition Investment Plan that outlines total investment of USD 98 billion from 2023 to 2027, focusing largely on clean energy, but also including support for coal mine closure planning, mine closure, rehabilitation, and land repurposing, coal worker transition support, and community revitalization (Presidency of Republic of South Africa, 2022).

Norway

Announced climate ambitions

In 2021, Norway established by law a target of reducing total GHG emissions, relative to 1990 levels, by 50–55% by 2030, and by 90–95% by 2050 (MCE, 2021). The Government has since updated the 2030 target to "by at least 55%"; and has proposed to amend its Climate Act to reflect this change (Government of Norway, 2022; MCE, 2023).

Government views on domestic fossil fuel production

The government views the oil and gas industry as playing "a vital role in the Norwegian economy and the financing of the Norwegian welfare state", especially in terms of providing employment, export value, and government revenues (NPD & MPE, 2023b). The industry is highly regulated, and a large share of the sector's revenue is directly channelled into the government's sovereign wealth fund (Lahn, 2019). Despite increasing political controversy, a broad political majority continues to support expanding Norway's offshore exploration and production (Harrison & Bang, 2022). The war in Ukraine has foregrounded Norway's role as a secure provider of gas for Europe, and the Government of Norway has therefore sought to secure EU support for increased oil and gas exploration and production (Melgård, 2022). Both government and industry justify their position by citing the sector's relatively low production-related GHG emissions and future decarbonization plans (KonKraft, 2022; MPE, 2023, p. 59). Additionally, the majority state-owned company Equinor aims to achieve net-zero (including Scope 3 or full lifecycle) emissions by 2050 (Equinor, 2022).

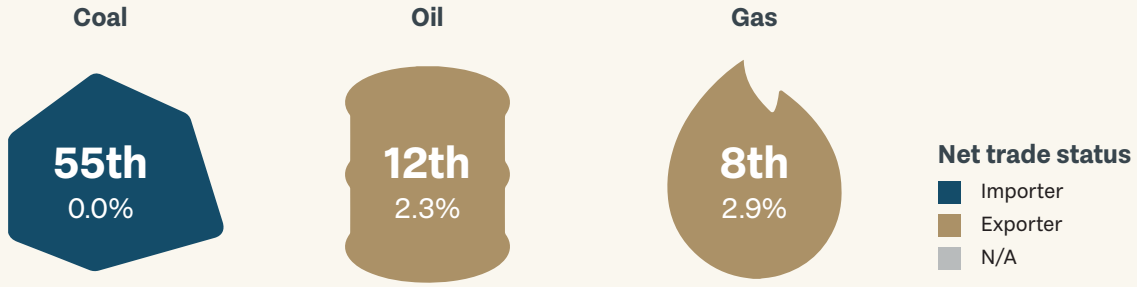
Plans and projections for domestic fossil fuel production

As shown in Figure 3.13, Norway's oil and gas production are projected to peak in 2026 and decline over the next decades, by a combined 67% between 2026 and 2050, as resources in the large North Sea fields are depleted (Norwegian Ministry of Finance, 2021). However, the rate of decline is uncertain and depends heavily on possible new discoveries and thus on government policy for exploration (NPD, 2022). The Norwegian Petroleum Directorate (NPD) notes that official forecasts tend to underestimate resource growth (NPD, 2022, p. 58). To complement their official central forecast previously published in 2021, the NPD published a new scenario under "high resource growth with considerable and fast technology development" in 2022 (NPD, 2022, p. 58). In this scenario, decline is considerably slower, with 2050 production about 50% higher than in the central forecast (see Figure 3.13).

Government support for domestic fossil fuel production

- The government's oil and gas exploration policy plays a major role in influencing domestic production. While some specific offshore less-explored or frontier areas have been closed off to exploration for political and environmental reasons (Buli & Adomaitis, 2022; Lahn, 2019), licenses are still awarded annually in so-called "mature" areas, with 47 licenses awarded in 2022 (MPE, 2023, p. 56). The government also intends to substantially increase the areas designated as "mature", especially in the Arctic (MPE, 2023).
- Although Norway's tax system ensures a 78% effective tax rate on oil and gas production profits, the government effectively acts as a co-investor that shoulders a large share of risk in all new investments (Lahn, 2019).
- To support the industry during the fall in oil price in early 2020, the government introduced a special tax scheme in which all new developments approved by the end of 2023 will benefit from special provisions. A recent estimate suggests this temporary scheme may amount to a tax subsidy of around NOK 26 billion (USD 2.7 billion) (Rydje & Holter, 2022; cf. Norwegian Ministry of Finance, 2022).

Rank of country in, and share of, global production, and net trade status

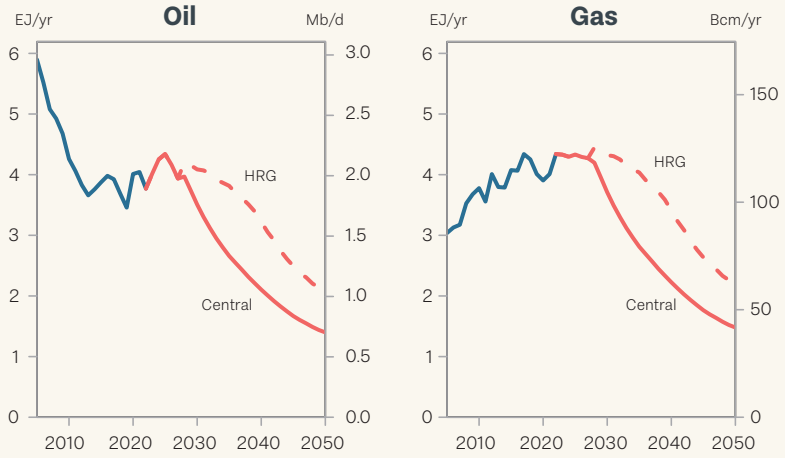


Fossil fuel transition capacity and dependence indicators

Income level	Coal direct employment	Coal economic dependence	Share of GDP from oil & gas production
High income	No data	No data	14%

Figure 3.13

Historical (2005–2022) and projected oil and gas production for Norway. Coal production is small (<0.5 EJ/yr) and not shown. Sources: Historical data and 2023–2027 projections are from the Norwegian Petroleum Directorate (2023a); 2028–2050 projections are from the Norwegian Ministry of Finance (2021). The 2028–2050 oil and gas projections are estimated from the source document's reported total, assuming the liquids-to-gas ratio remains constant at average 2022–2027 values. To complement their official central forecast, a new scenario under "high resource growth with considerable and fast technology development" (HRG) was also published in 2022.



■ The government provided further tax breaks and budget expenditures for oil and gas production (primarily for research, development, and demonstration) worth NOK 656 million (USD 76 million) in 2021, according to OECD estimates (OECD, 2023b).

Government support for international fossil fuel production

Norway has generally wound down its international support for fossil fuels after adopting the Paris Agreement: for example, by reorienting aid programmes from oil to renewable energy (Norwegian Ministry of Finance, 2021). In addition, the Norwegian sovereign wealth fund decided to exclude upstream oil and gas companies from its investment portfolio in 2019 (Norwegian Ministry of Finance, 2019). The government has stressed that this divestment should not be seen as a climate policy measure, but as a diversification strategy to make the Norwegian economy less exposed to oil price fluctuations (Norwegian Ministry of Finance, 2019). Equinor operates on a commercial basis and continues to invest in new oil and gas developments globally, including in recent controversial projects in Argentina (Vaca Muerta) and the UK (Rosebank) (Helgesen, 2020; Searancke, 2023).

Policies and discourses on a managed wind-down of fossil fuel production

Norway has no official strategy for winding down oil and gas production, and the government emphasizes that it wants to "develop, not dismantle" the industry (MPE, 2023). There have, however, been recent moves to incorporate climate concerns into the regulatory process for approving new oil and gas fields. As of 2022, companies are required to undertake a climate risk assessment for the economic viability of the field, and, following a decision in the Norwegian Supreme Court, the Ministry of Petroleum and Energy (MPE) has begun to assess the expected GHG emissions of new fields, including from the eventual combustion of produced fuels (MPE, 2023). The MPE commissioned Rystad Energy, an independent consultancy, to develop a methodology for determining the net GHG effects of additional Norwegian oil production. The resulting methodology and assessment concluded that new oil and gas production by Norway would result in a net emissions reduction globally due to substitution effects (Rystad Energy, 2023). However, the methods and assumptions diverge from similar analyses by other researchers, who come to the opposite conclusion (Fæhn et al., 2017; Prest et al., 2023; Riekeles, 2023).

Policies and discourses supporting a just and equitable transition away from fossil fuel production

The need to prepare for an eventual transition away from oil and gas production is widely accepted, and government strategies generally emphasize the importance of diversifying current offshore activities into new areas such as offshore wind, CCS, and blue hydrogen production (e.g. MPE, 2023), in parallel with initiatives to reduce GHG emissions from oil and gas production (Jordhus-Lier et al., 2022, pp. 9–10). In 2022, the government established a tripartite[24] Just Transition Advisory Council in the context of achieving a "zero-emissions future" (MCE, 2022). However, in line with the government's commitment to encourage further oil and gas production, the council does not have a specific mandate related to fossil fuels (MCE, 2022), and there is generally a lack of specific policies to advance a just transition agenda (Jordhus-Lier et al., 2022, p. 7).

[24] Norway has a well-established tradition for tripartite cooperation between government, unions, and employers' associations, including for the petroleum sector (see, e.g., https://www.ptil.no/en/tripartite-cooperation/responsibility/tripartite-collaboration-explained/).

Brazil

Announced climate ambitions

Brazil updated its NDC in March 2022, maintaining the earlier target of reducing GHG emissions by 37% from 2005 levels by 2025, while increasing ambition to 50% below 2005 levels by 2030, and including the objective of climate neutrality by 2050 (Federative Republic of Brazil, 2022). Petrobras, a state-owned company that accounts for a majority of Brazil's oil and gas production, has also set a goal of net-zero operational emissions by 2050 (Petrobras, 2023).

Government views on domestic fossil fuel production

With significant reserves of crude oil in "pre-salt" offshore basins with upstream GHG emissions intensity less than half of the global average (Bello et al., 2023; Draeger et al., 2022), the government views oil production and exports as critical for the country's development (MME, 2023c). National laws and regulatory changes enacted in recent years, along with improving financial conditions, have played critical roles in attracting investment and driving the expansion of Brazil's oil and gas industry (Barboza Mariano et al., 2023). The current administration continues to count on economic and regional development from the exploration of new petroleum frontiers, extension of the production period of mature fields, and tax revenues from fossil fuel production (Petrobras, 2023; MME, 2023c).

Plans and projections for domestic fossil fuel production

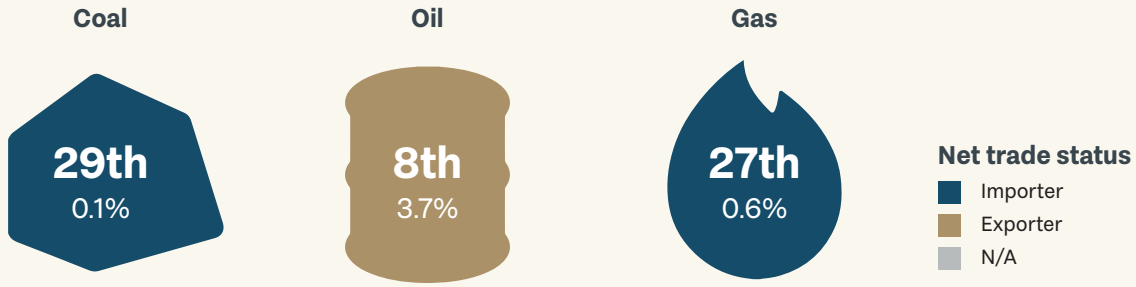
As shown in Figure 3.14, Brazil's 10-Year Energy Expansion Plan 2032 and the longer-term National Energy Plan 2050 both indicate an expanded role for oil and gas, with the production of both types of fossil fuels set to increase in the coming decades (MME & EPE, 2020, 2023). (The small reduction between 2032 and 2033 in gas are due to a disconnect between the two plans, given their different release dates.) The 2032 Plan foresees production of oil and gas increasing by 63% and 124%, respectively, between 2022 and 2032. These projections were derived based on the Petrobras business plan (Petrobras, 2023), investment expectations generated by auctions announced by the Brazilian National Agency of Petroleum, Natural Gas and Biofuels (ANP) for the coming years, and the New Natural Gas Market programme announced by the Ministry of Mines and Energy (MME) in 2021 (Federative Republic of Brazil, 2021).

The current administration also recently announced its intention to launch a new initiative to guarantee investments in exploration and "transform Brazil into the fourth-largest oil producer in the world" (MME, 2023c).

Government support for domestic fossil fuel production

- Tax expenditures and direct budgetary transfers to incentivize oil and gas production totalled USD 8.6 billion in 2021, much of this from a tax exemption for the import and manufacture of equipment used for oil and gas exploration and production ("Repetro") that was set to expire in 2020, but was renewed until 2040 (Inesc, 2022).
- The "Open Acreage" programme, a continuous offer of exploration blocks (MME, 2021b), was introduced in 2019 to attract private investments, expand exploration and production, and increase government revenues from the hydrocarbon sector (Barboza Mariano et al., 2022). As of 2022, permanent offering replaced regular bidding rounds for areas

Rank of country in, and share of, global production, and net trade status

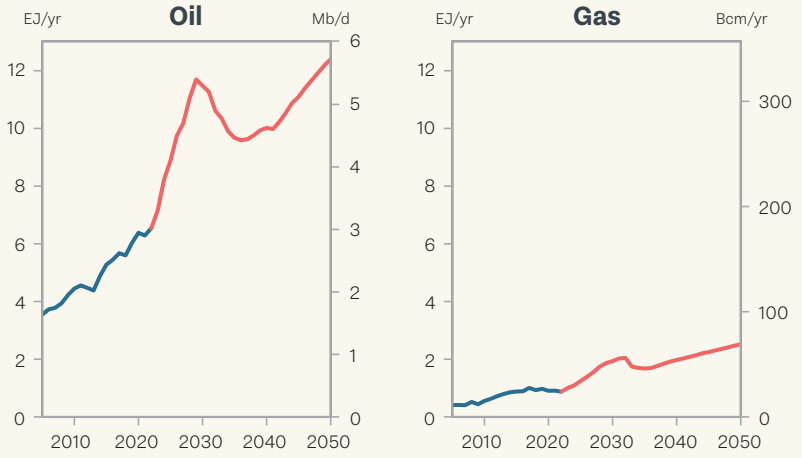


Fossil fuel transition capacity and dependence indicators

Income level	Coal direct employment	Coal economic dependence	Share of GDP from oil & gas production
Upper-middle income	No data	No data	10%

Figure 3.14

Historical (2005–2022) and projected oil and gas production for Brazil. Coal production is small (<0.5 EJ/yr) and not shown. Sources: 2023–2032 projections are from the 10-Year Energy Expansion Plan 2032 (MME & EPE, 2023); 2033–2050 projections are from the National Energy Plan 2050 (MME & EPE, 2020). Historical coal and oil data are from the Brazilian National Agency of Petroleum, Natural Gas and Biofuels (ANP, n.d.-b), and from the IEA (2023a) for gas. Brazil's gas production (as shown) does not include fractions that are re-injected, self-consumed, and flared, which accounts for around 50% of total production historically and is expected to account for 52% of total production in 2023–2027 on average (ANP, n.d.-a); this average is applied to subsequent years.



with exploratory risks, enabling an acceleration of activity in the pre-salt region that accounts for a majority of Brazil's oil production (Diário Oficial da União, 2021).

- In 2021, the prior administration launched the New Natural Gas Market Program to spur the production, transport, and use of gas, with expected investments of about USD 10 billion, largely in pipelines to connect users with offshore fields, where gas is currently reinjected to enhance oil recovery (Barboza Mariano et al., 2023).

Government support for international fossil fuel production

No support was identified.

Policies and discourses on a managed wind-down of fossil fuel production

State-controlled Petrobras stated that the company must prepare for an inevitable energy transition and will lead Brazil's shift to renewable energy, while keeping its oil and gas expansion on track (Frontini & Nogueira, 2023). Petrobras recently set up a new division responsible for energy transition and sustainability, which has raised expectations of a major pivot towards renewables (Chetwynd, 2023).

The government has recently begun preparing for the decommissioning of end-of-life oil and gas infrastructure through new regulations that provide guarantees and stimulate investments to remediate abandoned wells and other exploration and production facilities (Barboza Mariano et al., 2023).

Policies and discourses supporting a just and equitable transition away from fossil fuel production

While Brazil has relatively limited coal production, the coal mining and consumption industry still accounts for nearly USD 1 billion in annual revenues and 20,000 direct and indirect jobs in the state of Santa Catarina (SIECESC, 2022). A legal framework issued in 2022 encompasses a just transition policy while also extending the lifetime of the region's coal power generation from 2025 to 2040 (Diário Oficial da União, 2022).

There are currently no official policies or discourses related to just transition in the oil and gas industry. The significant contribution to federal, state, and municipal government budgets, reaching USD 21.4 billion including royalties and windfall profit tax in 2022, highlights Brazil's fiscal dependency on fossil fuels (MME, 2020a, 2020b). The United Federation of Oil Workers is actively championing investments in new oil refining capacity and gas power as a means to generate high-quality jobs (FUP, 2021).

Kazakhstan

Announced climate ambitions

In 2016, Kazakhstan set an unconditional NDC target to reduce GHG emissions to 15% below 1990 levels by 2030, and a conditional target of 25% below 1990 levels by 2030, subject to international investment (Ministry of Ecology and Natural Resources, 2023). In 2020, the government announced a goal of achieving carbon neutrality by 2060 (Government of the Republic of Kazakhstan, 2021). In February 2023, the government approved a strategy document that identified the transformations needed to achieve the carbon-neutrality goal (Government of the Republic of Kazakhstan, 2023b).

Government views on domestic fossil fuel production

Kazakhstan is a net exporter of fossil fuels (IEA, 2023a). The oil and gas sector is a significant part of Kazakhstan's economy, contributing nearly 20% of GDP in 2021 (National Bureau of Statistics Kazakhstan, 2023). The government seeks to increase domestic production and processing of gas and petrochemicals (Haidar, 2022). The country's carbon-neutrality strategy states that the "decarbonization of the energy sector requires the use of natural gas as an intermediate fuel" and encourages the exploration of new gas fields (Government of the Republic of Kazakhstan, 2023b). The government has announced plans to increase shale gas production (Vladimirskaya, 2022). Additionally, the government is exploring the possibility of developing other unconventional reserves, such as shale oil (KAZENERGY, 2022; Official Information Source of the Prime Minister, 2022).

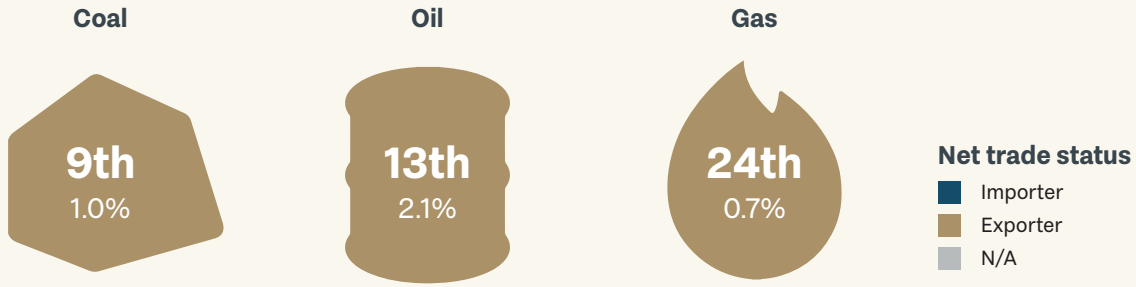
Kazakhstan has the 10th-largest coal reserves in the world, estimated at about 29.4 billion tonnes across 49 deposits (KAZENERGY, 2021), and the government's carbon-neutrality strategy foresees continued production of coal (Government of the Republic of Kazakhstan, 2023b). Due to its high ash and sulfur content and low calorific value, Kazakh coal exports are not financially competitive, especially in markets with stringent emission controls or coal standards, like the European Union (KAZENERGY, 2021; Ministry of Energy, 2020). Instead, there are plans to invest in the production of high-value-added coal-based products and technologies, and in exploring alternative uses of coal such as in building materials or products to clean contaminated soil and water (Kuzekbay, 2021; Mannapbekov & Hampel-Milagrosa, 2021; Government of the Republic of Kazakhstan, 2023b).

Plans and projections for domestic fossil fuel production

The 2021 National Energy Report, produced by a consortium of government agencies, projects oil and gas production to increase slightly in the near term before gradually declining after 2025, while coal production is projected to decline from 2020 onwards, as shown in Figure 3.15 (KAZENERGY, 2021). These projections are broadly consistent with government production targets for 2026 of 115 million tonnes of coal, 99 million tonnes of oil, and 35 Bcm of commercial gas (Government of the Republic of Kazakhstan, 2022).

The government plans to achieve a near-term increase in oil production by expanding production in mature fields and developing new fields. This involves significant investment in infrastructure and technology, including enhanced oil recovery techniques, as well as collaboration with foreign partners (Official Information Source of the Prime Minister, 2021). Kazakhstan exports nearly 80% of its oil via the Caspian Pipeline Consortium pipeline through the Russian Federation (KAZENERGY, 2021; Reuters, 2023c). New plans focus on diversifying oil export routes across the Caspian Sea and China (Government of the Republic of Kazakhstan, 2023b).

Rank of country in, and share of, global production, and net trade status



Fossil fuel transition capacity and dependence indicators

Income level
Upper-middle income

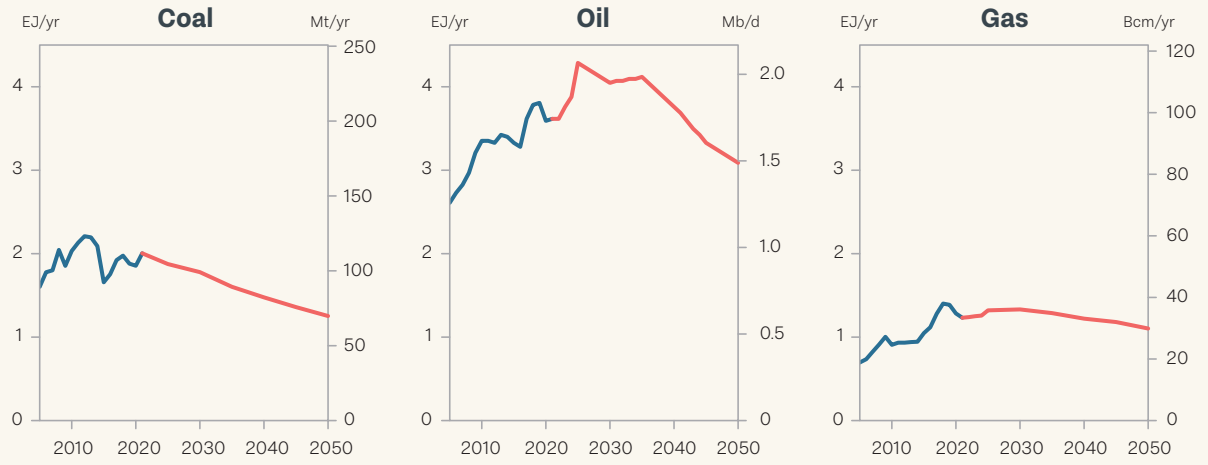
Coal direct employment
3.2 coal miners per 1,000 workers

Coal economic dependence
Low Medium High Very high

Share of GDP from oil & gas production
13%

Figure 3.15

Historical (2005–2021) and projected coal, oil, and gas production for Kazakhstan. Sources: Projections are from the National Energy Report 2021 (KAZENERGY, 2021). The projected gas production (as shown) does not include fractions that are re-injected and used by producers, which is expected to account for around 50% of total gas production. Historical coal and gas data are from the IEA (2023a); historical oil data are from National Energy Report 2021.



Kazakhstan also plans to increase its gas exports to neighbouring countries such as China, though rapidly increasing domestic demand may see export volumes diverted to the local market (Satubaldina, 2023). Several investments in pipelines and processing facilities are planned by the national gas company, QazaqGaz, to support this growth, including the Beineu-Zhanaozen second line with a capacity of 5.8 Bcm, and the Makat-Northern Caucasus gas pipeline with a capacity of 13.1 Bcm (Turan Times, 2023).

Government support for domestic fossil fuel production

- The government provides incentives and direct subsidies for companies engaged in coal, oil, and gas production, including exemptions from value-added, income, and property taxes and other direct financial support such as accelerated depreciation and low-interest loans and grants. The government also provides indirect subsidies such as access to infrastructure and social services (KAZENERGY, 2023; State Revenue Committee, 2023).
- In 2023, the government introduced an enhanced model contract for hydrocarbon production that grants a package of fiscal and regulatory preferences designed to stimulate investment, including exemptions from taxes and export customs duties (Ministry of Energy, 2023b; Satubaldina, 2023).
- The government invests in research and development to improve the efficiency and competitiveness of the fossil fuel industry (Government of the Republic of Kazakhstan, 2023a). Companies are obliged to put 3% of production costs towards oil and gas research and development projects, including education and training programmes (Government of the Republic of Kazakhstan, 2017, 2018).

Government support for international fossil fuel production

No support was identified.

Policies and discourses on a managed wind-down of fossil fuel production

No such government policies or discourses were identified.

Policies and discourses supporting a just and equitable transition away from fossil fuel production

Kazakhstan's carbon-neutrality strategy notes that "the most important priorities for low-carbon development should be a just transition and job creation" (Government of the Republic of Kazakhstan, 2021). The strategy supports social protection measures and retraining programmes for workers who have lost their jobs in the fossil fuel industry and proposes retraining in green jobs or assistance with developing green businesses (Government of the Republic of Kazakhstan, 2023b).

Kuwait

Announced climate ambitions

Kuwait submitted a revised NDC in 2021, which included a pledge to cut GHG emissions to 7.4% below business-as-usual levels by 2035 (State of Kuwait, 2021a). At COP27 in November 2022, the Government of Kuwait pledged to achieve carbon neutrality in the oil and gas sector by 2050, and the rest of the economy by 2060 (Kuwait News Agency, 2022).

Government views on domestic fossil fuel production

Oil is central to Kuwait's economy and the energy sector is under full state ownership. Kuwait holds around 7% of the world's current proven reserves of oil (ITA, 2022). The oil industry accounts for about 90% of government revenue and 95% of total exports (ITA, 2022). Kuwait's oil fields are aging and have struggled to attract investment (EIA, 2023a; Gnana, 2022). Foreign investment in the oil and gas sector is prohibited by Kuwaiti Law (WTO, 2012). Kuwait Vision 2035, launched in 2017, does not necessarily seek to reduce or move beyond oil dependence, but rather aims to diversify economic activity into non-oil sectors (State of Kuwait, 2021b). A priority for the Kuwait Oil Company — a subsidiary of state-owned Kuwait Petroleum Corporation (KPC) — is to increase gas production to meet local demand and reduce reliance on imported LNG (Al-Abdullah et al., 2020, pp. 8–9; Mohamed, 2022). KPC also aspires to achieve operational net-zero emissions by 2050 (KPC, n.d.-b).

Plans and projections for domestic fossil fuel production

KPC plans to raise oil production capacity to 3.5 Mb/d by 2025 and 4 Mb/d by 2035, maintaining the latter up to 2040 (Gnana, 2022; KPC, n.d.-a). The KPC strategy also states a target for non-associated (but not total) gas production of 2 billion cubic feet per day by 2040 (approximately 21 Bcm/yr) (KPC, n.d.-a). According to the 2019 Kuwait Energy Outlook published by the Kuwait Institute for Scientific Research, total gas production is expected to increase by 57% between 2017 and 2035, reaching around 27 Bcm/yr (KISR, 2019, p. 48). Officials in 2022 announced plans to accelerate spending on oil production, exploration, and other projects, including new gas developments, between 2022 and 2025 as part of the Kuwait National Development Plan 2020–25 (State of Kuwait, 2019; Zawya Projects, 2022).

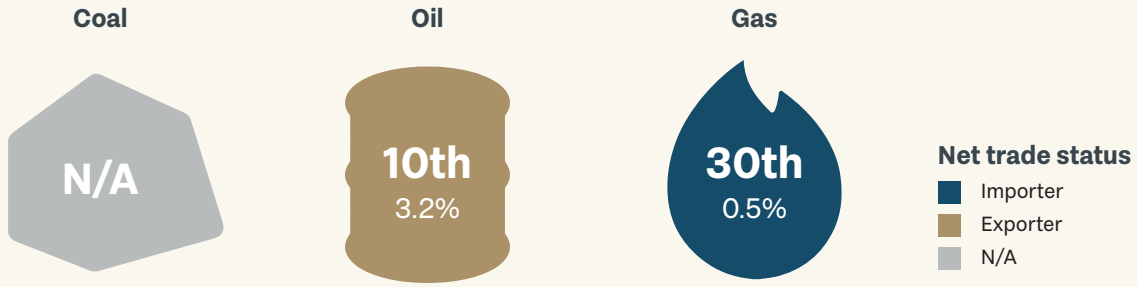
Government support for domestic fossil fuel production

No information is publicly available on tax expenditures or other measures to support fossil fuel production in Kuwait.

Government support for international fossil fuel production

The Kuwait Foreign Petroleum Company (KUFPEC), a subsidiary of KPC, is engaged in the exploration, development, and production of crude oil and fossil gas outside Kuwait. In 2021, KUFPEC was involved in 49 projects in 13 countries, produced its first oil from fields in Malaysia and Norway, and announced its largest-ever hydrocarbon discovery, a gas find in Malaysia (KUFPEC, 2021, pp. 10–19).

Rank of country in, and share of, global production, and net trade status

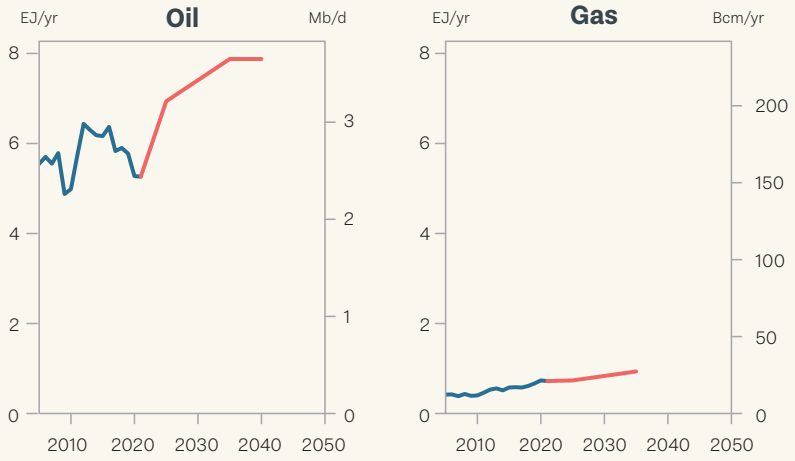


Fossil fuel transition capacity and dependence indicators

Income level	Coal direct employment	Coal economic dependence	Share of GDP from oil & gas production
High income	N/A	N/A	40%

Figure 3.16

Historical (2005–2021) and projected oil and gas production for Kuwait. No coal is produced. Sources: 2025, 2035, and 2040 oil production are assumed to scale with the respective increases in production capacity targets (Gnana, 2022; KPC, n.d.-a). 2025 and 2035 gas production projections are from the 2019 Kuwait Energy Outlook published by the Kuwait Institute for Scientific Research (KISR, 2019, p. 48). Historical data are from the IEA (2023a).



Policies and discourses on a managed wind-down of fossil fuel production

No such government policies or discourses were identified.

Policies and discourses supporting a just and equitable transition away from fossil fuel production

No such government policies or discourses were identified.

Mexico

Announced climate ambitions

At COP27 in 2022, Mexico updated its NDC targets to a 35% unconditional, and 40% conditional GHG emissions reduction by 2030 relative to its baseline scenario, up from 22% and 36%, respectively, in its prior NDC (INECC, 2020, 2022). For the unconditional pledge, a 30% reduction is to be achieved with national resources and the other 5% with already-agreed international finance for clean energy.

Government views on domestic fossil fuel production

The current Mexican administration has stated that it wants to expand oil and gas production in order to end fossil fuel imports and guarantee "energy sovereignty" for Mexico (Galeana, 2023). Since 2018, government investment and infrastructure packages have aimed at reversing declining production trends at Pemex (Calles Almeida et al., 2023), an SOE that accounts for 97% of Mexico's oil and gas production. During the Major Economies Forum on Energy and Climate 2022, the government announced that Pemex would invest a total of USD 2 billion to reduce methane emissions from exploration and production by up to 98% by 2024 (Obrador, 2022).

Plans and projections for domestic fossil fuel production

The Ministry of Energy has not updated its longer-term oil and gas production projections last published in 2018, which are shown in Figure 3.17 (SENER, 2018a, 2018b). However, the National Commission for Hydrocarbons (CNH), an independent regulator, has provided quarterly nearer-term projections (Comisión Nacional de Hidrocarburos, 2022). Based on existing reserves and development plans, CNH has continuously revised its oil production projections downwards, and gas production upwards, out to 2028.

Government support for domestic fossil fuel production

- Starting in 2022, the government reduced Pemex's shared utility tax from 52% to 40%, a further decrease from 65% prior to 2020 (SHCP, 2021). The tax reduction amounts to an estimated subsidy of MXN 83 billion in 2021 (USD 4.1 billion) (OECD, 2023b).
- Overall, tax expenditures for oil and gas production totalled MXN 158 billion (USD 7.8 billion) in 2021 (OECD, 2023b).
- In 2021, the federal government injected capital of USD 3.5 billion to strengthen Pemex's finances (SHCP, 2021).

Government support for international fossil fuel production

No data were found to suggest support for production in other countries. Pemex does, however, invest in midstream activity, and spent USD 596 million to purchase ownership in the Deer Park refinery in Houston, US in 2022 (EIA, 2023c).

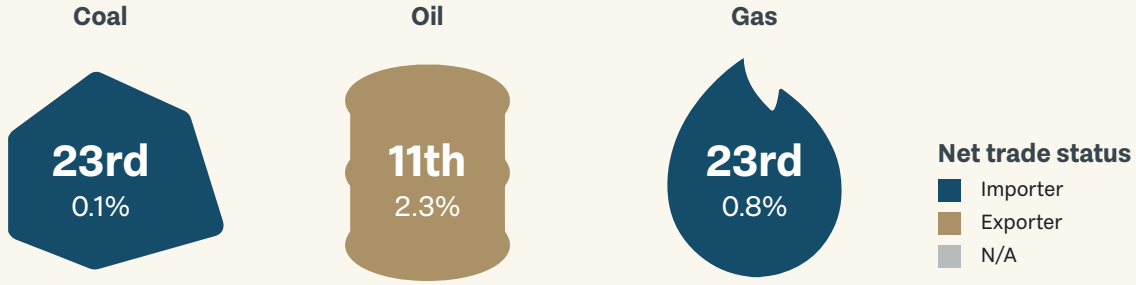
Policies and discourses on a managed wind-down of fossil fuel production

No such government policies or discourses were identified.

Policies and discourses supporting a just and equitable transition away from fossil fuel production

No such government policies or discourses were identified.

Rank of country in, and share of, global production, and net trade status

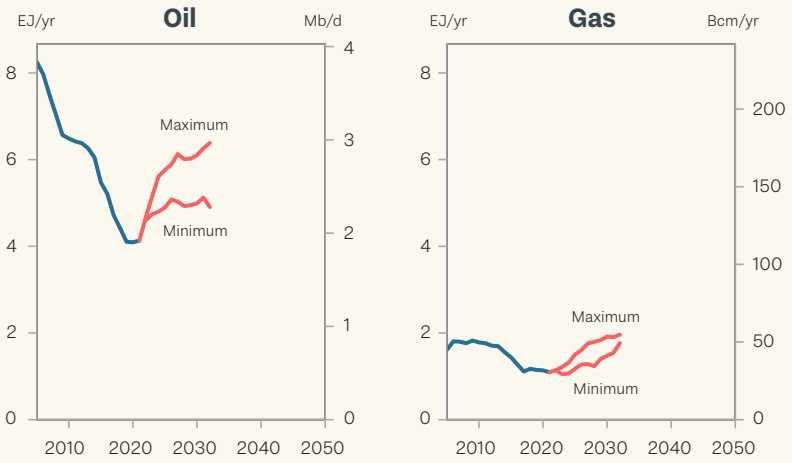


Fossil fuel transition capacity and dependence indicators

Income level	Coal direct employment	Coal economic dependence	Share of GDP from oil & gas production
Upper-middle income	No data	No data	4%

Figure 3.17

Historical (2005–2021) and projected oil and gas production for Mexico. Coal production is small (<0.5 EJ/yr) and not shown. Sources: 2018–2032 production projections under two scenarios, “maximum” and “minimum”, are reported in the 2018 outlook (SENER, 2018a, p. 71, 2018b, p. 60). Since these documents have not been updated since 2018, we apply the projected changes under each scenario to the 2021 historical oil and gas production values to estimate 2022–2032 production projections. Historical data are from the IEA (2023a).



Nigeria

Announced climate ambitions

Nigeria's updated NDC, submitted in 2021, targets an unconditional GHG emission reduction of 20% below a business-as-usual baseline projection by 2030, and a 47% reduction conditional on international support (Federal Ministry of Environment, 2021). The 2021 Climate Change Act of Nigeria sets a target for net-zero GHG emissions between 2050 and 2070 (Government of Nigeria, 2021). Later in 2021, at COP26, the President of Nigeria committed to achieving net-zero emissions by 2060 (The State House, 2021).

Government views on domestic fossil fuel production

Nigeria has long been Africa's largest oil producer and has the second-largest oil reserves in Africa, after Libya (OPEC, 2022). The Government of Nigeria considers oil and gas a mainstay of the economy, as it contributes approximately 40% of the federal government's revenue and 85–90% of export earnings (Central Bank of Nigeria, 2023a). However, the petroleum industry represents only 6% of GDP (Central Bank of Nigeria, 2023b).

With significant gas reserves amounting to 209 trillion cubic feet as of January 2023 (Addeh & Uzoho, 2023), the government declared 2020–2030 as the "decade of gas", during which gas would serve as a major generator of revenue and jobs (GECF, 2021). Nigeria's Energy Transition Plan (ETP) "recognizes the role natural gas must play as a transition fuel on the path to net zero" (ETP, 2022). Government initiatives aim to reduce the GHG emissions intensity of oil and gas production, including though the implementation of regulations to reduce flaring and industry guidelines on reducing fugitive methane emissions (Federal Government of Nigeria, 2018; NUPRC, 2022).

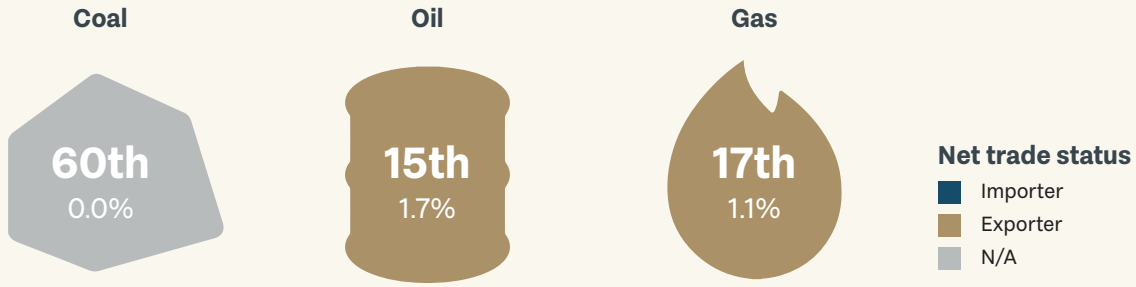
There is growing interest in exporting coal to Europe as a result of the war in Ukraine (Ezeugwu, 2022). The government signalled a return to coal exploration in 2023 through the sale of new coal blocks held by state-owned Nigerian Coal Corporation (New Telegraph, 2023).

Plans and projections for domestic fossil fuel production

Nigeria's crude oil production declined between 2020 and 2022 due to oversupply in the industry and damage to oil infrastructure in the Niger Delta, with daily production falling below 1 Mb/d, the lowest level since 1983 (Addeh, 2023; IEA, 2023a). Following the adoption of new security measures by the federal government, official production increased to 1.4 Mb/d in the first quarter of 2023 (Akpan, 2023; Elumoye et al., 2023). According to Nigeria Agenda 2050, a national development plan released in May 2023, oil production is projected to reach 2.4 Mb/d by 2025, decline to 2 Mb/d by 2030 and then to 1 Mb/d by 2050 (Federal Government of Nigeria, 2023). However, the government has also signalled a more ambitious oil production target of 4 Mb/d by 2030 (Ndwaru, 2022).

Nigeria Agenda 2050 also foresees a ramp-up of domestic gas production, approximately doubling by 2030 and increasing fourfold by 2050, compared to 2020 levels (Federal Government of Nigeria, 2023). The Ajaokuta-Kaduna-Kano gas pipeline from Nigeria's gas-rich east to the north of the country is under construction, and is part of a proposed trans-Saharan pipeline, which, if built, would enable gas exports to Europe (Mojjido, 2023).

Rank of country in, and share of, global production, and net trade status

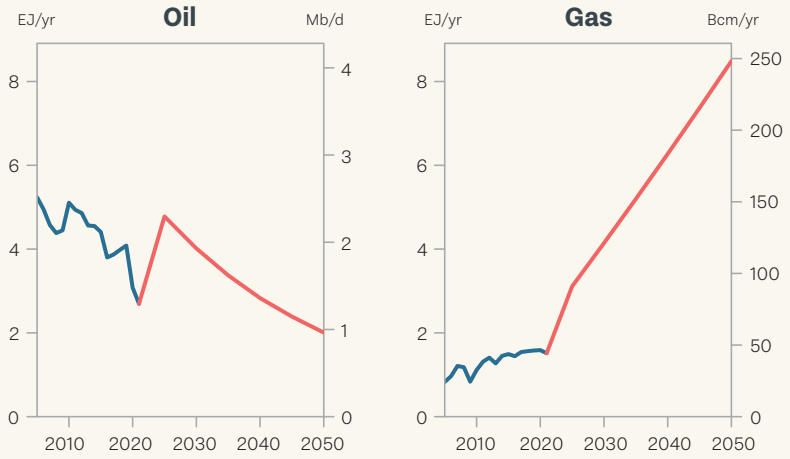


Fossil fuel transition capacity and dependence indicators

Income level	Coal direct employment	Coal economic dependence	Share of GDP from oil & gas production
Lower-middle income	No data	No data	10%

Figure 3.18

Historical (2005–2021) and projected oil and gas production for Nigeria. Coal production is small (<0.5 EJ/yr) and not shown. Projections are from the Nigeria Agenda 2050 plan (Federal Government of Nigeria, 2023). The projected gas production (as shown) does not include fractions that are re-injected and used by producers and flared, which accounted for around 25% of total production in 2020 and is expected to reduce to 20% by 2050 according to Nigeria Agenda 2050. Historical data are from the IEA (2023a).



Government support for domestic fossil fuel production

- In 2021, the government signed the Petroleum Industry Act (PIA) into law (Federal Government of Nigeria, 2021) to reform the governance and regulation of the petroleum industry and encourage investment in fossil fuels. The PIA commercializes the Nigerian National Petroleum Corporation (NNPC), codifies transparency, accountability, and good governance over fossil fuel resources, and allocates funds towards developing host communities where fossil fuels are produced. The PIA also establishes a fund to support exploration in frontier basins using a portion of leasing rents and NNPC's profits (Federal Government of Nigeria, 2021). It also provides tax holidays of up to 10 years for midstream gas operations and lowers the maximum tax rate on profits from upstream oil and gas operations from 85% to 60%. For companies operating in deep offshore areas, the maximum tax rate is even lower at 30% (PwC Nigeria, 2021).
- No other information is publicly available on tax expenditures or other measures to support fossil fuel production in Nigeria.

Government support for international fossil fuel production

No support was identified.

Policies and discourses on a managed wind-down of fossil fuel production

No such government policies or discourses were identified.

Policies and discourses supporting a just and equitable transition away from fossil fuel production

A key objective of Nigeria's ETP is to promote a "fair, inclusive and equitable energy transition in Africa that will include gas as a 'transitionary fuel'" (ETP, 2022). The Initiative for Climate Action Transparency in partnership with Nigeria's Federal Ministry of Labour and Productivity seeks to implement the Just Transition and Gender Initiative that includes a focus on the energy sector (ICAT, 2023).

Colombia

Announced climate ambitions

Colombia's updated NDC, submitted in 2020, pledged not to emit more than 169.44 $MtCO_2eq$ by 2030 (Government of Colombia, 2020). This is equivalent to a 51% emissions reduction from a revised 2030 reference scenario, compared to a 20% reduction in the first NDC (UNDP, 2022). In December 2021, Colombia enshrined a 2050 net-zero GHG emissions target into law (Congreso de Colombia, 2021b).

Government views on domestic fossil fuel production

The extractive sector, which is dominated by fossil fuels, accounts for almost 11% of government revenues and over 50% of the country's export earnings (EITI, 2020; Moloney, 2022; Portafolio, 2023). Colombia generally exports more than 90% of its produced coal, which accounted for about 13% of total exports in 2020 (NMA, 2022). In 2022, Colombia's newly elected administration announced that it will not approve any new oil and gas exploration licenses (Taylor, 2023). However, there is some uncertainty about the country's future energy policy direction (Moloney, 2023; Paula Rubiano A., 2022). For example, the Ministry of Finance has stated that the country remains open to new oil and gas projects, and the government's strategy for advancing a just and sustainable energy transition includes plans for continued exploration and production of oil and gas to ensure energy self-sufficiency (MME, 2023b; Taylor, 2023). However, the Ministry of Mines and Energy has reaffirmed the exploration ban and indicated that pilot fracking projects would also be halted (Forbes, 2023).

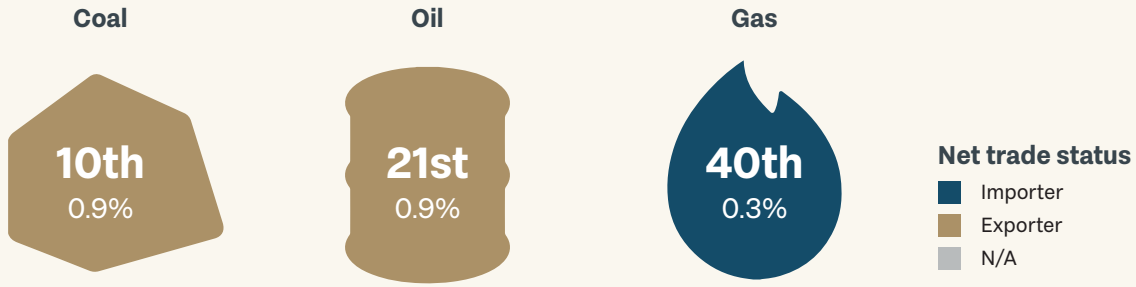
Plans and projections for domestic fossil fuel production

Colombia's draft 2022–2052 National Energy Plan, which was being finalized as of August 2023, presents scenarios of coal, oil, and gas production based on varying estimates of reserves and resources, with Scenario 1 having the "greatest certainty" (UPME, 2023). These production scenarios are one of many elements that inform five different energy scenarios presented in the plan. As shown in Figure 3.19, under the "Actualización" (updated) energy scenario featuring fossil fuel production Scenario 1, coal production is projected to more than double between 2021 and 2035, before declining by around 70% by 2050. Oil and gas production are expected to decline by 67% and 45%, respectively, between 2021 and 2050. Colombia's oil and gas production have fallen steadily since 2013 due to a combination of factors, including low success rates in exploration, instability in oil-producing regions, and reduced oil demand during the COVID-19 pandemic (ACI-PET, 2016; Smith, 2020; Tarazona, 2022).

Government support for domestic fossil fuel production

- Colombia provides subsidies through tax expenditures and budgetary transfers to coal, oil, and gas production that totalled COP 2.3 billion (USD 610 million) in 2021 (OECD, 2023b). About 52% of this value goes toward public funding of Colombia's National Hydrocarbons Agency (OECD, 2023a).
- Colombia provides tax incentives for non-conventional energy projects, including blue hydrogen, which indirectly provides tax benefits for coal and gas production (Congreso de Colombia, 2021a; MME, 2021a).
- State ownership of Ecopetrol, Colombia's largest oil company, is 88.49% (Ecopetrol, 2022a). Ecopetrol has committed to investing USD 17–20 billion between 2022 and 2024, with 69% of this investment going towards domestic and international oil and gas exploration and production projects, and annual investments of about USD 5.2–6 billion continuing until at least 2040 (Ecopetrol, 2022b).

Rank of country in, and share of, global production, and net trade status



Fossil fuel transition capacity and dependence indicators

Income level
Upper-middle income

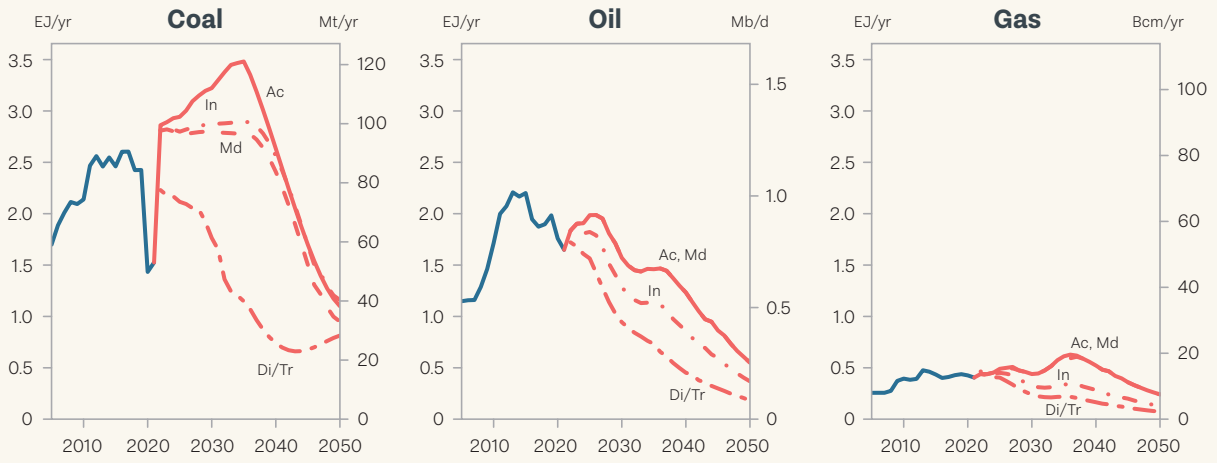
Coal direct employment
1.7 coal miners per 1,000 workers

Coal economic dependence
Low | Medium | High | Very high

Share of GDP from oil & gas production
5%

Figure 3.19

Historical (2005–2021) and projected coal, oil, and gas production for Colombia. Sources: Projections are from the draft 2022–2052 National Energy Plan (UPME, 2023). Five different energy scenarios are presented: Actualización (Ac); Modernization (Md); Inflection (In); Disruption (Di); and Transition (Tr). (The Ac and Md scenarios overlap for oil and gas, while the Di and Tr scenarios have the same fossil fuel production projections.) Historical data are from the IEA (2023a).



Government support for international fossil fuel production

Ecopetrol's planned investments include USD 1.87 billion by 2024 in the US's Permian basin and an unspecified amount in Brazil (Ecopetrol, 2022b, 2022c).

Policies and discourses on a managed wind-down of fossil fuel production

As of August 2023, the current administration's pledge to ban new oil and gas exploration projects was not yet reflected in adopted policy or legislation (Forbes, 2023). Instead, recent efforts have focused on reviewing existing contracts and implementing measures to improve resource recovery efficiency (MME & ANH, 2022). The Congress of Colombia recently dropped a proposal to ban new open-pit coal mines from the country's latest National Development Plan (DNP, 2023). In May 2023, the Senate of Colombia approved a bill to ban fracking; this bill is currently pending review and approval by Congress (Congreso de Colombia, 2022).

The Colombian administration has called for multinational banks to stop financing fossil fuels (Echeverria, 2022). In August 2023, Colombia signed on to the Beyond Oil and Gas Alliance (BOGA) as a "Friend of BOGA", making it the largest fossil fuel producer to join BOGA to date, and the only country out of the 20 profiled here to sign on to an international initiative focused on phasing out fossil fuel production (MME, 2023d).[25]

Ecopetrol has committed to reaching net-zero emissions in 2050 from its oil and gas production activities and aims to reduce its total emissions (including those from the combustion of its produced fossil fuels) by 50% by 2050 (Ecopetrol, 2023). However, none of these commitments translate to a planned reduction in production.

Policies and discourses supporting a just and equitable transition away from fossil fuel production

In recent years, the concept of a just energy transition has appeared in many government discourses. For example, Colombia's updated NDC included a commitment to develop a just energy transition for workers (Government of Colombia, 2020), and the latest four-year National Development Plan aims to accelerate a just energy transition by using financial surpluses from coal and oil production to fund alternative sectors leading to a greener economy (DNP, 2023). The concept of a just energy transition is also reiterated throughout the draft 2022–2052 National Energy Plan (UPME, 2023). However, concrete policies and implementation are still lacking. According to the Ministry of Mines and Energy, a detailed just energy transition roadmap will be released in February 2024 (MME, 2023a). The roadmap is keenly anticipated by civil society, especially in light of the country's high fiscal and economic dependency on fossil fuels and the socioeconomic and environmental impacts resulting from the abrupt closure of two major coal mines in 2020 (Paula Rubiano A., 2022; Tarazona, 2023; Yanguas-Parra et al., 2021).

[25] There are three BOGA membership levels: Core Members, Associate Members, and Friends of BOGA (see https://beyondoilandgasalliance.org/who-we-are/).

United Kingdom of Great Britain and Northern Ireland (UK)

Announced climate ambitions

In its latest NDC, the UK committed to reducing GHG emissions to at least 68% below 1990 levels by 2030 (UK Government, 2022, p. 1). The country has also established legally binding targets of reducing GHG emissions by around 77% by 2035 and achieving net-zero by 2050 (UK BEIS, 2019; UK Government, 2021b).[26]

Government views on domestic fossil fuel production

The UK's oil and gas policy is governed by a statutory duty to "maximise economic recovery" (UK Public General Acts, 1998). To meet this principal objective, the relevant authority, the Oil and Gas Authority — now known as the North Sea Transition Authority (NSTA) — develops a strategy on a four-year cycle, including obligations for the oil and gas industry. In its latest strategy, the NSTA placed, alongside the principal objective, a requirement for the industry to assist the government in meeting the 2050 net-zero target (OGA, 2021). This includes halving production-based emissions by 2030 compared to a 2018 baseline, and broader initiatives to support CCUS and the development of hydrogen production (UK BEIS & OGA, 2021). The government considers continued domestic oil and gas production as key to its energy security (UK DESNZ, 2023), and consistent with its net-zero ambition (Environmental Audit Committee, 2023, p. 14; UK BEIS, 2022a). However, the government's own Climate Change Committee has stated that "Expansion of fossil fuel production is not in line with Net Zero" (UK CCC, 2023, p. 15).

Coal production in the UK has been in decline for many years; demand has plummeted as the UK government aims to phase out unabated coal use in power generation by October 2024 (UK BEIS, 2021c). Nevertheless, the government approved a major new coal mine in 2022, the first in over 40 years, which is intended to supply coal for the steel industry in the UK and abroad (UK DLUHC, 2022). This project has faced significant opposition by civil society on climate grounds (BBC News, 2023; Friends of the Earth, 2023).

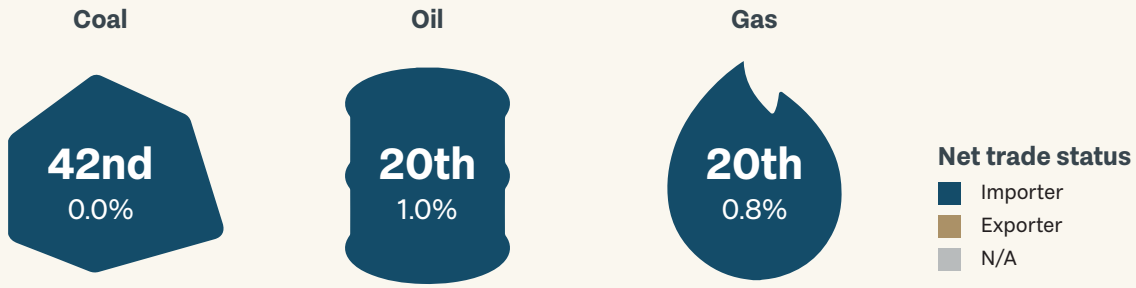
Plans and projections for domestic fossil fuel production

The NSTA's oil and gas production projections as of February 2023 are shown in Figure 3.20 (NSTA, 2023). Compared to prior projections (NSTA, 2021), UK oil and gas production are now projected to drop faster between 2021 and 2040, by 69% and 82%, respectively (compared to 58% and 70% previously). However, previous projections by the NSTA have underestimated actual production in subsequent years (Hall, 2019, pp. 18–22), and there are limited details on how these projections are developed (NSTA, 2022a).[27] The UK government has argued that the NSTA's estimated annual decline rates in oil and gas production are consistent with the country's net-zero goal and with 1.5°C-aligned global reduction pathways as estimated in the 2021 Production Gap Report and other studies (UK BEIS, 2022c, pp. 464–465).

Government support for domestic fossil fuel production

- In 2021, the UK provided tax expenditures for oil and gas production totalling GBP 2 billion (USD 2.8 billion) (OECD, 2023b).
- In recent years, profits from oil and gas production have been subject to a "ring fence corporation tax" at an effective rate of 40% (Seely, 2023). This constitutes one of the lowest oil and gas tax and royalty regimes in the world, with the global average at 70% (Graham, 2022).
- In 2022, the government brought in an Energy Profits Levy of 25%. This additional but temporary windfall tax on oil and gas company profits was then increased to 35% in January

Rank of country in, and share of, global production, and net trade status

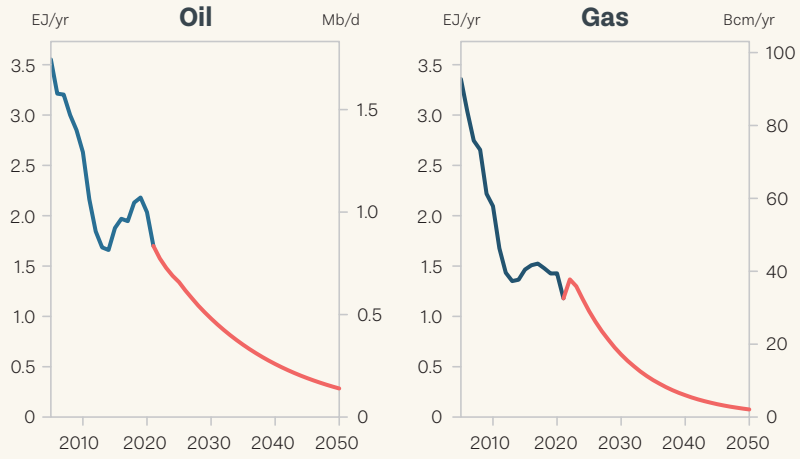


Fossil fuel transition capacity and dependence indicators

Income level	Coal direct employment	Coal economic dependence	Share of GDP from oil & gas production
High income	0.0 coal miners per 1,000 workers	No data	1%

Figure 3.20

Historical (2005–2022) and projected oil and gas production for the UK. Coal production is small (<0.5 EJ/yr) and not shown. Sources: Historical data and projections are from the North Sea Transition Authority's February 2023 oil and gas production projections (NSTA, 2023).



2023, and was set to remain in place until 2028 (UK HMRC, 2022). However, the levy comes with a generous tax relief for investments in new oil and gas fields; for every British pound invested, just over 91% is returned in tax relief (Graham, 2022).

- In 2022–2023, the UK opened new licensing rounds for oil and gas exploration and expansion in the North Sea with more than 100 awards expected (NSTA, 2022b). The government argued that this would boost the country's energy security and economy, and is not in conflict with the country's net-zero goal (NSTA, 2022b).
- Between 2023 and 2063, the UK will provide an estimated GBP 12.7 billion (USD 15.6 billion) in tax relief to oil and gas companies for the GBP 40 billion (USD 49 billion) cost of decommissioning offshore infrastructure (UK Government, 2023).

Government support for international fossil fuel production

Effective from March 2021, the UK government issued a policy of no longer providing "new direct financial or promotional support for the fossil fuel energy sector overseas", including support provided by UK Export Finance (UKEF) (UK BEIS, 2021a, p. 4). Unabated gas generation and associated infrastructure may still receive support if certain conditions are met (UK BEIS, 2021a, p. 7). The UKEF financing of up to USD 1.15 billion for the Mozambique LNG project was approved in 2020 (UK Export Finance, 2021). The UK also signed onto the Glasgow Statement pledging to end international public financing for unabated fossil fuel projects at COP26 (UK Government, 2021a).

Policies and discourses on a managed wind-down of fossil fuel production

The current government's position is that "continued oil and gas licensing is not inherently incompatible with the UK's climate objectives" (UK BEIS, 2022a, p. 3). This position was established following a review in late 2020 (UK BEIS, 2020), and again following a public consultation on designing a "climate compatibility checkpoint" launched in late 2021 (UK BEIS, 2021b). The initially proposed checkpoints included emissions from both production- and consumption-based activities, as well as a consideration of the "global production gap" (UK BEIS, 2021b, p. 24). Ultimately, the checkpoint tests focused on production-based emissions only and became an "informative" rather than a "deterministic" process, meaning a licensing round could be permitted even if the tests were not met (UK BEIS, 2022a, 2022b). Therefore, this report has found no evidence that the UK government is actively winding down oil and gas production.

Policies and discourses supporting a just and equitable transition away from fossil fuel production

The North Sea Transition Deal, a partnership between the UK government and the oil and gas sector published in March 2021, highlighted that it will invest in skills and job training oriented around CCS and hydrogen, complementing continued oil and gas production (UK BEIS & OGA, 2021). The devolved government for Scotland, where most of the UK's oil and gas sector is located, established a Just Transition Commission in 2018 to support "a net zero and climate resilient economy in a way that delivers fairness and tackles inequality and injustice" (Scottish Government, n.d.).

[26] The UK's Sixth Carbon Budget codified a target to reduce GHG emissions to 965 $MtCO_2eq$ between 2033–2037. This means that emissions (including from international aviation and shipping) will be about 77% lower in 2035 than in 1990.

[27] The NSTA publishes projections of domestic oil and gas production out to 2050 twice a year to inform the Office for Budget Responsibility's fiscal forecasts. The extent to which new licensing rounds, such as that launched in 2022 (NSTA, 2022a), and other fiscal measures that have been considered in the projections are unclear. The NSTA's description notes that "projections are not modelled but, instead, are based on informed judgement"; production projections for the next five years are more carefully developed, after which compound annual decline rates of 6% and 9% are applied to oil and gas respectively.

Germany

Announced climate ambitions

The Government of Germany amended its Climate Change Act to establish legally binding targets of carbon neutrality by 2045 and GHG emission reductions of at least by 65% by 2030, relative to 1990 levels, following a ruling by Germany's Federal Constitutional Court in 2021 (IEA, 2022d).

Government views on domestic fossil fuel production

Germany closed down its last hard coal mine in 2018, but remains the world's second-largest producer of lignite, the most carbon-intensive type of coal, after China (BGR, 2022). It is a relatively marginal producer of oil and gas (IEA, 2023a), with modest and dwindling reserves (OECD, 2023b). Hydraulic fracturing ("fracking") of unconventional oil and gas deposits was banned in 2017 (Government of Germany, 2017).

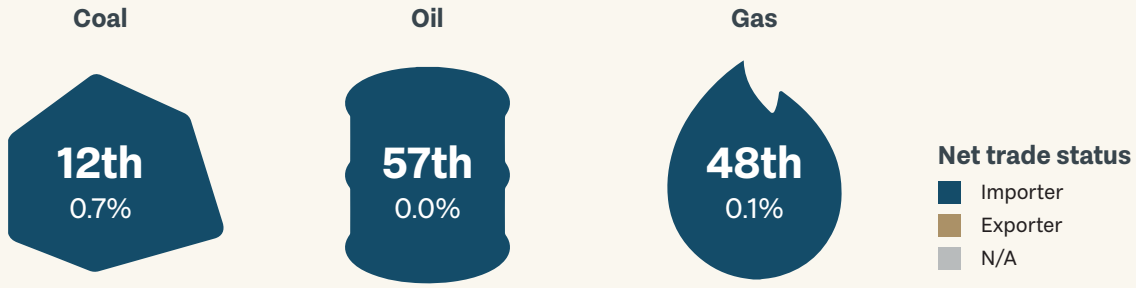
The 2020 Coal Phase-out Act states that coal-fired power generation will end in 2038 at the latest (Government of Germany, 2020); in 2021, the current government agreed to "ideally" bring this date forward to 2030 (Government of Germany, 2021). In response to the 2022–2023 global energy crisis, the government amended certain laws to temporarily delay some short-term coal generation phase-out deadlines, but did not change its long-term goals. For example, the Replacement Power Plant Availability Act allowed for a delayed closure of certain hard-coal-fired power plants and the re-activation of both hard-coal- and lignite-powered power plants from the grid reserve until 31 March 2024 (Government of Germany, 2022). An amendment to the Coal Phase-out Act delayed the retirement of 1.2 gigawatts (GW) of lignite-fired power plants from 2022 until 31 March 2024 and, at the same time, brought the coal phase-out in the western lignite mining region forward from 2038 to 2030 (for 3 GW of lignite-fired power plants) (Enerdata, 2022). These measures helped to replace some Russian gas imports; nevertheless, Germany's domestic coal consumption remains in structural decline.

Although Germany's Coal Phase-out Act does not explicitly address production, it has strong implications for lignite mining, given that the country consumes all of its produced lignite (IEA, 2023a) and that Germany's open-pit lignite mines and power plants work in tandem (BMWK, 2023a). It is also worth noting that in response to the energy crisis, the government took steps to accelerate the energy transition, including raising the target for the share of renewables in the power sector from 65% to 80% by 2030 (Goverment of Germany, 2022a). This will structurally reduce the share of fossil fuels in the energy mix, and thus the need for their production, especially in the case of lignite.

Plans and projections for domestic fossil fuel production

Figure 3.21 shows the projected declines in Germany's lignite coal, oil, and gas production to 2030 based on the "climate action plan" scenario consistent with Germany achieving carbon neutrality by 2050, as published in the Integrated National Energy and Climate Plan (NECP) adopted in June 2020 (BMWK, 2020). These do not yet reflect recent policies, such as more ambitious climate and energy targets in Germany and the EU. For example, reforms of the EU Emissions Trading Scheme are likely to significantly increase the price of coal beyond 2030 (European Council, 2023), creating enabling conditions for an earlier coal phase-out. A final version of the new NECP is expected in 2024.

Rank of country in, and share of, global production, and net trade status



Fossil fuel transition capacity and dependence indicators

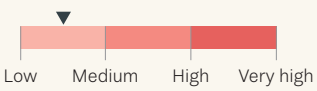
Income level

High income

Coal direct employment

0.3 coal miners per 1,000 workers

Coal economic dependence

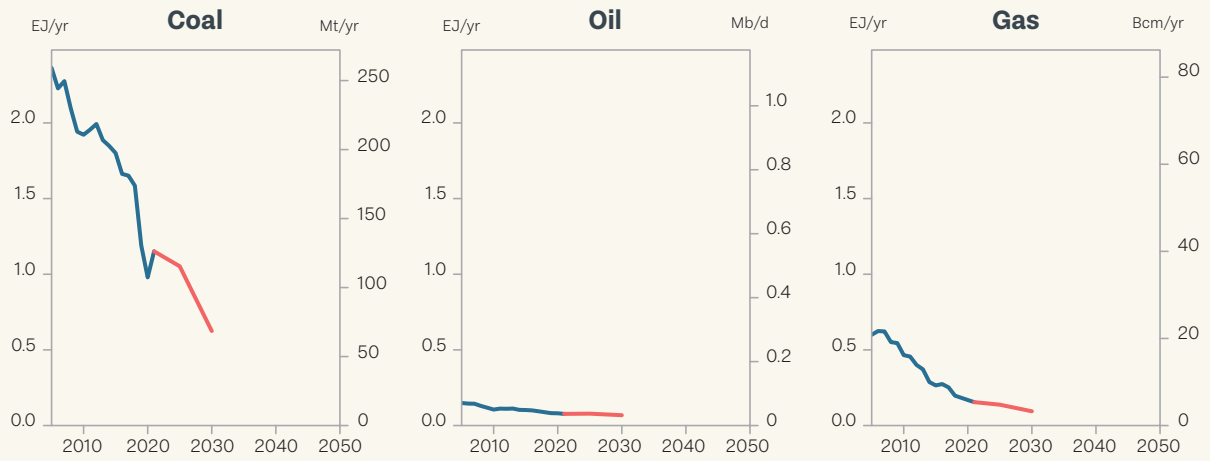


Share of GDP from oil & gas production

No data

Figure 3.21

Historical (2005–2021) and projected coal, oil, and gas production for Germany. Sources: Projections are from the "climate action plan scenario" from the 2020 Integrated National Energy and Climate Plan (BMWK, 2020). Historical data are from the IEA (2023a).



Government support for domestic fossil fuel production

■ Lignite coal producers benefit from mining royalty and water fee exemptions, amounting to EUR 49.5 million (USD 58.5 million) in 2021 (OECD, 2023b).

■ The rehabilitation and clean-up of abandoned open-pit coal mines is an expensive and long-term process, and these financial liabilities have often fallen to the state and federal governments of Germany, including for mines that were closed over a century ago (Öko-Institut, 2022; rbb24, 2023). The federal government is spending around EUR 266 million (USD 306 million) annually to help rehabilitate lignite mining sites in Eastern Germany (OECD, 2023b).

■ The government is also financing early retirement payments for hard coal miners and other assistance in North-Rhine Westphalia, home to most of Germany's traditional coal-mining areas; the total value in 2021 is estimated to be EUR 606 million (USD 697 million) (OECD, 2023b).

Government support for international fossil fuel production

■ Germany's export credit agency (Hermes Cover), the German development bank (KfW), and the German Investment and Development Corporation jointly invested USD 2.8 billion a year in public finance for fossil fuels in 2019–2021 (O'Manique et al., 2022). It is unclear how much of this investment went towards upstream projects. KfW does not invest in coal projects and limits investment in upstream oil and gas, but has stated that up to one-third of its energy investment may go to fossil gas until 2030 (E3G, 2022). Hermes Cover's latest policies exclude new coal plants and oil production with routine flaring (BMWK, 2023b).

■ At COP26 in 2021, Germany signed onto the Glasgow Statement pledging to end international public financing for unabated fossil fuel projects by the end of 2022 (UK Government, 2021a). However, a draft policy released by Germany's export credit agency in July 2023 indicates that the agency plans to continue supporting the development of new gas fields and related transport facilities until 2025 when justified by national security and in compliance with the Paris Agreement targets (BMWK, 2023b; Civillini, 2023b).

■ In light of Europe's efforts to phase out gas imports from the Russian Federation and given Germany's high gas dependency, the government views ensuring the short- to medium-term availability of gas on the global market as crucial for energy security, and has recently pushed for continued public investment in the gas sector by the G7 countries (Mooney et al., 2023). The government also plans to build more LNG import terminals than any other EU country, spending at least EUR 9.8 billion (USD 11.3 billion) between 2022 and 2038 (Kędzierski, 2023). Along with seeking long-term supply contacts, this buildout of new terminals indirectly encourages international gas production, as it signals long-term demand to producers.

Policies and discourses on a managed wind-down of fossil fuel production

Germany's Coal Phase-out Act commits to ending coal-fired power generation by 2038 at the latest. The government is supporting the affected regions (see below).

Policies and discourses supporting a just and equitable transition away from fossil fuel production

In 2019, the Commission for Growth, Structural Change and Employment made a proposal to phase out coal by 2035 or 2038 along with conditions for a just transition, with minimal socioeconomic fallout and based on collective agreements and societal acceptance. Upon its recommendation, the government committed EUR 40 billion (USD 42 billion) to managing the transition of coal regions, targeting employment (supporting workers through training and early retirements) and a move towards a more sustainable economy, as well as compensating operators (Goverment of Germany, 2023).

References: Chapter 1

Al Jaber, S. A. (2023). *COP28 UAE Letter to Parties.* https://www.cop28.com/en/letter-to-parties

Alkousaa, R. (2023, June 8). COP28 president says fossil fuels phasedown is inevitable. *Reuters.* https://www.reuters.com/business/environment/cop28-president-says-fossil-fuels-phasedown-is-inevitable-2023-06-08/

Bousso, R., & Adomaitis, N. (2023, July 3). Oil giants drill deep as profits trump climate concerns. *Reuters.* https://www.reuters.com/sustainability/climate-energy/oil-giants-drill-deep-profits-trump-climate-concerns-2023-07-03/

Brower, D. (2022, March 7). Oil price rises to highest level since 2008 on talk of Russia oil sanctions. *Financial Times.* https://www.ft.com/content/30b22986-85fd-450f-9e62-22b4fc61122c

Civillini, M. (2023, July 24). G20 divisions over key climate goals pile pressure on Cop28 hosts. *Climate Home News.* https://www.climatechangenews.com/2023/07/24/g20-divisions-over-key-climate-goals-piles-pressure-on-cop28-hosts/

Clark, C. J., Johnson, N. P., Soriano, M., Warren, J. L., Sorrentino, K. M., Kadan-Lottick, N. S., Saiers, J. E., Ma, X., & Deziel, N. C. (2022). Unconventional Oil and Gas Development Exposure and Risk of Childhood Acute Lymphoblastic Leukemia: A Case–Control Study in Pennsylvania, 2009–2017. *Environmental Health Perspectives, 130*(8), 087001. https://doi.org/10.1289/EHP11092

CSO Equity Review. (2021). *A Fair Shares Phase Out: A Civil Society Equity Review on an Equitable Global Phase Out of Fossil Fuels.* http://civilsocietyreview.org/report2021/

Cushing, L. J., Vavra-Musser, K., Chau, K., Franklin, M., & Johnston, J. E. (2020). Flaring from Unconventional Oil and Gas Development and Birth Outcomes in the Eagle Ford Shale in South Texas. *Environmental Health Perspectives, 128*(7), 077003. https://doi.org/10.1289/EHP6394

Donaghy, T. Q., Healy, N., Jiang, C. Y., & Battle, C. P. (2023). Fossil fuel racism in the United States: How phasing out coal, oil, and gas can protect communities. *Energy Research & Social Science, 100,* 103104. https://doi.org/10.1016/j.erss.2023.103104

Dubash, N. K. (2023). The G20 should forge a pact to support nations' shifts to a low-carbon future. *Nature, 619,* 9. https://doi.org/10.1038/d41586-023-02208-1

Erickson, P., & Lazarus, M. (2018). Would constraining US fossil fuel production affect global CO_2 emissions? A case study of US leasing policy. *Climatic Change, 150,* 29–42. https://doi.org/10.1007/s10584-018-2152-z

Forster, P. M., Smith, C. J., Walsh, T., Lamb, W. F., Lamboll, R., Hauser, M., Ribes, A., Rosen, D., Gillett, N., Palmer, M. D., Rogelj, J., von Schuckmann, K., Seneviratne, S. I., Trewin, B., Zhang, X., Allen, M., Andrew, R., Birt, A., Borger, A., … Zhai, P. (2023). Indicators of Global Climate Change 2022: Annual update of large-scale indicators of the state of the climate system and human influence. *Earth System Science Data, 15*(6), 2295–2327. https://doi.org/10.5194/essd-15-2295-2023

Friedlingstein, P., O'Sullivan, M., Jones, M. W., Andrew, R. M., Gregor, L., Hauck, J., Le Quéré, C., Luijkx, I. T., Olsen, A., Peters, G. P., Peters, W., Pongratz, J., Schwingshackl, C., Sitch, S., Canadell, J. G., Ciais, P., Jackson, R. B., Alin, S. R., Alkama, R., … Zheng, B. (2022). Global Carbon Budget 2022. *Earth System Science Data, 14*(11), 4811–4900. https://doi.org/10.5194/essd-14-4811-2022

Frynas, J. G., & Buur, L. (2020). The presource curse in Africa: Economic and political effects of anticipating natural resource revenues. *The Extractive Industries and Society, 7*(4), 1257–1270. https://doi.org/10.1016/j.exis.2020.05.014

Gaventa, J. (2021). *The failure of "gas for development" – Mozambique case study.* E3G. https://www.e3g.org/publications/the-failure-of-gas-for-development-mozambique-case-study/

Global Witness. (2022). *Decade of defiance: Ten years of reporting land and environmental activism worldwide.* https://www.globalwitness.org/en/campaigns/environmental-activists/decade-defiance/

Gonzalez, D. J. X., Nardone, A., Nguyen, A. V., Morello-Frosch, R., & Casey, J. A. (2023). Historic redlining and the siting of oil and gas wells in the United States. *Journal of Exposure Science & Environmental Epidemiology, 33,* 76–83. https://doi.org/10.1038/s41370-022-00434-9

IEA. (2022). *World Energy Outlook 2022.* International Energy Agency. https://www.iea.org/reports/world-energy-outlook-2022

IEA. (2023a). *CCUS Projects Explorer* [dataset]. International Energy Agency https://www.iea.org/data-and-statistics/data-tools/ccus-projects-explore

IEA. (2023b). *Global EV Outlook 2023.* International Energy Agency. https://www.iea.org/reports/global-ev-outlook-2023

IEA. (2023c). *Russia's War on Ukraine.* International Energy Agency. https://www.iea.org/topics/russias-war-on-ukraine

IEF & S&P Global. (2023). *IEF Upstream Oil and Gas Investment Outlook Report.* International Energy Forum & S&P Global Commodity Insights. https://www.ief.org/focus/ief-reports/upstream-investment-report-2023

IPCC (Ed.). (2022). *Climate Change 2022—Mitigation of Climate Change: Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.* Cambridge University Press. https://doi.org/10.1017/9781009157926

IPCC. (2023). *IPCC AR6 Synthesis Report: Summary for Policymakers.* Intergovernmental Panel on Climate Change. https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_SPM.pdf

Kartha, S., Caney, S., Dubash, N. K., & Muttitt, G. (2018). Whose carbon is burnable? Equity considerations in the allocation of a "right to extract." *Climatic Change, 150,* 117–129. https://doi.org/10.1007/s10584-018-2209-z

Liu, Z., Deng, Z., Davis, S., & Ciais, P. (2023). Monitoring global carbon emissions in 2022. *Nature Reviews Earth & Environment, 4,* 205–206. https://doi.org/10.1038/s43017-023-00406-z

References: Chapter 1 (cont.)

Mei, D., Prasad, S., O'Malia, K., & Behrsin, I. (2023). *A Race to the Top: China 2023.* Global Energy Monitor. https://globalenergymonitor.org/wp-content/uploads/2023/06/GEM-RTTT-China-2023-report-English.pdf

Mercure, J.-F., Pollitt, H., Viñuales, J. E., Edwards, N. R., Holden, P. B., Chewpreecha, U., Salas, P., Sognnaes, I., Lam, A., & Knobloch, F. (2018). Macroeconomic impact of stranded fossil fuel assets. *Nature Climate Change, 8.* https://doi.org/10.1038/s41558-018-0182-1

Net Zero Tracker. (2023). *Net Zero Tracker.* https://zerotracker.net

Nwosisi, M. C., Oguntoke, O., Taiwo, A. M., Agbozu, I. E., & Noragbon, E. J. (2021). Spatial patterns of gas flaring stations and the risk to the respiratory and dermal health of residents of the Niger Delta, Nigeria. *Scientific African, 12,* e00762. https://doi.org/10.1016/j.sciaf.2021.e00762

Paris Agreement, (2015). https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf

Prest, B. C., Fell, H., Gordon, D., & Conway, T. (2023). *Estimating the Emissions Reductions from Supply-side Fossil Fuel Interventions* (Working Paper 23–12). Resources for the Future. https://www.rff.org/publications/working-papers/estimating-the-emissions-reductions-from-supply-side-fossil-fuel-interventions/

Pye, S., Bradley, S., Hughes, N., Price, J., Welsby, D., & Ekins, P. (2020). An equitable redistribution of unburnable carbon. *Nature Communications, 11,* 3968. https://doi.org/10.1038/s41467-020-17679-3

Reed, S. (2023, February 7). BP, in a Reversal, Says It Will Produce More Oil and Gas. *The New York Times.* https://www.nytimes.com/2023/02/07/business/bp-oil-gas-profits.html

REN21. (2023). *Renewables 2023 Global Status Report.* REN21. https://www.ren21.net/gsr-2023/

Reuters & Lo, J. (2023, July 13). UAE's Cop28 president plans "brutally honest" climate summit. *Climate Home News.* https://www.climatechangenews.com/2023/07/13/cop28-presidency-brutally-honest/

Ross, M. L. (2012). *The Oil Curse: How Petroleum Wealth Shapes the Development of Nations.* Princeton University Press.

Sokona, Y., Mulugetta, Y., Tesfamichael, M., Kaboub, F., Niclas Hällström, Stilwell, M., Adow, M., & Besaans, C. (2023). *Just Transition: A Climate, Energy and Development Vision for Africa.* https://www.justtransitionafrica.org

Steadman, S., Gençsü, I., Mustapha, S., Colenbrander, S., & Tyson, J. (2023). *Indebted: How to support countries heavily reliant on oil and gas revenues to secure long-term prosperity.* Overseas Development Institute. https://odi.org/en/publications/indebted-how-to-support-countries-heavily-reliant-on-oil-and-gas-revenues-to-secure-long-term-prosperity/

Tong, D., Zhang, Q., Zheng, Y., Caldeira, K., Shearer, C., Hong, C., Qin, Y., & Davis, S. J. (2019). Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target. *Nature, 572,* 373–377. https://doi.org/10.1038/s41586-019-1364-3

Trout, K., Muttitt, G., Lafleur, D., Van de Graaf, T., Mendelevitch, R., Mei, L., & Meinshausen, M. (2022). Existing fossil fuel extraction would warm the world beyond 1.5 °C. *Environmental Research Letters, 17*(6), 064010. https://doi.org/10.1088/1748-9326/ac6228

US Department of State. (2022, November 17). *Global Methane Pledge: From Moment to Momentum.* United States Department of State. https://www.state.gov/global-methane-pledge-from-moment-to-momentum/

Visavadia, H. (2023). Shell abandons plans to limit oil production despite previous pledge. *IR Magazine.* https://www.irmagazine.com/esg/shell-abandons-plans-limit-oil-production-despite-previous-pledge

Wang, N., Akimoto, K., & Nemet, G. F. (2021). What went wrong? Learning from three decades of carbon capture, utilization and sequestration (CCUS) pilot and demonstration projects. *Energy Policy, 158,* 112546. https://doi.org/10.1016/j.enpol.2021.112546

Winkler, H., Lecocq, F., Lofgren, H., Vilariño, M. V., Kartha, S., & Portugal-Pereira, J. (2022). Examples of shifting development pathways: Lessons on how to enable broader, deeper, and faster climate action. *Climate Action, 1.* https://doi.org/10.1007/s44168-022-00026-1

References: Chapter 2

Achakulwisut, P., Calles Almeida, P., & Arond, E. (2022, March 28). It's time to move beyond "carbon tunnel vision". *Stockholm Environment Institute.* https://www.sei.org/perspectives/move-beyond-carbon-tunnel-vision/

Achakulwisut, P., Erickson, P., Guivarch, C., Schaeffer, R., Brutschin, E., & Pye, S. (2023). Global fossil fuel reduction pathways under different climate mitigation strategies and ambitions. *Nature Communications, 14,* 5425. https://doi.org/10.1038/s41467-023-41105-z

Achakulwisut, P., Erickson, P., & Koplow, D. (2021). Effect of subsidies and regulatory exemptions on 2020–2030 oil and gas production and profits in the United States. *Environmental Research Letters, 16*(8), 084023. https://doi.org/10.1088/1748-9326/ac0a10

Aghion, P., Hepburn, C., Teytelboym, A., & Zenghelis, D. (2019). Path dependence, innovation and the economics of climate change. In *Handbook on Green Growth* (pp. 67–83). Edward Elgar Publishing. https://doi.org/10.4337/9781788110686

Amnesty International. (2017). *A criminal enterprise? Shell's involvement in human rights violations in Nigeria in the 1990s.* Amnesty International. https://www.amnesty.org/en/documents/AFR44/7393/2017/en/

Armstrong, C. (2020). Decarbonisation and world poverty: A just transition for fossil fuel exporting countries? *Political Studies, 68*(3), 671–688. https://doi.org/10.1177/0032321719868214

Baylin-Stern, A., & Berghout, N. (2021, February 17). Is carbon capture too expensive? *International Energy Agency.* https://www.iea.org/commentaries/is-carbon-capture-too-expensive

Blondeel, M., Bradshaw, M. J., Bridge, G., & Kuzemko, C. (2021). The geopolitics of energy system transformation: A review. *Geography Compass, 15*(7). https://doi.org/10.1111/gec3.12580

Buonocore, J. J., Reka, S., Yang, D., Chang, C., Roy, A., Thompson, T., Lyon, D., McVay, R., Michanowicz, D., & Arunachalam, S. (2023). Air pollution and health impacts of oil & gas production in the United States. *Environmental Research: Health, 1*(2), 021006. https://doi.org/10.1088/2752-5309/acc886

Byers, E., Krey, V., Kriegler, E., Riahi, K., Schaeffer, R., Kikstra, J., Lamboll, R., Nicholls, Z., Sanstad, M., Smith, C., van der Wijst, K.-I., Al Khourdajie, A., Lecocq, F., Portugal-Pereira, J., Saheb, Y., Strømann, A., Winkler, H., Auer, C., Brutschin, E., … van Vuuren, D. (2022). *AR6 Scenarios Database* [dataset]. In Climate Change 2022: Mitigation of Climate Change (1.1). Intergovernmental Panel on Climate Change. https://doi.org/10.5281/zenodo.7197970

Calverley, D., & Anderson, K. (2022). *Phaseout Pathways for Fossil Fuel Production Within Paris-compliant Carbon Budgets.* Tyndall Centre, University of Manchester. https://research.manchester.ac.uk/en/publications/phase-out-pathways-for-fossil-fuel-production-within-paris-complia

Calvin, K., Cowie, A., Berndes, G., Arneth, A., Cherubini, F., Portugal-Pereira, J., Grassi, G., House, J., Johnson, F. X., Popp, A., Rounsevell, M., Slade, R., & Smith, P. (2021). Bioenergy for climate change mitigation: Scale and sustainability. *GCB Bioenergy, 13*(9), 1346–1371. https://doi.org/10.1111/gcbb.12863

Caney, S. (2016). *Climate change, equity, and stranded assets.* Oxfam America. http://www.oxfamamerica.org/explore/research-publications/climate-change-equity-and-stranded-assets/

Creutzig, F., Erb, K.-H., Haberl, H., Hof, C., Hunsberger, C., & Roe, S. (2021). Considering sustainability thresholds for BECCS in IPCC and biodiversity assessments. *GCB Bioenergy, 13*(4), 510–515. https://doi.org/10.1111/gcbb.12798

Diluiso, F., Walk, P., Manych, N., Cerutti, N., Chipiga, V., Workman, A., Ayas, C., Cui, R. Y., Cui, D., Song, K., Banisch, L. A., Moretti, N., Callaghan, M. W., Clarke, L., Creutzig, F., Hilaire, J., Jotzo, F., Kalkuhl, M., Lamb, W. F., … Minx, J. C. (2021). Coal transitions—part 1: A systematic map and review of case study learnings from regional, national, and local coal phase-out experiences. *Environmental Research Letters, 16*(11), 113003. https://doi.org/10.1088/1748-9326/ac1b58

Donaghy, T. Q., Healy, N., Jiang, C. Y., & Battle, C. P. (2023). Fossil fuel racism in the United States: How phasing out coal, oil, and gas can protect communities. *Energy Research & Social Science, 100,* 103104. https://doi.org/10.1016/j.erss.2023.103104

Friedlingstein, P., O'Sullivan, M., Jones, M. W., Andrew, R. M., Gregor, L., Hauck, J., Le Quéré, C., Luijkx, I. T., Olsen, A., Peters, G. P., Peters, W., Pongratz, J., Schwingshackl, C., Sitch, S., Canadell, J. G., Ciais, P., Jackson, R. B., Alin, S. R., Alkama, R., … Zheng, B. (2022). Global Carbon Budget 2022. *Earth System Science Data, 14*(11), 4811–4900. https://doi.org/10.5194/essd-14-4811-2022

Fuss, S., Lamb, W. F., Callaghan, M. W., Hilaire, J., Creutzig, F., Amann, T., Beringer, T., de Oleveira Garcia, W., Hartmann, J., Khanna, T., Luderer, G., Nemet, G. F., Rogelj, J., Smith, P., Vicente Vicente, J. L., Wilcox, J., del Mar Zamora Dominguez, M., & Minx, J. C. (2018). Negative emissions—Part 2: Costs, potentials and side effects. *Environmental Research Letters, 13*(6), 063002. https://doi.org/10.1088/1748-9326/aabf9f

Gaventa, J. (2021). *The failure of 'gas for development' – Mozambique case study.* E3G. https://www.e3g.org/publications/the-failure-of-gas-for-development-mozambique-case-study/

Grant, N., Gambhir, A., Mittal, S., Greig, C., & Köberle, A. C. (2022). Enhancing the realism of decarbonisation scenarios with practicable regional constraints on CO2 storage capacity. *International Journal of Greenhouse Gas Control, 120*, 103766. https://doi.org/10.1016/j.ijggc.2022.103766

Grant, N., Hawkes, A., Mittal, S., & Gambhir, A. (2021a). Confronting mitigation deterrence in low-carbon scenarios. *Environmental Research Letters, 16*(6), 064099. https://doi.org/10.1088/1748-9326/ac0749

References: Chapter 2 (cont.)

Grant, N., Hawkes, A., Mittal, S., & Gambhir, A. (2021b). The policy implications of an uncertain carbon dioxide removal potential. *Joule, 5*(10), 2593–2605. https://doi.org/10.1016/j.joule.2021.09.004

Green, F., & Denniss, R. (2018). Cutting with both arms of the scissors: The economic and political case for restrictive supply-side climate policies. *Climatic Change, 150,* 73–87. https://doi.org/10.1007/s10584-018-2162-x

Grubb, M., Wieners, C., & Yang, P. (2021). Modeling myths: On DICE and dynamic realism in integrated assessment models of climate change mitigation. *WIREs Climate Change, 12*(3), e698. https://doi.org/10.1002/wcc.698

Grubert, E., & Hastings-Simon, S. (2022). Designing the mid-transition: A review of medium-term challenges for coordinated decarbonization in the United States. *WIREs Climate Change, 13*(3), e768. https://doi.org/10.1002/wcc.768

Grubler, A., Wilson, C., Bento, N., Boza-Kiss, B., Krey, V., McCollum, D. L., Rao, N. D., Riahi, K., Rogelj, J., De Stercke, S., Cullen, J., Frank, S., Fricko, O., Guo, F., Gidden, M., Havlík, P., Huppmann, D., Kiesewetter, G., Rafaj, P., … Valin, H. (2018). A low energy demand scenario for meeting the 1.5°C target and sustainable development goals without negative emission technologies. *Nature Energy, 3,* 515–527. https://doi.org/10.1038/s41560-018-0172-6

Harfoot, M. B. J., Tittensor, D. P., Knight, S., Arnell, A. P., Blyth, S., Brooks, S., Butchart, S. H. M., Hutton, J., Jones, M. I., Kapos, V., Scharlemann, J. P. W., & Burgess, N. D. (2018). Present and future biodiversity risks from fossil fuel exploitation. *Conservation Letters, 11*(4), e12448. https://doi.org/10.1111/conl.12448

Harmsen, M., Kriegler, E., van Vuuren, D. P., van der Wijst, K.-I., Luderer, G., Cui, R., Dessens, O., Drouet, L., Emmerling, J., Morris, J. F., Fosse, F., Fragkiadakis, D., Fragkiadakis, K., Fragkos, P., Fricko, O., Fujimori, S., Gernaat, D., Guivarch, C., Iyer, G., … Zakeri, B. (2021). Integrated assessment model diagnostics: Key indicators and model evolution. *Environmental Research Letters, 16*(5), 054046. https://doi.org/10.1088/1748-9326/abf964

Heede, R. (2014). Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010. *Climatic Change, 122,* 229–241. https://doi.org/10.1007/s10584-013-0986-y

Huppmann, D., Kriegler, E., Krey, V., Riahi, K., Rogelj, J., Calvin, K., Humpenoeder, F., Popp, A., Rose, S. K., Weyant, J., Bauer, N., Bertram, C., Bosetti, V., Doelman, J., Drouet, L., Emmerling, J., Frank, S., Fujimori, S., Gernaat, D., … Zhang, R. (2019). *IAMC 1.5°C scenario explorer and data hosted by IIASA* (release 2.0) [dataset]. Zenodo. https://doi.org/10.5281/ZENODO.3363345

IEA. (2021). *Net zero by 2050: A roadmap for the global energy sector.* International Energy Agency. https://www.iea.org/reports/net-zero-by-2050

IEA. (2022a). *An Energy Sector Roadmap to Net Zero Emissions in Indonesia.* International Energy Agency. https://www.iea.org/reports/an-energy-sector-roadmap-to-net-zero-emissions-in-indonesia

IEA. (2022b). *Carbon capture, utilisation and storage—Fuels & Technologies.* International Energy Agency. https://www.iea.org/fuels-and-technologies/carbon-capture-utilisation-and-storage

IEA. (2022c). *World Energy Outlook 2022.* International Energy Agency. https://www.iea.org/reports/world-energy-outlook-2022

IEA. (2023a). *CCUS Projects Explorer* [dataset]. International Energy Agency https://www.iea.org/data-and-statistics/data-tools/ccus-projects-explorer

IEA. (2023b). *Greenhouse Gas Emissions from Energy (2022 edition)* [dataset]. Organisation for Economic Cooperation and Development. https://doi.org/10.1787/co2-data-en

IEA. (2023c). *Net zero roadmap: A global pathway to keep the 1.5°C goal in reach.* International Energy Agency. https://www.iea.org/reports/net-zero-roadmap-a-global-pathway-to-keep-the-15-0c-goal-in-reach

IEA. (2023d). *World energy statistics and balances (2022 edition)* [dataset]. Organisation for Economic Cooperation and Development. https://doi.org/10.1787/data-00512-en

IMF. (2023). *Economic Consequences of Large Extraction Declines: Lessons for the Green Transition.* International Monetary Fund. https://www.imf.org/en/Publications/WP/Issues/2023/05/08/Economic-Consequences-of-Large-Extraction-Declines-Lessons-for-the-Green-Transition-533196

IPCC. (2018). *Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty.* Cambridge University Press. https://doi.org/10.1017/9781009157940

IPCC. (2021). *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.* Cambridge University Press. https://doi.org/10.1017/9781009157896

IPCC (Ed.). (2022). *Climate Change 2022—Mitigation of Climate Change: Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.* Cambridge University Press. https://doi.org/10.1017/9781009157926

IPCC. (2023). *IPCC AR6 Synthesis Report: Summary for Policymakers.* Intergovernmental Panel on Climate Change. https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_SPM.pdf

Kartha, S., Caney, S., Dubash, N. K., & Muttitt, G. (2018). Whose carbon is burnable? Equity considerations in the allocation of a "right to extract". *Climatic Change, 150,* 117–129. https://doi.org/10.1007/s10584-018-2209-z

Kartha, S., Lazarus, M., & Tempest, K. (2016). *Fossil fuel production in a 2°C world: The equity implications of a diminishing carbon budget* [SEI Discussion Brief]. Stockholm Environment Institute. https://www.sei.org/publications/equity-carbon-budget/

References: Chapter 2 (cont.)

Kemfert, C., Präger, F., Braunger, I., Hoffart, F. M., & Brauers, H. (2022). The expansion of natural gas infrastructure puts energy transitions at risk. *Nature Energy, 7,* 582–587. https://doi.org/10.1038/s41560-022-01060-3

Kikstra, J. S., Nicholls, Z. R. J., Smith, C. J., Lewis, J., Lamboll, R. D., Byers, E., Sandstad, M., Meinshausen, M., Gidden, M. J., Rogelj, J., Kriegler, E., Peters, G. P., Fuglestvedt, J. S., Skeie, R. B., Samset, B. H., Wienpahl, L., van Vuuren, D. P., van der Wijst, K.-I., Al Khourdajie, A., … Riahi, K. (2022). The IPCC Sixth Assessment Report WGIII climate assessment of mitigation pathways: From emissions to global temperatures. *Geoscientific Model Development, 15*(24), 9075–9109. https://doi.org/10.5194/gmd-15-9075-2022

Lane, J., Greig, C., & Garnett, A. (2021). Uncertain storage prospects create a conundrum for carbon capture and storage ambitions. *Nature Climate Change, 11,* 925–936. https://doi.org/10.1038/s41558-021-01175-7

Le Billon, P., & Kristoffersen, B. (2019). Just cuts for fossil fuels? Supply-side carbon constraints and energy transition. *Environment and Planning A: Economy and Space, 52*(6), 1072–1092. https://doi.org/10.1177/0308518X18816702

Lenferna, G. A. (2018). Can we equitably manage the end of the fossil fuel era? *Energy Research & Social Science, 35,* 217–223. https://doi.org/10.1016/j.erss.2017.11.007

Luderer, G., Madeddu, S., Merfort, L., Ueckerdt, F., Pehl, M., Pietzcker, R., Rottoli, M., Schreyer, F., Bauer, N., Baumstark, L., Bertram, C., Dirnaichner, A., Humpenöder, F., Levesque, A., Popp, A., Rodrigues, R., Strefler, J., & Kriegler, E. (2022). Impact of declining renewable energy costs on electrification in low-emission scenarios. *Nature Energy, 7*(1), 32–42. https://doi.org/10.1038/s41560-021-00937-z

McLaren, D., & Markusson, N. (2020). The co-evolution of technological promises, modelling, policies and climate change targets. *Nature Climate Change, 10,* 392–397. https://doi.org/10.1038/s41558-020-0740-1

Mercure, J.-F., Pollitt, H., Bassi, Andrea. M., Viñuales, Jorge. E., & Edwards, N. R. (2016). Modelling complex systems of heterogeneous agents to better design sustainability transitions policy. *Global Environmental Change, 37,* 102–115. https://doi.org/10.1016/j.gloenvcha.2016.02.003

Muttitt, G., & Kartha, S. (2020). Equity, climate justice and fossil fuel extraction: Principles for a managed phase out. *Climate Policy, 20*(8), 1024–1042. https://doi.org/10.1080/14693062.2020.1763900

OECD. (2022). *Global Plastics Outlook: Economic Drivers, Environmental Impacts and Policy Options*. Organisation for Economic Co-operation and Development. https://doi.org/10.1787/de747aef-en

Paris Agreement, (2015). https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf

Pye, S., Bradley, S., Hughes, N., Price, J., Welsby, D., & Ekins, P. (2020). An equitable redistribution of unburnable carbon. *Nature Communications, 11,* 3968. https://doi.org/10.1038/s41467-020-17679-3

Raimi, M. O., Sawyerr, H. O., Ezekwe, C. I., & Opasola, A. O. (2022). Quality Water, Not Everywhere: Assessing the Hydrogeochemistry of Water Quality Across Ebocha-Obrikom Oil and Gas Flaring Area in the Core Niger Delta Region of Nigeria. *Pollution, 8*(3), 751–778. https://doi.org/10.2139/ssrn.4124546

Riahi, K., Schaeffer, R., Arango, J., Calvin, K., Guivarch, C., Hasegawa, T., Jiang, K., Kriegler, E., Matthews, R., Peters, G. P., Rao, A., Robertson, S., Sebbit, A. M., Steinberger, J., Tavoni, M., & van Vuuren, D. P. (2022). Chapter 3: Mitigation pathways compatible with long-term goals. In *Climate Change 2022—Mitigation of Climate Change: Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.* Cambridge University Press. https://www.ipcc.ch/report/ar6/wg3

Rogelj, J., Fransen, T., den Elzen, M. G. J., Lamboll, R. D., Schumer, C., Kuramochi, T., Hans, F., Mooldijk, S., & Portugal-Pereira, J. (2023). Credibility gap in net-zero climate targets leaves world at high risk. *Science, 380*(6649), 1014–1016. https://doi.org/10.1126/science.adg6248

Rogelj, J., Schleussner, C.-F., & Hare, W. (2017). Getting It Right Matters: Temperature Goal Interpretations in Geoscience Research. *Geophysical Research Letters, 44*(20), 10,662-10,665. https://doi.org/10.1002/2017GL075612

Sanchez, F., Björn, N., Olle, O., & Linde, L. (2023). *Lessons from oil and gas transitions in the North Sea.* Stockholm Environment Institute. https://doi.org/10.51414/sei2023.041

Schleussner, C.-F., Ganti, G., Rogelj, J., & Gidden, M. J. (2022). An emission pathway classification reflecting the Paris Agreement climate objectives. *Communications Earth & Environment, 3,* 135. https://doi.org/10.1038/s43247-022-00467-w

Schleussner, C.-F., Rogelj, J., Schaeffer, M., Lissner, T., Licker, R., Fischer, E. M., Knutti, R., Levermann, A., Frieler, K., & Hare, W. (2016). Science and policy characteristics of the Paris Agreement temperature goal. *Nature Climate Change, 6,* 827–835. https://doi.org/10.1038/nclimate3096

SEI, IISD, ODI, Climate Analytics, CICERO, & UNEP. (2019). *The Production Gap: The discrepancy between countries' planned fossil fuel production and global production levels consistent with limiting warming to 1.5°C or 2°C.* Stockholm Environment Institute, International Institute for Sustainable Development, Overseas Development Institute, Climate Analytics, CICERO Center for International Climate Research, and United Nations Environment Programme. http://productiongap.org/2019report/

SEI, IISD, ODI, E3G, & UNEP. (2020). *The Production Gap: Special Report 2020.* Stockholm Environment Institute, International Institute for Sustainable Development, Overseas Development Institute, E3G, and United Nations Environment Programme. http://productiongap.org/2020report

References: Chapter 2 (cont.)

SEI, IISD, ODI, E3G, & UNEP. (2021). *The Production Gap: Governments' planned fossil fuel production remains dangerously out of sync with Paris Agreement limits.* Stockholm Environment Institute, International Institute for Sustainable Development, Overseas Development Institute, E3G and United Nations Environment Programme. https://productiongap.org/2021report/

Semieniuk, G., Holden, P. B., Mercure, J.-F., Salas, P., Pollitt, H., Jobson, K., Vercoulen, P., Chewpreecha, U., Edwards, N. R., & Viñuales, J. E. (2022). Stranded fossil-fuel assets translate to major losses for investors in advanced economies. *Nature Climate Change, 12,* 532–538. https://doi.org/10.1038/s41558-022-01356-y

Seto, K. C., Davis, S. J., Mitchell, R. B., Stokes, E. C., Unruh, G., & Ürge-Vorsatz, D. (2016). Carbon lock-in: Types, causes, and policy implications. *Annual Review of Environment and Resources, 41,* 425–452. https://doi.org/10.1146/annurev-environ-110615-085934

Smith, S., Geden, O., Nemet, G. F., Gidden, M., Lamb, W. F., Powis, C., Bellamy, R., Callaghan, M., Cowie, A., Cox, E., Fuss, S., Gasser, T., Grassi, G., Greene, J., Lueck, S., Mohan, A., Müller-Hansen, F., Peters, G., Pratama, Y., … Minx, J. C. (2023). *State of Carbon Dioxide Removal—1st Edition.* https://osf.io/w3b4z/

Soergel, B., Kriegler, E., Weindl, I., Rauner, S., Dirnaichner, A., Ruhe, C., Hofmann, M., Bauer, N., Bertram, C., Bodirsky, B. L., Leimbach, M., Leininger, J., Levesque, A., Luderer, G., Pehl, M., Wingens, C., Baumstark, L., Beier, F., Dietrich, J. P., … Popp, A. (2021). A sustainable development pathway for climate action within the UN 2030 Agenda. *Nature Climate Change, 11,* 656–664. https://doi.org/10.1038/s41558-021-01098-3

Stern, N., Stiglitz, J., & Taylor, C. (2022). The economics of immense risk, urgent action and radical change: Towards new approaches to the economics of climate change. *Journal of Economic Methodology, 29*(3), 181–216. https://doi.org/10.1080/1350178X.2022.2040740

Stoddard, I., Anderson, K., Capstick, S., Carton, W., Depledge, J., Facer, K., Gough, C., Hache, F., Hoolohan, C., Hultman, M., Hällström, N., Kartha, S., Klinsky, S., Kuchler, M., Lövbrand, E., Nasiritousi, N., Newell, P., Peters, G. P., Sokona, Y., … Williams, M. (2021). Three Decades of Climate Mitigation: Why Haven't We Bent the Global Emissions Curve? *Annual Review of Environment and Resources, 46*(1), 653–689. https://doi.org/10.1146/annurev-environ-012220-011104

Temper, L., Demaria, F., Scheidel, A., Del Bene, D., & Martinez-Alier, J. (2018). The Global Environmental Justice Atlas (EJAtlas): Ecological distribution conflicts as forces for sustainability. *Sustainability Science, 13,* 573–584. https://doi.org/10.1007/s11625-018-0563-4

Tong, D., Zhang, Q., Zheng, Y., Caldeira, K., Shearer, C., Hong, C., Qin, Y., & Davis, S. J. (2019). Committed emissions from existing energy infrastructure jeopardize 1.5 °C climate target. *Nature, 572,* 373–377. https://doi.org/10.1038/s41586-019-1364-3

Trout, K., Muttitt, G., Lafleur, D., Van de Graaf, T., Mendelevitch, R., Mei, L., & Meinshausen, M. (2022). Existing fossil fuel extraction would warm the world beyond 1.5 °C. *Environmental Research Letters, 17*(6), 064010. https://doi.org/10.1088/1748-9326/ac6228

UNEP. (2022). *Emissions Gap Report 2022.* United Nations Environment Programme. http://www.unep.org/resources/emissions-gap-report-2022

UNEP & CCAC. (2021). *Global methane assessment: Benefits and costs of mitigating methane emissions.* United Nations Environment Programme & Climate and Clean Air Coalition. https://www.unep.org/resources/report/global-methane-assessment-benefits-and-costs-mitigating-methane-emissions

UNFCCC. (2021). *Glasgow Climate Pact.* https://unfccc.int/documents/310475

UNFCCC. (2022). *Sharm el-Sheikh Implementation Plan.* https://unfccc.int/sites/default/files/resource/cop27_auv_2_cover%20decision.pdf?download

United Nations. (1992). *United Nations Framework Convention on Climate Change.* https://unfccc.int/resource/docs/convkp/conveng.pdf

van Beek, L., Hajer, M., Pelzer, P., van Vuuren, D., & Cassen, C. (2020). Anticipating futures through models: The rise of Integrated Assessment Modelling in the climate science-policy interface since 1970. *Global Environmental Change, 65,* 102191. https://doi.org/10.1016/j.gloenvcha.2020.102191

Vohra, K., Vodonos, A., Schwartz, J., Marais, E. A., Sulprizio, M. P., & Mickley, L. J. (2021). Global mortality from outdoor fine particle pollution generated by fossil fuel combustion: Results from GEOS-Chem. *Environmental Research, 195,* 110754. https://doi.org/10.1016/j.envres.2021.110754

Wang, N., Akimoto, K., & Nemet, G. F. (2021). What went wrong? Learning from three decades of carbon capture, utilization and sequestration (CCUS) pilot and demonstration projects. *Energy Policy, 158,* 112546. https://doi.org/10.1016/j.enpol.2021.112546

Way, R., Ives, M. C., Mealy, P., & Farmer, J. D. (2022). Empirically grounded technology forecasts and the energy transition. *Joule, 6*(9), 2057–2082. https://doi.org/10.1016/j.joule.2022.08.009

Wilson, C., Guivarch, C., Kriegler, E., van Ruijven, B., van Vuuren, D. P., Krey, V., Schwanitz, V. J., & Thompson, E. L. (2021). Evaluating process-based integrated assessment models of climate change mitigation. *Climatic Change, 166,* 3. https://doi.org/10.1007/s10584-021-03099-9

World Bank. (2022). *World Bank country classifications by income level: 2022–2023* [dataset]. https://blogs.worldbank.org/opendata/new-world-bank-country-classifications-income-level-2022-2023

References: Chapter 3

117th Congress. (2022). *H.R. 5376—Inflation Reduction Act of 2022.* United States Congress. https://www.congress.gov/bill/117th-congress/house-bill/5376

118th Congress. (2023). *H.R. 3746—Fiscal Responsibility Act of 2023.* United States Congress. http://www.congress.gov/bill/118th-congress/house-bill/3746

Achakulwisut, P., Erickson, P., & Koplow, D. (2021). Effect of subsidies and regulatory exemptions on 2020–2030 oil and gas production and profits in the United States. *Environmental Research Letters, 16*(8), 084023. https://doi.org/10.1088/1748-9326/ac0a10

ACIPET. (2016). *Éxito exploratorio en Colombia.* Asociación Colombiana de Ingenieros de Petróleos. https://acipet.com/nuevobem/model/archs/2016/EXITO%20EXPLORATORIO%20EN%20COLOMBIA%20FINAL.pdf

ADB. (2022a). *African Economic Outlook 2022.* African Development Bank. https://www.afdb.org/en/documents/african-economic-outlook-2022

ADB. (2022b, November 14). ADB and Indonesia Partners Sign Landmark MOU on Early Retirement Plan for First Coal Power Plant Under Energy Transition Mechanism. *Asian Development Bank.* https://www.adb.org/news/adb-and-indonesia-partners-sign-landmark-mou-early-retirement-plan-first-coal-power-plant

Addeh, E. (2023, May 11). Apprehension as Nigeria's Oil Production Hits Seven-month Low. *This Day Live.* https://www.thisdaylive.com/index.php/2023/05/11/apprehension-as-nigerias-oil-production-hits-seven-month-low/

Addeh, E., & Uzoho, P. (2023, April 21). NUPRC: Nigeria's oil reserves fell by 0.22%, gas pool rose 0.10% in 2022. *This Day Live.* https://www.thisdaylive.com/index.php/2023/04/21/nuprc-nigerias-oil-reserves-fell-by-0-22-gas-pool-rose-0-10-in-2022/

Adler, B. (2022, November 17). In a first, U.S. signals support for U.N. agreement to phase down use of fossil fuels. *Yahoo News.* https://news.yahoo.com/in-a-first-us-signals-support-for-un-agreement-to-phase-down-use-of-fossil-fuels-000125333.html

ADNOC. (2022, November 28). *UAE President Chairs ADNOC Board of Directors Meeting.* https://adnocgas.ae/en/news-and-media/press-releases/2023/uae-president-chairs-adnoc-board-of-directors-meeting

ADNOC. (2023a). *Advancing Towards Net Zero.* Abu Dhabi National Oil Company. https://www.adnoc.ae/-/media/Adnoc-v2/Sub-Brands/Sustainability-and-Energy-Transition/Files/Advancing-TowardsNetZero---Delivering-Progress--JULY2023.ashx

ADNOC. (2023b). *Role of Natural Gas.* https://www.adnoc.ae/en/sustainability-and-energy-transition/energy-transition/role-of-natural-gas

Aklin, M., & Urpelainen, J. (2022, August 2). Enable a just transition for American fossil fuel workers through federal action. *The Brookings Institution.* https://www.brookings.edu/research/enable-a-just-transition-for-american-fossil-fuel-workers-through-federal-action/

Akpan, U. (2023, April 10). Nigeria's oil production drops 2% to 1.517million bpd. *Vanguard News.* https://www.vanguardngr.com/2023/04/nigerias-oil-production-drops-2-to-1-517million-bpd/

Al Jazeera. (2022, November 29). *QatarEnergy, ConocoPhillips sign LNG deal for Germany.* https://www.aljazeera.com/news/2022/11/29/qatarenergy-conocophillips-sign-lng-deal-for-germany

Al Jazeera. (2023, June 20). *Qatar secures second major LNG supply deal with China.* https://www.aljazeera.com/news/2023/6/20/qatar-secures-second-major-lng-supply-deal-with-china

Al-Abdullah, Y. M., Shehabi, M., & Sreekanth, K. J. (2020). *2020 Kuwait Energy Outlook: Current Policies and Necessity of Reform.* Kuwait Institute for Scientific Research. https://www.kisr.edu.kw/media/filer_public/52/a7/52a7faac-837d-44dd-8f05-d78f6e6b2335/keo_2020_web_version_new.pdf

Alifirova, E. (2021, May 17). The Government of the Russian Federation approved the general scheme for the development of the gas and oil industries until 2035. *Neftegaz.Ru.* https://neftegaz.ru/news/gosreg/680394-pravitelstvo-rf-utverdilo-genskhemy-razvitiya-gazovoy-i-neftyanoy-otrasley-do-2035-g/

Almheiri, M. bint M. S. H. (2023, February 17). *Power shifts: Geopolitics of the green transition* [Munich Security Conference]. https://securityconference.org/en/msc-2023/agenda/event/power-shifts-geopolitics-of-the-green-transition/

Al-Sarihi, A., & Mason, M. (2020). Challenges and opportunities for climate policy integration in oil-producing countries: The case of the UAE and Oman. *Climate Policy, 20*(10), 1226–1241. https://doi.org/10.1080/14693062.2020.1781036

ANP. (n.d.-a). *Painel Dinâmico: Consulta das Previsões de Atividade, Investimento e Produção na Fase de Produção.* Agência Nacional do Petróleo, Gás Natural e Biocombustíveis. Retrieved June 18, 2023, from https://www.gov.br/anp/pt-br/centrais-de-conteudo/paineis-dinamicos-da-anp/paineis-dinamicos-sobre-exploracao-e-producao-de-petroleo-e-gas/paineis-dinamicos-de-producao-de-petroleo-e-gas-natural

ANP. (n.d.-b). *Produção de petróleo e gás natural nacional.* Agência Nacional do Petróleo, Gás Natural e Biocombustíveis. Retrieved June 18, 2023, from https://www.gov.br/anp/pt-br/centrais-de-conteudo/dados-abertos/producao-de-petroleo-e-gas-natural-nacional

References: Chapter 3 (cont.)

APRA. (2021, April 22). APRA releases guidance on managing the financial risks of climate change. *Australian Prudential Regulation Authority.* https://www.apra.gov.au/news-and-publications/apra-releases-guidance-on-managing-financial-risks-of-climate-change

Aramco. (2021a). *Base prospectus.* https://www.rns-pdf.londonstockexchange.com/rns/0904B_1-2021-6-7.pdf

Aramco. (2021b). *Who we are: Global presence.* https://www.aramco.com/en/who-we-are/overview/global-presence

Aramco. (2021c, October 23). *Aramco expands climate goals, stating ambition to reach operational net-zero emissions by 2050.* https://www.aramco.com/en/news-media/news/2021/ambition-to-reach-operational-net-zero-emissions-by-2050

Aramco. (2023a). *Annual report 2022.* https://www.aramco.com/-/media/publications/corporate-reports/saudi-aramco-ara-2022-english.pdf?la=en&hash=6BC0409B50ECFF4A4C743307DF2FF7BDBCEC8B43

Aramco. (2023b, March 12). *Aramco announces record full-year 2022 results.* https://www.aramco.com/en/news-media/news/2023/aramco-announces-full-year-2022-results

Aramco Ventures. (2022). *Sustainability Fund.* https://aramcoventures.com/programs-fund/sustainability-fund/

ARTC. (2022). *Hunter Valley* [Map]. Australian Rail Track Corporation. https://www.artc.com.au/customers/maps/system/hunter-valley/

Atlantic Council. (2023, January 14). *Why accessible and affordable gas plays a role in helping countries reach climate goals and expand renewable energy* [Global Energy Forum]. https://www.atlanticcouncil.org/news/transcripts/why-accessible-and-affordable-gas-plays-a-role-in-helping-countries-reach-cop-goals-and-expand-renewable-energy/

Australian Taxation Office. (2021, June 1). *Fuel tax credits—Business.* Australian Government; Australian Taxation Office. https://www.ato.gov.au/Business/Fuel-schemes/Fuel-tax-credits---business/

Barboza Mariano, J., Hernández, M., Szklo, A., Santos, T., & Cunha, B. S. L. (2023). Addendum OGEL 5 (2022)—Brazilian Policies and Regulations in the Offshore Energy Generation Chain: Implications for Short and Mid-Term Investments. *Oil, Gas & Energy Law, 5*(2022). https://www.ogel.org/journal-advance-publication-article.asp?key=748

Barboza Mariano, J., Szklo, A., & Draeger, R. (2022). Permanent Offering: A New Way of Accessing Brazilian Petroleum Resources. *Oil, Gas & Energy Law, 3*(2022). https://www.ogel.org/article.asp?key=4029

BBC News. (2023, April 12). *Whitehaven coal mine legal challenge rejected.* https://www.bbc.com/news/uk-england-cumbria-65253462

Bello, A., Lyro, B., Paiva, G., Gonzalez, G., Araújo, G., Lima, H., Sampaio, L., Guimarães, P., Guedes, R., Rafaela, T., & Telles, Y. (2023). *Neutralidade de carbono até 2050: Cenários para uma transição eficiente no Brasil* (IDB-CEBRI-EPE Energy Transition Program). Centro Brasileiro de Relações Internacionais. https://cebri.org/media/documentos/arquivos/PTE_RelatorioFinal_PT_Digital_645a72bc36da1.pdf

BGR. (2022). *Deutschland –Rohstoffsituation 2021.* Bundesanstalt für Geowissenschaften und Rohstoffe. https://www.bgr.bund.de/DE/Themen/Min_rohstoffe/Downloads/rohsit-2021.pdf?__blob=publicationFile&v=4

Birol, F., & Kant, A. (2022, January 10). India's clean energy transition is rapidly underway, benefiting the entire world. IEA Commentary. https://www.iea.org/commentaries/india-s-clean-energy-transition-is-rapidly-underway-benefiting-the-entire-world

Bloomberg News. (2022). *China Signals Coal Reliance to Continue With Three New Mines.* https://www.bloomberg.com/news/articles/2022-02-21/china-signals-coal-reliance-to-continue-with-three-new-mines

BloombergNEF. (2023, January 24). *US to See Dramatic Growth in LNG Export Capacity.* https://about.bnef.com/blog/us-to-see-dramatic-growth-in-lng-export-capacity/

BMWK. (2020). *Nationaler Energie- und Klimaplan (NECP).* Bundesministerium für Wirtschaft und Klimaschutz. https://www.bmwk.de/Redaktion/DE/Textsammlungen/Energie/necp.html

BMWK. (2023a). *Coal.* Bundesministerium für Wirtschaft und Klimaschutz. https://www.bmwk.de/Redaktion/EN/Artikel/Energy/coal.html

BMWK. (2023b, July 24). *Climate policy sector guidelines for export credit guarantees — BMWK is aligning foreign trade promotion more closely with climate protection*. Bundesministerium für Wirtschaft und Klimaschutz. https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2023/07/20230724-klimapolitische-sektorleitlinien-fur-exportkreditgarantien.html

BOGA. (n.d.-a). *Who We Are.* Beyond Oil & Gas Alliance. Retrieved October 14, 2022, from https://beyondoilandgasalliance.com/who-we-are/

BOGA. (n.d.-b). *Why BOGA.* Beyond Oil & Gas Alliance. https://beyondoilandgasalliance.org/why-boga/

Bowen, C. (2023, March 27). Safeguard mechanism one step closer to parliamentary passage. *Department of Climate Change, Energy, the Environment and Water.* https://minister.dcceew.gov.au/bowen/media-releases/safeguard-mechanism-one-step-closer-parliamentary-passage

Bowen, C., & McAllister, J. (2022, October 25). Delivering Australia's climate and energy transformation [Joint media release]. *Department of Climate Change, Energy, the Environment and Water.* https://minister.dcceew.gov.au/mcallister/media-releases/joint-media-release-delivering-australias-climate-and-energy-transformation

References: Chapter 3 (cont.)

Brady, W. J., & Crannell, J. P. (2012). Hydraulic fracturing regulation in the United States: The laissez-faire approach of the federal government and varying state regulations. *Vermont Journal of Environmental Law, 1,* 39–70.

Bridle, R., Muzondo, C., Laan, T., Viswamohanan, A., & Geddes, A. (2022). *South Africa's Energy Fiscal Policies: An inventory of subsidies, taxes, and policies impacting the energy transition.* International Institute for Sustainable Development. https://www.iisd.org/publications/south-africa-energy-subsidies

Bruce, M. (2019, July 17). The LNG industry is booming. So why are we not getting the royalties? *The New Daily.* https://thenewdaily.com.au/finance/finance-news/2019/07/17/lng-industry-booming-no-royalties/

Buli, N., & Adomaitis, N. (2022, November 3). Norway to postpone oil and gas licensing round. *Reuters.* https://www.reuters.com/business/energy/norway-postpones-oil-gas-licencing-round-media-reports-2022-11-29/

Burton, J. (2022, January 13). Coal in 2022: South Africa's Just Energy Transition Partnership. *E3G.* https://www.e3g.org/news/coal-in-2022-south-africa-s-just-energy-transition-partnership/

Burton, J., Baker, L., Marquard, A., & Lehmann-Grube, P. (2022). From MEC to net-zero: The role of the energy sector in the just transition. In N. Xaba & S. Fakir (Eds.), *A Just Transition to a Low Carbon Future in South Africa.* African Books Collective. https://mistra.org.za/mistra-publications/a-just-transition-to-a-low-carbon-future-in-south-africa/

Burton, J., Lott, T., & Rennkamp, B. (2018). Sustaining carbon lock-in: Fossil fuel subsidies in South Africa. In J. Skovgaard & H. van Asselt (Eds.), *The Politics of Fossil Fuel Subsidies and their Reform* (1st ed., pp. 229–245). Cambridge University Press. https://doi.org/10.1017/9781108241946.015

Butler, B. (2021, April 11). Shell expects to pay Australia no resource tax on gas drawn from Gorgon project. *The Guardian.* http://www.theguardian.com/business/2021/apr/12/shell-expects-to-pay-australia-no-resource-tax-on-gas-drawn-from-gorgon-project

Calles Almeida, P., Vega Araújo, J., Arond, E., Muñoz Cabré, M., Guerrero, R., Valle Riestra, E., Mariño, H., Fonseca, R., & Tamborrel, A (2023). *Transición energética en Latinoamérica: ¿hacia dónde vamos?* Stockholm Environment Institute. https://doi.org/10.51414/sei2023.002

Calverley, D., & Anderson, K. (2022). *Phaseout Pathways for Fossil Fuel Production Within Paris-compliant Carbon Budgets.* Tyndall Centre, University of Manchester. https://research.manchester.ac.uk/en/publications/phaseout-pathways-for-fossil-fuel-production-within-paris-complia

Campbell, R. (2020). *Fracking and slacking: NT Government subsidies to onshore oil and gas.* The Australia Institute. https://australiainstitute.org.au/wp-content/uploads/2020/12/P886-Fracking-and-slacking-NT-government-assistance-to-onshore-gas-Web.pdf

References: Chapter 3 (cont.)

Campbell, R., Ogge, M., & Verstegan, P. (2023). *New fossil fuel projects in Australia 2023.* The Australia Institute. https://australiainstitute.org.au/report/new-fossil-fuel-projects-in-australia-2023/

Canada Energy Regulator. (2023). *Canada's Energy Future 2023.* Government of Canada. https://www.cer-rec.gc.ca/en/data-analysis/canada-energy-future/2023/

Caney, S. (2016). *Climate change, equity, and stranded assets* [Research Backgrounder]. Oxfam America. https://policy-practice.oxfamamerica.org/static/media/files/climate_change_equity_and_stranded_assets_backgrounder.pdf

Carbon Brief. (2022, November 17). Draft COP27 agreement fails to call for 'phase-down' of all fossil fuels. *Carbon Brief.* https://www.carbonbrief.org/daily-brief/draft-cop27-agreement-fails-to-call-for-phase-down-of-all-fossil-fuels/

CAT. (2022, October 26). *Indonesia: Policies & action.* Climate Action Tracker. https://climateactiontracker.org/countries/indonesia/policies-action/

CCIA. (2021). *Guiding Opinions on High-Quality Development of the Coal Industry during the "14th Five-Year Plan."* China Coal Industry Association. http://www.coalchina.org.cn/upload-file/2021/0603/20210603114439221.pdf

Central Bank of Nigeria. (2023a). *Central Bank of Nigeria Economic Report Fourth Quarter 2022.* https://www.cbn.gov.ng/Out/2023/RSD/FOURTH%20QUARTER%202022%20ECONOMIC%20REPORT.pdf

Central Bank of Nigeria. (2023b). *Real Gross Domestic Product* [dataset]. https://www.cbn.gov.ng/rates/RealGDP.asp

Central Dispatch Department of the Fuel and Energy Complex. (2021, September 30). *General Scheme for the Development of the Oil Industry.* https://www.cdu.ru/tek_russia/issue/2021/7/930/

Chakraborty, S. (2023, February 7). India Energy Week: PM Modi seeks more investments in oil & gas, refineries. *Business Standard.* https://www.business-standard.com/article/current-affairs/india-energy-week-pm-modi-seeks-more-investments-in-oil-gas-refineries-123020600830_1.html

Chetwynd, G. (2023, May 19). Petrobras turns to Tolmasquim for energy transition. *Upstream Online.* https://www.upstreamonline.com/people/petrobras-turns-to-tolmasquim-for-energy-transition/2-1-1452506

CIL. (2021). *About us.* Coal India Limited. https://www.coalindia.in/about-us/

Civillini, M. (2023a, June 26). What does "unabated" fossil fuels mean? *Climate Home News.* https://www.climatechangenews.com/2023/06/26/what-does-unabated-fossil-fuels-mean/

Civillini, M. (2023b, July 27). Germany plans to keep funding new gas projects overseas despite pledge. *Climate Home News.* https://www.climatechangenews.com/2023/07/27/germany-plans-to-keep-funding-new-gas-projects-overseas-despite-pledge/

Climate Analytics. (2021). *Why gas is the new coal.* https://climateanalytics.org/publications/2021/why-gas-is-the-new-coal/

CNN Indonesia. (2023, February 6). *Pengamat persoalkan sumber energi baru dalam RUU EBET.* https://www.cnnindonesia.com/ekonomi/20230206165126-85-909566/pengamat-persoalkan-sumber-energi-baru-dalam-ruu-ebet

CNPC. (2021). *2020 Corporate social responsibility report: Sustainable energy supply.* China National Petroleum Corporation. https://www.cnpc.com.cn/en/csr2020enhmshn/202105/031c7f9dff8140e9b403d26db8c9fbb6/files/bfe6a34a1b7f-44d1a11c4b2ddaf7530e.pdf

CNPC. (2022). *2021 Annual Report.* China National Petroleum Corporation. https://www.cnpc.com.cn/en/2021enbvfgrme/202208/9f9800629f2b49e1bb7108eed28d1a30/files/1e36341535874a608d0b17b82df9d429.pdf

CNPC ETRI. (2022). *2060 World and China Energy Outlook (2022 Edition).* China National Petroleum Corporation. https://mp.weixin.qq.com/s/u7AJ9FsJVxvCXJ98ZshyHA

Comisión Nacional de Hidrocarburos. (2022). *Prospectiva de Producción 2022-2028: Actualización Tercer Trimestre de 2022.* https://hidrocarburos.gob.mx/estadisticas/

Commonwealth of Australia. (2023). *Budget, 2023-24: Budget Strategy and Outlook, Budget Paper No. 1.* https://budget.gov.au/content/bp1/index.htm

Comrie, S. (2022, January 27). Gwede Mantashe's vision for South Africa's energy future is powered by gas. *Daily Maverick.* https://www.dailymaverick.co.za/article/2022-01-27-gwede-mantashes-vision-for-south-africas-energy-future-is-powered-by-gas/

Congreso de Colombia. (2021a). *Ley no. 2099 de 2021.* https://dapre.presidencia.gov.co/normativa/normativa/LEY%202099%20DEL%2010%20DE%20JULIO%20DE%202021.pdf

Congreso de Colombia. (2021b). *Ley no. 2169 de 2021.* https://acmineria.com.co/sitio/wp-content/uploads/2022/01/Ley-N0002169-de-2021-1.pdf

Congreso de Colombia. (2022). *Proyecto de Ley 114 de 2022.* https://leyes.senado.gov.co/proyectos/index.php/textos-radicados-senado/p-ley-2022-2024/2674-proyecto-de-ley-114-de-2022

Congressional Research Service. (2020). *Methane and Other Air Pollution Issues in Natural Gas Systems* (R42986). https://fas.org/sgp/crs/misc/R42986.pdf

References: Chapter 3 (cont.)

Connolly, K. (2022, September 1). 5 Lessons from South Africa's Just Transition Journey. *World Resources Institute.* https://www.wri.org/technical-perspectives/5-lessons-south-africas-just-transition-journey

Creamer, M. (2022, May 5). World Coal Association favours just energy transition to net zero future. *Mining Weekly.* https://www.miningweekly.com/article/world-coal-association-favours-just-energy-transition-to-net-zero-future-2022-05-05

Dargin, J. (2022). What's at Stake in the Massive China-Qatar Gas Deal. *Carnegie Endowment for International Peace.* https://carnegieendowment.org/2022/12/29/what-s-at-stake-in-massive-china-qatar-gas-deal-pub-88696

DCCEEW. (2022). *Australia's emissions projections 2022.* Department of Climate Change, Energy, the Environment and Water. https://www.dcceew.gov.au/sites/default/files/documents/australias-emissions-projections-2022.pdf

DCCEEW. (2023a). *Australia's National Greenhouse Accounts (ANGA)* (Emissions inventories > National inventory by economic sector > obtain total fossil fuel supply chain emissions by summing sectors B 06, B 07, C 17, and D 27.) [dataset]. Department of Climate Change, Energy, the Environment and Water. https://greenhouseaccounts.climatechange.gov.au/

DCCEEW. (2023b). *Safeguard Mechanism Reforms.* Department of Climate Change, Energy, the Environment and Water. https://www.dcceew.gov.au/sites/default/files/documents/safeguard-mechanism-reforms-factsheet-2023.pdf

Department of Finance Canada. (2021, June 7). *Investment Tax Credit for Carbon Capture, Utilization, and Storage.* Government of Canada. https://www.canada.ca/en/department-finance/programs/consultations/2021/investment-tax-credit-carbon-capture-utilization-storage.html

Department of Finance Canada. (2022a, May 11). *Update on Trans Mountain Expansion Project* [Statements]. Government of Canada. https://www.canada.ca/en/department-finance/news/2022/05/update-on-trans-mountain-expansion-project.html

Department of Finance Canada. (2022b, August 9). *Additional Design Features of the Investment Tax Credit for Carbon Capture, Utilization and Storage: Recovery Mechanism, Climate Risk Disclosure, and Knowledge Sharing* [Backgrounders]. Government of Canada. https://www.canada.ca/en/department-finance/news/2022/08/additional-design-features-of-the-investment-tax-credit-for-carbon-capture-utilization-and-storage-recovery-mechanism-climate-risk-disclosure-and-k.html

Department of Industry, Science and Resources. (2022a). *Commonwealth of Australia resources and energy major projects 2022* [Data and analysis]. Office of the Chief Economist. https://www.industry.gov.au/publications/resources-and-energy-major-projects-2022

Department of Industry, Science and Resources. (2022b). *National Reconstruction Fund: Diversifying and transforming Australia's industry and economy*. Commonwealth of Australia. https://www.industry.gov.au/news/national-reconstruction-fund-diversifying-and-transforming-australias-industry-and-economy

Department of Industry, Science and Resources. (2023). *Commonwealth of Australia resources and energy quarterly: March 2023.* Office of the Chief Economist. https://www.industry.gov.au/publications/resources-and-energy-quarterly-march-2023

Department of the Prime Minister and Cabinet. (2023, May 5). A new national Net Zero Authority. *Commonwealth of Australia.* https://www.pmc.gov.au/news/new-national-net-zero-authority

Depledge, J. (2008). Striving for no: Saudi Arabia in the climate change regime. *Global Environmental Politics, 8*(4), 9–35. https://doi.org/10.1162/glep.2008.8.4.9

DFC. (2021). *Public Information Summary—Rovuma LNG.* US International Development Finance Corporation. https://www.dfc.gov/sites/default/files/media/documents/9000093392.pdf

DFFE. (2022). *National GHG inventory report South Africa 2000-2020*. Department of Forestry, Fisheries and the Environment. https://www.dffe.gov.za/sites/default/files/reports/8nationalgreenhousegasreport2022.pdf

Di Paola, A., & Ratcliffe, V. (2022, May 17). UAE to more than double LNG export capacity with fujairah plant. *Bloomberg.* https://www.bloomberg.com/news/articles/2022-05-17/uae-to-more-than-double-lng-export-capacity-with-fujairah-plant

Diário Oficial da União. (2021). *N. 83, de 10 de dezembro de 2021 Resolução n. 27, de 9 de Dezembro 2021 do Conselho Nacional de Política Energética.* Presidência da República. https://www.gov.br/mme/pt-br/assuntos/conselhos-e-comites/cnpe/resolucoes-do-cnpe/resolucoes-2021/Res_CNPE272021.pdf

Diário Oficial da União. (2022). *Lei no 14.299, de 5 de janeiro de 2022—DOU - Imprensa Nacional.* https://www.gov.br/casacivil/pt-br/assuntos/colegiados/conselho-do-programa-de-transicao-energetica-justa/decreto-11124_2022-conselho-do-tej.pdf

Disavino, S. (2021, December 21). U.S. to be world's biggest LNG exporter in 2022. *Reuters.* https://www.reuters.com/business/energy/us-be-worlds-biggest-lng-exporter-2022-2021-12-21/

DMRE. (2021). *South African gas master plan: Basecase report (v01)* (Gas Master Plan 2022: Stakeholder Consultation). Department of Mineral Resources and Energy. https://www.energy.gov.za/files/media/explained/Gas_Master_Plan_Basecase_Report.pdf

DNP. (2023). *Colombia, potencia mundial de la vida: Bases del plan nacional de desarrollo 2022-2026.* Departamento Nacional de Planeación. https://colaboracion.dnp.gov.co/CDT/portalDNP/PND-2023/2023-02-23-bases-plan-nacional-de-desarrollo-web.pdf

References: Chapter 3 (cont.)

Draeger, R., Cunha, B. S. L., Müller-Casseres, E., Rochedo, P. R. R., Szklo, A., & Schaeffer, R. (2022). Stranded crude oil resources and just transition: Why do crude oil quality, climate ambitions and land-use emissions matter. *Energy, 255,* 124451. https://doi.org/10.1016/j.energy.2022.124451

Dyatel, T. (2023, April 24). Taxes evaporate from ammonia. *Kommersant.* https://www.kommersant.ru/doc/5952375

E3G. (2022). Fossil fuel exclusion policies. https://www.e3g.org/bank-metrics-2/fossil-fuel-exclusion-policies-kfw/

ECCC. (2021). *Canada's Enhanced Nationally Determined Contribution*. Environment and Climate Change Canada. https://www.canada.ca/en/environment-climate-change/news/2021/04/canadas-enhanced-nationally-determined-contribution.html

ECCC. (2022). *Reducing methane emissions from Canada's oil and gas sector: discussion paper*. Environment and Climate Change Canada. https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/consultation-reducing-methane-emissions-oil-gas-sector.html

ECCC. (2023a). *Government of Canada delivers on key climate commitment to phase out inefficient fossil fuel subsidies*. Environment and Climate Change Canada. https://www.canada.ca/en/environment-climate-change/news/2023/07/government-of-canada-delivers-on-key-climate-commitment-to-phase-out-inefficient-fossil-fuel-subsidies.html

ECCC. (2023b). *Speech for the Honourable Steven Guilbeault, Minister of Environment and Climate Change, Appearance at the Indian Institute of Technology Madras*. Environment and Climate Change Canada. https://www.canada.ca/en/environment-climate-change/news/2023/07/speech-for-the-honourable-steven-guilbeault-minister-of-environment-and-climate-change-appearance-at-the-indian-institute-of-technology-madras.html

Echeverria, J. (2022, November 7). Cop27: Colombia calls for political solutions. *Argus.* https://www.argusmedia.com/en/news/2388656-cop-27-colombia-calls-for-political-solutions

Ecopetrol. (2022a). *Composición accionaria* [dataset]. https://www.ecopetrol.com.co/wps/portal/Home/es/Inversionistas/informacion/Composicionaccionaria

Ecopetrol. (2022b). *Estrategia 2040.* https://files.ecopetrol.com.co/web/esp/cargas/web/noticias/VCM/estrategia-2040.pdf

Ecopetrol. (2022c, December 9). El grupo ecopetrol invertirá entre cop 25.3 y cop 29.8 billones en 2023 para acelerar la senda de transición y soberanía energética. *Ecopetrol.* https://www.ecopetrol.com.co/wps/portal/Home/es/noticias/detalle/inversion-ge-2023-transicion-energetica#:~:text=Ecopetrol%20S.A.%20(BVC%3A%20ECOPETROL%3B,29.8%20billones%20para%20el%202023.

Ecopetrol. (2023, February 9). *Mitigación de gases efecto invernadero.* https://www.ecopetrol.com.co/wps/portal/Home/es/ResponsabilidadEtiqueta/Medio%20ambiente/cambio-climatico-et

References: Chapter 3 (cont.)

EDC. (2018). *2018 Individual Transaction Information.* Export Development Canada. https://www.edc.ca/content/dam/edc/en/corporate/disclosure/reporting/2018-individual-transactions.pdf

EDC. (2019). *2019 Individual Transaction Information. Export Development Canada.* https://www.edc.ca/content/dam/edc/en/corporate/disclosure/reporting/2019-individual-transactions.pdf

EDC. (2020). *2020 Individual Transaction Information.* Export Development Canada. https://www.edc.ca/content/dam/edc/en/corporate/disclosure/reporting/2020-individual-transactions.pdf

EDC. (2021). 2021 Individual Transaction Information. Export Development Canada. https://www.edc.ca/content/dam/edc/en/corporate/disclosure/reporting/2021-individual-transactions.pdf

Edovina, T. (2022, February 4). "We need to support not only current exports, but also future ones." *Kommersant.* https://www.kommersant.ru/doc/5195437

EIA. (2023a). *Country analysis brief: Kuwait.* U.S. Energy Information Administration. https://www.eia.gov/international/content/analysis/countries_long/Kuwait/kuwait.pdf

EIA. (2023b). *Country analysis brief: Qatar.* U.S. Energy Information Administration. https://www.eia.gov/international/content/analysis/countries_long/Qatar/qatar.pdf

EIA. (2023c). *Mexico.* U.S. Energy Information Administration. https://www.eia.gov/international/analysis/country/mex

EITI. (2020). *Colombia.* Extractive Industries Transparency Initiative. https://eiti.org/countries/colombia

Elumoye, D., Addeh, E., & Uzoho, P. (2023, February). Steady progress as Nigeria's oil production exceeds 1.6 million barrels per day, says Kyari. *This Day Live.* https://www.thisdaylive.com/index.php/2023/02/22/steady-progress-as-nigerias-oil-production-exceeds-1-6-million-barrels-per-day-says-kyari/

Enerdata. (2022, October 5). *Germany's RWE brings forward its coal phase-out plan from 2038 to 2030.* https://www.enerdata.net/publications/daily-energy-news/germanys-rwe-brings-forward-its-coal-phase-out-plan-2038-2030.html

Environmental and Energy Law Program. (2022). *Environmental Justice (EJ) Provisions of the 2022 Inflation Reduction Act.* Harvard University. http://eelp.law.harvard.edu/wp-content/uploads/EELP-IRA-EJ-Provisions-Table.pdf

Environmental Audit Committee. (2023). *Accelerating the transition from fossil fuels and securing energy supplies: Government and regulator response to the committee's fourth report* (Fourth Special Report of Session 2022–23). House of Commons. https://committees.parliament.uk/publications/34534/documents/190069/default/

Equinor. (2022). *2022 Energy transition plan.* https://cdn.equinor.com/files/h61q9gi9/global/6a64fb766c58f70ef37807deca2ee036a3f4096b.pdf?energy-transition-plan-2022-equinor.pdf

Eskom. (2023). *Just Energy Transition (JET).* https://www.eskom.co.za/about-eskom/just-energy-transition-jet/

ETP. (2022). N*igeria energy transition plan*. Nigeria Energy Transition Plan. https://www.energytransition.gov.ng/

European Commission. (2022, December 14). *Political Declaration on establishing the JETP with Viet Nam.* https://ec.europa.eu/commission/presscorner/detail/en/statement_22_7724

European Commission. (2023). *The EU and the International Partners Group announced a Just Energy Transition Partnership with Senegal combining climate and development goals.* https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3448

European Council. (2023, April 25). *"Fit for 55": Council adopts key pieces of legislation delivering on 2030 climate targets.* https://www.consilium.europa.eu/en/press/press-releases/2023/04/25/fit-for-55-council-adopts-key-pieces-of-legislation-delivering-on-2030-climate-targets/

Evans, D. (2022, December 6). Zarubezhneft eyes giant East Natuna gas block in Indonesia. *Energy Voice.* https://www.energyvoice.com/oilandgas/asia/466597/zarubezhneft-eyes-giant-east-natuna-gas-block-in-indonesia/

EXIM. (2023a). *Authorizations From 10/01/2006 Thru 12/31/2022* [dataset]. data.exim.gov. https://catalog.data.gov/dataset/authorizations-from-10-01-2006-thru-12-31-2022

EXIM. (2023b). Export-Import Bank of the United States Board Approves Two Deals in Support of Thousands of U.S. Jobs in Transportation, Energy Sectors. *Export-Import Bank of the United States.* https://www.exim.gov/news/export-import-bank-united-states-board-approves-two-deals-support-thousands-jobs-transportation

Ezeugwu, S. (2022, November). Russia-Ukraine war raising europe's interest in Nigeria's coal. *Leadership.* https://leadership.ng/russia-ukraine-war-raising-europes-interest-in-nigerias-coal-adegbite/

Fæhn, T., Hagem, C., Lindholt, L., Mæland, S., & Rosendahl, K. E. (2017). Climate policies in a fossil fuel producing country: Demand versus supply side policies. *The Energy Journal, 38*(1), 77–102. https://doi.org/10.5547/01956574.38.1.tfae

Federal Government of Nigeria. (2018). *Flare gas (prevention of waste and pollution) regulations.* https://www.nuprc.gov.ng/wp-content/uploads/2020/06/Flare-Gas-Prevention-of-Waste-Pollution-Regulations-2018.pdf

Federal Government of Nigeria. (2021). *Petroleum Industry Act.* http://www.petroleumindustrybill.com/wp-content/uploads/2021/09/Official-Gazette-of-the-Petroleum-Industry-Act-2021.pdf

References: Chapter 3 (cont.)

Federal Government of Nigeria. (2023). *Nigeria Agenda 2050.* https://nationalplanning.gov.ng/wp-content/uploads/2023/05/Nigeria-Agenda-2050-Report-Corrected.pdf

Federal Ministry of Environment. (2021). *Nigeria's first nationally determined contribution.* Federal Government of Nigeria. https://climatechange.gov.ng/wp-content/uploads/2021/08/NDC_File-Amended-_11222.pdf

Federative Republic of Brazil. (2021). *Lei nº 14.134, de 8 de abril de 2021.* https://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/l14134.htm

Federative Republic of Brazil. (2022). *Nationally Determined Contribution.* Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/NDC/2022-06/Updated%20-%20First%20NDC%20-%20%20FINAL%20-%20PDF.pdf

FFNPT. (2023). *Who has called for a Fossil Fuel Non-Proliferation Treaty?* The Fossil Fuel Non-Proliferation Treaty. https://fossilfueltreaty.org/endorsements

Fogarty, D. (2023, January 17). Questions over impact on green agenda as oil boss set to lead UN climate talks. *The Straits Times.* https://www.straitstimes.com/opinion/an-oil-boss-will-lead-un-climate-talks-will-he-really-push-the-green-agenda

Forbes. (2023, January 19). Ministra de Minas insiste que el Gobierno Petro no firmará nuevos contratos de exploración de petróleo y gas. *Forbes Colombia.* https://forbes.co/2023/01/19/actualidad/ministra-de-minas-insiste-que-el-gobierno-petro-no-firmara-nuevos-contratos-de-exploracion-de-petroleo-y-gas/

Fransen, T., Henderson, C., O'Connor, R., Alayza, N., Caldwell, M., Chakrabarty, S., Dixit, A., Finch, M., Kustar, A., Langer, P., Stolle, F., Walls, G., & Welle, B. (2022). *The State of Nationally Determined Contributions: 2022.* World Resources Institute. https://doi.org/10.46830/wrirpt.22.00043

Friends of the Earth. (2023, January 16). *Legal challenge filed over Cumbrian coal mine.* https://friendsoftheearth.uk/climate/legal-challenge-filed-over-cumbrian-coal-mine

Frontini, P., & Nogueira, M. (2023, January 27). New Petrobras CEO says to drive energy shift while expanding oil and gas. *Reuters.* https://www.reuters.com/business/energy/new-petrobras-ceo-says-drive-energy-shift-while-expanding-oil-gas-2023-01-27/

FUP. (2021). *Carta dos petroleiros ao presidente Lula.* Federação Única dos Petroleiros. https://fup.org.br/wp-content/uploads/2022/03/Carta-ao-Lula-peb.pdf

G20. (2009). *G20 Leaders Statement: The Pittsburgh Summit.* Group of Twenty. http://www.g20.utoronto.ca/2009/2009communique0925.html

G20. (2022). *G20 Bali leaders' declaration.* Group of Twenty. https://www.g20.org/content/dam/gtwenty/gtwenty_new/about_g20/previous-summit-documents/2022-bali/G20%20Bali%20Leaders%27%20Declaration,%2015-16%20November%202022.pdf

G20 Peer-review Team. (2016). *China's efforts to phase out and rationalise its inefficient fossil-fuel subsidies: A report on the G20 peer review of inefficient fossil-fuel subsidies that encourage wasteful consumption in China.* Report prepared by members of the peer-review team: Germany, Indonesia, the United States, the IMF, and the OECD (Chair of the peer review). https://www.oecd.org/fossil-fuels/publication/G20%20China%20Peer%20Review_G20_FFS_Review_final_of_20160902.pdf

Galeana, E. (2023, March 21). Mexico will accomplish oil sovereignty in 2024: Amlo. *Mexico Business News.* https://mexico-business.news/energy/news/mexico-will-accomplish-oil-sovereignty-2024-amlo

Gaventa, J. (2021). *The failure of "gas for development" – Mozambique case study.* E3G. https://www.e3g.org/publications/the-failure-of-gas-for-development-mozambique-case-study/

GCO. (2008). *Qatar National Vision 2030.* Government Communications Office, State of Qatar. https://www.gco.gov.qa/wp-content/uploads/2016/09/GCO-QNV-English.pdf

GECF. (2021, March 30). GECF member Nigeria heralds 'decade of gas' to transform its future. *Gas Exporting Countries Forum.* https://www.gecf.org/events/gecf-member-nigeria-heralds-%E2%80%98decade-of-gas%E2%80%99-to-transform-its-future

Geuskens, I., & Butijn, H. (2022). Locked out of a Just Transition: *Fossil Fuel Financing in Africa.* Bank Track et al. https://www.banktrack.org/news/at_least_132_billion_in_finance_for_fossil_fuels_is_locking_africa_out_of_a_just_transition_shows_new_report

Gibson, J. (2022, December 28). Business case for Middle Arm Sustainable Development Precinct triggers climate concerns from critics. *ABC News.* https://www.abc.net.au/news/2022-12-29/nt-middle-arm-sustainable-development-precinct-climate-concerns/101809178

Global Development Policy Center. (2022). *China's global energy finance database* [dataset]. Boston University Global Development Policy Center. https://www.bu.edu/cgef/#/intro

Global Energy Monitor. (2023). *Global Coal Mine Tracker (April 2023 release)* [dataset]. https://globalenergymonitor.org/projects/global-coal-mine-tracker/

Global Methane Pledge. (n.d.). Fast action on methane to keep a 1.5°C future within reach. Retrieved June 19, 2023, from https://www.globalmethanepledge.org/

Glover, F. (2021, September 2). Mubadala Petroleum finalises $1bn deal for 22% stake in Israel's Tamar gas field. *The National.* https://www.thenationalnews.com/business/2021/09/02/mubadala-petroleum-finalises-1bn-deal-for-22-stake-in-israels-tamar-gas-field/

Gnana, J. (2022, August 2). Kuwait nears maximum oil production, with politics, technical challenges stunting growth. *S&P Global.* https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/oil/080222-kuwait-nears-maximum-oil-production-with-politics-technical-challenges-stunting-growth

References: Chapter 3 (cont.)

Goldman, G., Bailin, D., Rogerson, P., Agatstein, J., Imm, J., & Phartiyal, P. (2013). *Toward an Evidence-Based Fracking Debate: Science, Democracy, and Community Right to Know in Unconventional Oil and Gas Development.* The Center for Science and Democracy, Union of Concerned Scientists. https://www.ucsusa.org/sites/default/files/2019-09/fracking-report-full_0.pdf

Gordon, D., Reuland, F., Jacob, D. J., Worden, J. R., Shindell, D. T., & Dyson, M. (2023). Evaluating net life-cycle greenhouse gas emissions intensities from gas and coal at varying methane leakage rates. *Environmental Research Letters, 18*(8). https://doi.org/10.1088/1748-9326/ace3db

Government of Canada. (2021, February 25). *Canadian Net-Zero Emissions Accountability Act.* https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/net-zero-emissions-2050/canadian-net-zero-emissions-accountability-act.html

Government of Canada. (2022a). *Chapter 3: Clean Air and a Strong Economy (Budget 2022).* https://www.budget.canada.ca/2022/report-rapport/chap3-en.html

Government of Canada. (2022b). *Draft guidance for best-in-class GHG emissions performance by oil and gas projects.* https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/oil-gas-emissions-cap/best-class-draft-guidance.html

Government of Canada. (2022c, March 29). *2030 Emissions Reduction Plan: Clean Air, Strong Economy.* https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/climate-plan-overview/emissions-reduction-2030.html

Government of Canada. (2022d, July 18). *Oil and gas emissions cap.* https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/oil-gas-emissions-cap.html

Government of Canada. (2023a). *Sustainable Jobs Plan.* https://www.canada.ca/en/services/jobs/training/initiatives/sustainable-jobs/plan.html

Government of Canada. (2023b). *Government Bill (House of Commons) C-50 (44-1)—Canadian Sustainable Jobs Act*. https://www.parl.ca/DocumentViewer/en/44-1/bill/C-50/first-reading

Government of China. (2021). *China's Achievements, New Goals and New Measures for Nationally Determined Contributions.* Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/NDC/2022-06/China%E2%80%99s%20Achievements%2C%20New%20Goals%20and%20New%20Measures%20for%20Nationally%20Determined%20Contributions.pdf

Government of Colombia. (2020). *Actualización de la contribución determinada a nivel nacional de Colombia (NDC).* https://unfccc.int/sites/default/files/NDC/2022-06/NDC%20actualizada%20de%20Colombia.pdf

Government of Germany. (2017, February 13). *No fracking in Germany.* https://www.bundesregierung.de/breg-en/issues/sustainability/no-fracking-in-germany-391340

Government of Germany. (2020). *Coal Phase-out Act.* http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl120s1818.pdf

Government of Germany. (2021). *Koalitionsvertrag zwischen SPD, Bündnis 90/Die Grünen und FDP.* https://www.bundesregierung.de/breg-de/aktuelles/koalitionsvertrag-2021-1990800

Government of Germany. (2022a). *Update to the long-term strategy for climate action of the Federal Republic of Germany.* Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/resource/Anlage%202_Update%20to%20the%20long-term%20strategy%20for%20climate%20action%20of%20the%20Federal%20Republic%20of%20Germany_02Nov2022_0.pdf

Government of Germany. (2022b). *Ersatzkraftwerkebereithaltungsgesetz.* https://www.bundesnetzagentur.de/DE/Fachthemen/ElektrizitaetundGas/Kohleausstieg/EKBG/start.html

Government of Germany. (2023). *What is the German government doing for the climate?* https://www.bundesregierung.de/breg-en/issues/climate-action/government-climate-policy-1779414

Government of India. (2022). *India's Updated First Nationally Determined Contribution Under Paris Agreement.* Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/NDC/2022-08/India%20Updated%20First%20Nationally%20Determined%20Contrib.pdf

Government of Indonesia. (2021). *Indonesia long-term strategy for low carbon and climate resilience 2050.* https://unfccc.int/sites/default/files/resource/Indonesia_LTS-LCCR_2021.pdf

Government of Indonesia. (2022). *Enhanced Nationally Determined Contribution: Republic of Indonesia.* Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/NDC/2022-09/23.09.2022_Enhanced%20NDC%20Indonesia.pdf

Government of Nigeria. (2021). *Climate Change Act.* https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/112597/140749/F962932059/NGA112597.pdf

Government of Norway. (2022). *Update of Norway's Nationally Determined Contribution.* Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/NDC/2022-11/NDC%20Norway_second%20update.pdf

Government of South Africa. (2020). *South Africa's low emission development strategy 2050.* Republic of South Africa. https://unfccc.int/documents/253724

References: Chapter 3 (cont.)

Government of South Africa. (2021). *South Africa updated first NDC September 2021*. Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/NDC/2022-06/South%20Africa%20updated%20first%20NDC%20September%202021.pdf Government of the Republic of Kazakhstan. (2017). *Code on subsoil and subsoil use: 125-IV*. https://adilet.zan.kz/eng/docs/K1700000125

Government of the Republic of Kazakhstan. (2018). *Standard contracts for subsoil use: Code 233*. https://adilet.zan.kz/kaz/docs/V1800017140

Government of the Republic of Kazakhstan. (2021, November 2). Kazakh Prime-Minister Askar Mamin took part in the UN Climate Change Conference (COP26) in Glasgow, reaffirming the country's commitment to the global climate change agenda. *Embassy of the Republic of Kazakhstan to the Republic of Croatia*. https://www.gov.kz/memleket/entities/mfa-zagreb/press/news/details/278599?lang=en#:~:text=In%20December%202020%2C%20the%20President,to%2015%20percent%20by%202030

Government of the Republic of Kazakhstan. (2022). *On amendments to the Decree of the Government of the Republic of Kazakhstan dated June 28, 2014 No. 724 "On approval of the Concept for the development of the fuel and energy complex of the Republic of Kazakhstan until 2030."* https://adilet.zan.kz/rus/docs/P2200000931

Government of the Republic of Kazakhstan. (2023a). *On approval of the concept for the development of higher education and science in the Republic of Kazakhstan for 2023–2029*. https://adilet.zan.kz/kaz/docs/P2300000248

Government of the Republic of Kazakhstan. (2023b). *On approval of the strategy for achieving carbon neutrality of the Republic of Kazakhstan until 2060*. https://adilet.zan.kz/kaz/docs/U2300000121

Government of the Russian Federation. (2020a). *Development of the Coal Industry in Russia until 2035.* http://static.government.ru/media/files/OoKX6PriWgDz4CNNAxwIYZEE6zm6I52S.pdf

Government of the Russian Federation. (2020b). *Energy Strategy: Russian Federation for the Period up to 2035.* Russian Federation. http://static.government.ru/media/files/w4sigFOiDjGVDYT4IgsApssm6mZRb7wx.pdf

Government of the Russian Federation. (2022a). *Nationally Determined Contribution.* Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/NDC/2022-06/NDC_RF_eng.pdf

Government of the Russian Federation. (2022b). *Strategy of socio-economic development of the Russian Federation with low GHG emissions until 2050.* UNFCCC. https://unfccc.int/sites/default/files/resource/Strategy%20of%20Socio-Economic%20Development%20of%20the%20Russian%20Federation%20with%20Low%20GHG%20Emissions%20EN.pdf

Government of the Russian Federation. (2022c, October 7). *Andrey Belousov took part in the International Coal Forum in Kuzbass.* http://government.ru/news/46735/

Government of the Russian Federation. (2022d, November 3). The Government approved the creation of a new special economic zone in the Kemerovo region. *Government of the Russian Federation.* http://government.ru/news/46964/

References: Chapter 3 (cont.)

Government of the United Arab Emirates. (2022). Updated second nationally determined contribution of the United Arab Emirates: *A bridge to greater climate ambition.* Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/NDC/2022-09/UpdateNDC-EN-2022.pdf

Government of the United Arab Emirates. (2023a). *Accelerating Action Towards a Green, Inclusive and Resilient Economy: Third Update of Second Nationally Determined Contribution for the UAE.* Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/NDC/2023-07/Third%20Update%20of%20Second%20NDC%20for%20the%20UAE_v15.pdf

Government of the United Arab Emirates. (2023b). *UAE Centennial 2071.* United Arab Emirates' Government Portal. https://u.ae/en/about-the-uae/strategies-initiatives-and-awards/strategies-plans-and-visions/innovation-and-future-shaping/uae-centennial-2071

Graham, E. (2022, May 30). Tax relief for oil and gas is trouble for UK bills and energy transition. *E3G.* https://www.e3g.org/news/tax-relief-oil-gas-trouble-uk-household-bills-energy-transition/

Greco, E. (2020). Africa, extractivism and the crisis this time. *Review of African Political Economy, 47*(166), 511–521. https://doi.org/10.1080/03056244.2020.1859839

Green, F., & Denniss, R. (2018). Cutting with both arms of the scissors: The economic and political case for restrictive supply-side climate policies. *Climatic Change, 150,* 73–87. https://doi.org/10.1007/s10584-018-2162-x

Grubert, E., & Hastings-Simon, S. (2022). Designing the mid-transition: A review of medium-term challenges for coordinated decarbonization in the United States. *WIREs Climate Change, 13*(3), e768. https://doi.org/10.1002/wcc.768

Haidar, A. (2022, November 8). President Tokayev announces plans to turn Atyrau region into petrochemical center, addresses environmental issues. *The Astana Times.* https://astanatimes.com/2022/11/president-tokayev-announces-plans-to-turn-atyrau-region-into-petrochemical-center-addresses-environmental-issues/

Halim, D., & Omar, Z. (2020). Financing Fairly: *Assessing the Sustainability of Investment Policies for Development Finance Institutions in South Africa*. Centre for Environmental Rights. https://cer.org.za/wp-content/uploads/2020/05/Financing-Fairly-Report-and-Assessment-2020.pdf

Hall, M. (2019). *Gas Production from the UK Continental Shelf: An Assessment of Resources, Economics and Regulatory Reform* (OIES PAPER NG 148). Oxford Institute for Energy Studies. https://doi.org/10.26889/9781784671419

Hamilton, O., Nyberg, D., & Bowden, V. (2023). Elements of power: Material-political entanglements in Australia's fossil fuel hegemony. *Environment and Planning E: Nature and Space.* https://doi.org/10.1177/25148486231159305

Harrison, K., & Bang, G. (2022). Supply-Side Climate Policies in Major Oil-Producing Countries: Norway's and Canada's Struggles to Align Climate Leadership with Fossil Fuel Extraction. *Global Environmental Politics, 22*(4), 129–150. https://doi.org/10.1162/glep_a_00682

Helgesen, O. K. (2020, August 5). Equinor defies doubters on Vaca Muerta. *Upstream.* https://www.upstreamonline.com/shale/equinor-defies-doubters-on-vaca-muerta/2-1-852867

Hodgson, C., & Kazmin, A. (2023, March 27). Italy's shift away from Russian gas clashes with its climate targets. *Financial Times.* https://www.ft.com/content/762e9d17-d5ab-41ca-9394-d668b30fb072

House of Representatives. (2023). *Safeguard Mechanism (Crediting) Amendment Bill 2023.* The Parliament of the Commonwealth of Australia. https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6957_aspassed/toc_pdf/22136b01.pdf;fileType=application%2Fpdf

Hughes, S. (2023, October 14). *Corporate governance update: Climate change risk and disclosure* [Speech]. Governance Institute of Australia Fellows Roundtable, Australian Securities & Investments Commission. https://asic.gov.au/about-asic/news-centre/speeches/corporate-governance-update-climate-change-risk-and-disclosure/

IANS. (2022, October 15). India to produce 25 per cent of its oil demand by 2030: Hardeep Puri. *ETEnergyworld.Com.* https://energy.economictimes.indiatimes.com/news/oil-and-gas/india-to-produce-25-per-cent-of-its-oil-demand-by-2030-hardeep-puri/94871275

Ibrahim, L., & Hussein, H. (2021, July 10). UAW announces Net Zero by 2050 strategic initiative. *Emirates News Agency.* https://www.wam.ae/en/details/1395302978138

ICAT. (2023, April 4). Third ICAT project in Nigeria begins: MRV framework for a just and gender-inclusive transition. *Initiative for Climate Action Transparency.* https://climateactiontransparency.org/third-icat-project-in-nigeria-begins-mrv-framework-for-a-just-and-gender-inclusive-transition/

IEA. (2019). *World Energy Outlook 2019.* International Energy Agency. https://www.iea.org/reports/world-energy-outlook-2019

IEA. (2021). *Net zero by 2050: A roadmap for the global energy sector.* International Energy Agency. https://www.iea.org/reports/net-zero-by-2050

IEA. (2022a). *Africa Energy Outlook 2022* [World Energy Outlook Special Report]. International Energy Agency. https://www.iea.org/reports/africa-energy-outlook-2022

IEA. (2022b). *An Energy Sector Roadmap to Net Zero Emissions in Indonesia.* International Energy Agency. https://www.iea.org/reports/an-energy-sector-roadmap-to-net-zero-emissions-in-indonesia

References: Chapter 3 (cont.)

IEA. (2022c). *Coal 2022 – Analysis and forecast to 2025.* International Energy Agency. https://iea.blob.core.windows.net/assets/91982b4e-26dc-41d5-88b1-4c47ea436882/Coal2022.pdf

IEA. (2022d). *Federal Climate Change Act 2021* (IEA/IRENA Renewables Policies Database) [dataset]. https://www.iea.org/policies/13518-federal-climate-change-act-2021

IEA. (2023a). *World energy statistics and balances (2022 edition)* [dataset]. International Energy Agency. https://doi.org/10.1787/data-00512-en

IEA. (2023b). *World oil statistics (2023 edition)* [dataset]. International Energy Agency. https://doi.org/10.1787/data-00474-en

IISD. (2022). *Summary of the 56th session of the Intergovernmental Panel on Climate Change and the 14th session of Working Group III: 21 March – 4 April 2022.* Earth Negotiations Bulletin. https://enb.iisd.org/sites/default/files/2022-04/enb12795e.pdf

IMF. (2022). *Qatar: 2022 Article IV Consultation-Press Release; and Staff Report* (22/175). International Monetary Fund. https://www.imf.org/en/Publications/CR/Issues/2022/06/16/Qatar-2022-Article-IV-Consultation-Press-Release-and-Staff-Report-519679

Impact Assessment Agency of Canada. (2022, April 6). Government Accepts Agency's Recommendation on Bay du Nord Development Project, Subject to the Strongest Environmental GHG Condition Ever. *Government of Canada.* https://www.canada.ca/en/impact-assessment-agency/news/2022/04/government-accepts-agencys-recommendation-on-bay-du-nord-development-project-subject-to-the-strongest-environmental-ghg-condition-ever.html

Impact Assessment Agency of Canada. (2023, March 15). Federal Government Provides Concurring Decision to British Columbia on Cedar LNG. *Government of Canada.* https://www.canada.ca/en/impact-assessment-agency/news/2023/03/federal-government-provides-concurring-decision-to-british-columbia-on-cedar-lng.html

INECC. (2020). *Contribución determinada a nivel nacional: Actualización 2020.* Instituto Nacional de Ecología y Cambio Climático. https://unfccc.int/sites/default/files/NDC/2022-06/NDC-Esp-30Dic.pdf

INECC. (2022). *Contribución determinada a nivel nacional: Actualización 2022.* Instituto Nacional de Ecología y Cambio Climático. https://unfccc.int/sites/default/files/NDC/2022-11/Mexico_NDC_UNFCCC_update2022_FINAL.pdf

Inesc. (2022). *Fossil fuels subsidies in Brazil: Know, assess and reform.* Institute of Socioeconomic Studies. https://www.inesc.org.br/wp-content/uploads/2022/11/INGLES_ESTUDO-COMBUSTIVEIS.pdf

Infrastructure Australia. (2022). *Connection between eastern gas markets and gas suppliers* [dataset]. https://www.infrastructureaustralia.gov.au/map/connection-between-eastern-gas-markets-and-gas-suppliers

Interfax. (2022, April 8). Zarubezhneft decided to enter a new asset on the shelf of Vietnam. *Interfax.* https://www.interfax.ru/business/834004

ITA. (2021, May 20). Qatar – Oil & Gas North Field Expansion (NFE) Project. *International Trade Administration.* https://www.trade.gov/market-intelligence/qatar-oil-gas-north-field-expansion-nfe-project

ITA. (2022, September 13). Kuwait—Oil and Gas. *International Trade Administration.* https://www.trade.gov/country-commercial-guides/kuwait-oil-and-gas

Janda, M., Whitson, R., Robinson, K., & Hutchens, G. (2023, May 10). Do the PRRT changes in the budget go far enough to fix a "broken" Petroleum Resource Rent Tax? *ABC News.* https://www.abc.net.au/news/2023-05-11/prrt-are-gas-companies-going-to-pay-enough/102328276

Jones, N., Verkuijl, C., Muñoz Cabré, M., & Piggot, G. (2023). Connecting the dots: *Mapping references to fossil fuel production in national plans under the UNFCCC for the 2023 Global Stocktake.* Stockholm Environment Institute. https://doi.org/10.51414/sei2023.040

Jordhus-Lier, D., Houeland, C., Holmås, H. E., Szulecki, K., & Østring, P. R. (2022). *Petroleum transition pathways in Norway.* Oil and Gas Transitions. https://oilandgastransitions.org/wp-content/uploads/2022/09/Petroleum-Transition-Pathways-in-Norway.pdf

KAZENERGY. (2021). *National Energy Report 2021.* Kazakhstan Association of Oil&Gas and Energy Sector Organizations. https://kazenergy.com/upload/document/energy-report/NationalReport21_en.pdf

KAZENERGY. (2022, June 9). Replenishment of the mineral resource base through the study of unconventional reservoirs. *Kazakhstan Association of Oil&Gas and Energy Sector Organizations.* https://kazenergy.com/ru/press-center/news/2768/

KAZENERGY. (2023). *The key focus areas of the coordinating council for the development of the oil and gas industry.* Kazakhstan Association of Oil&Gas and Energy Sector Organizations. https://www.kazenergy.com/en/operation/coordination/2181/

Kędzierski, M. (2023, April 28). At all costs. Germany shifts to LNG. *OSW Centre for Eastern Studies.* https://www.osw.waw.pl/en/publikacje/osw-commentary/2023-04-28/all-costs-germany-shifts-to-lng

Kemfert, C., Präger, F., Braunger, I., Hoffart, F. M., & Brauers, H. (2022). The expansion of natural gas infrastructure puts energy transitions at risk. *Nature Energy, 7,* 582–587. https://doi.org/10.1038/s41560-022-01060-3

King, M. (2023, March 29). *Resources Statement to Parliament.* https://www.minister.industry.gov.au/ministers/king/speeches/resources-statement-parliament

References: Chapter 3 (cont.)

Kingdom of Saudi Arabia. (2021). *Updated First Nationally Determined Contribution.* Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/resource/202203111154---KSA%20NDC%202021.pdf

KISR. (2019). *2019 Kuwait Energy Outlook: Sustaining Prosperity Through Strategic Energy Management.* Kuwait Institute for Scientific Research. https://www.kisr.edu.kw/media/filer_public/a7/d7/a7d7ecfa-242e-4c5f-a9bc-f971295b0a41/keo_report_english.pdf

KonKraft. (2022). *Status Report 2022: The energy industry of tomorrow on the NCS climate strategy towards 2030 and 2050.* https://offshorenorge.no/globalassets/konkraft/eng_klimarapport-ver020822-v2.pdf

Kozlov, D. (2021, April 8). Mining and thoughts: Russia is unlikely to repeat the oil record of 2019. *Kommersant.* https://www.kommersant.ru/doc/4763122

KPC. (n.d.-a). *Our Strategy.* Kuwait Petroleum Corporation. Retrieved July 14, 2023, from https://www-dev.kpc.com.kw/Strategy2040

KPC. (n.d.-b). *Sustainability.* Kuwait Petroleum Corporation. Retrieved September 4, 2023, from https://www-dev.kpc.com.kw/Sustainability

Kramer, K. (2022, December 7). Just Energy Transition Partnerships: An opportunity to leapfrog from coal to clean energy. *International Institute for Sustainable Development.* https://www.iisd.org/articles/insight/just-energy-transition-partnerships

Krane, J. (2022). *Envisioning the Steps Towards a "Net Zero" Saudi Arabia* (289; Insights). National University of Singapore and Middle East Institute Singapore. https://mei.nus.edu.sg/wp-content/uploads/2022/10/Energy_text_merged.pdf

KUFPEC. (2021). *Annual report 2021.* Kuwait Foreign Petroleum Exploration Company. https://www.kufpec.com/en/publications/annual-reports

Kumar, M. (2023, February 22). Ajay Kumar Rastogi on leading India's first just transition task force. *Mongabay.* https://india.mongabay.com/2023/02/interview-ajay-kumar-rastogi-on-leading-indias-first-just-transition-task-force/

Kusuma, N. (2023, March 2). What is Just Energy Transition Partnerships? *Green Network Asia.* https://greennetwork.asia/news/what-is-just-energy-transition-partnerships/

Kuwait News Agency. (2022, July 11). *FM: Kuwait committed to reaching carbon neutrality by 2050.* https://www.kuna.net.kw/ArticleDetails.aspx?id=3066905&language=en

Kuzekbay, A. (2021, February 13). The coal industry remains a socially significant industry for the economy—Nikolay Radostovets. *Kazinform.* https://www.inform.kz/ru/ugol-naya-promyshlennost-ostaetsya-social-no-znachimoy-otrasl-yu-dlya-ekonomiki-nikolay-radostovec_a3752890

Lahn, B. (2019). *Norwegian petroleum policy in a changing climate.* CICERO Center for International Climate Research. http://hdl.handle.net/11250/2607906

Landrin, S. (2023, May 6). India is acting as a hub for Russian oil. *Le Monde.* https://www.lemonde.fr/en/international/article/2023/05/06/india-is-acting-as-a-hub-for-russian-oil_6025598_4.html

Leke, A., Gaius-Obaseki, P., & Onyekweli, O. (2022, June 8). The future of African oil and gas: Positioning for the energy transition. *McKinsey & Company.* https://www.mckinsey.com/industries/oil-and-gas/our-insights/the-future-of-african-oil-and-gas-positioning-for-the-energy-transition

Li, K. (2023). *Report on the Work of the Government.* Xinhua. https://english.news.cn/20230315/3514323d06154e2592c115e3495e59a1/c.html

Linde, L., Sanchez, F., Mete, G., & Lindberg, A. (2022). *North Sea oil and gas transition from a regional and global perspective.* Stockholm Environment Institute. https://doi.org/10.51414/sei2022.012

Mannapbekov, N., & Hampel-Milagrosa, A. (2021, August 21). Kazakhstan: A Future Without Coal? *Asian Development Blog.* https://blogs.adb.org/blog/kazakhstan-future-without-coal

Mantashe, G. (2022, February 1). *Remarks by the Honourable Minister of Mineral Resources and Energy Mr Gwede Mantashe on the occasion of the coal colloqiuim.* https://www.dmr.gov.za/news-room/post/1946/remarks-by-the-honourable-minister-of-mineral-resources-and-energy-mr-gwede-mantashe-on-the-occasion-of-the-coal-colloqiuim

MCE. (2021). *Act relating to Norway's climate targets (Climate Change Act).* Norwegian Ministry of Climate and Environment. https://lovdata.no/dokument/NLE/lov/2017-06-16-60

MCE. (2022, May 30). Tar med arbeidslivet på råd om rettferdig omstilling. *Regjeringen.* https://www.regjeringen.no/no/aktuelt/tar-med-arbeidslivet-pa-rad-om-rettferdig-omstilling/id2915888/

MCE. (2023). *Foreslår å oppdatere klimamålet i klimaloven.* Klima- og miljødepartementet. https://www.regjeringen.no/no/aktuelt/oppdaterer-klimamalet-i-klimaloven/id2973621/

McGibbon, A., Tucker, B., van der Burg, L., O'Manique, C., Pušić, N., & Rodel, N. (2023). *Promise breakers: Assessing the impact of compliance with the Glasgow Statement commitment to end international public finance for fossil fuels.* Oil Change International. https://priceofoil.org/2023/03/15/promise-breakers-assessing-the-impact-of-compliance-with-the-glasgow-statement-commitment-to-end-international-public-finance-for-fossil-fuels/

Mei, D., Prasad, S., O'Malia, K., & Behrsin, I. (2023). *A Race to the Top: China 2023.* Global Energy Monitor. https://globalenergymonitor.org/wp-content/uploads/2023/06/GEM-RTTT-China-2023-report-English.pdf

References: Chapter 3 (cont.)

Melgård, M. (2022, November 28). Norge og EU i klinsj om grønn industriavtale: Krangler om olje og Arktis. *Dagens Næringsliv.* https://www.dn.no/politikk/norge-og-eu-i-klinsj-om-gronn-industriavtale-krangler-om-olje-og-arktis/2-1-1359942

MEMR. (2021). *Road Map Pengembangan dan Pemanfaatan Batubara.* Ministry of Energy and Mineral Resources. https://www.esdm.go.id/assets/media/content/content-buku-road-map-pengembangan-dan-pemanfaatan-batubara.pdf

MEMR. (2022a). *Grand Strategy Mineral dan Batubara.* Ministry of Energy and Mineral Resources. https://www.esdm.go.id/assets/media/content/content-buku-grand-strategy-komoditas-minerba.pdf

MEMR. (2022b). Gasifikasi batubara ke dme ditargetkan beroperasi di 2027. *Ministry of Energy and Mineral Resources.* https://www.esdm.go.id/id/media-center/arsip-berita/gasifikasi-batubara-ke-dme-ditargetkan-beroperasi-di-2027

Mills, A. (2023, June 1). QatarEnergy and PetroBangla sign 15-year LNG supply deal, CEO says. *Reuters.* https://www.reuters.com/business/energy/qatarenergy-petrobangla-sign-15-year-lng-supply-deal-ceo-says-2023-06-01/

Minerals Council South Africa. (2021). *Facts and Figures 2020 Pocketbook* [dataset]. Facts and figures. https://www.mineralscouncil.org.za/industry-news/publications/facts-and-figures

Minerals Council South Africa. (2023). *Facts and Figures 2022 Pocketbook* [dataset]. Facts and figures. https://www.mineralscouncil.org.za/industry-news/publications/facts-and-figures

Ministry of Coal. (2022a). *Demand of coal forecasting / energy matters tracking.* Government of India. https://coal.gov.in/en/major-statistics/coal-demand-projections

Ministry of Coal. (2022b, November 3). Finance Minister Launches Biggest Ever Coal Mine Auction of 141 Mines. *Press Information Bureau.* https://www.pib.gov.in/PressReleasePage.aspx?PRID=1873522

Ministry of Coal. (2023, May 15). *Ministry of Coal Organizes "Just Transition Roadmap" Seminar.* https://coal.nic.in/sites/default/files/2023-05/PIB1924239.pdf

Ministry of Ecology and Natural Resources. (2023). *Updated Nationally Determined Contribution of the Republic of Kazakhstan to the global response to climate change.* Republic of Kazakhstan; Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/NDC/2023-06/12updated%20NDC%20KAZ_Gov%20Decree313_19042023_en_cover%20page.pdf

Ministry of Energy. (2020). *Concept of development of the fuel and energy complex of the Republic of Kazakhstan until 2030.* Republic of Kazakhstan. https://www.gov.kz/memleket/entities/energo/documents/details/4506

Ministry of Energy. (2023a). *Transcript of meetings March 15, 2023.* State Duma - Federal Assembly of the Russian Federation. http://transcript.duma.gov.ru/node/6044/

Ministry of Energy. (2023b, February 6). First improved model contract for hydrocarbon production signed in Kazakhstan. *Republic of Kazakhstan.* https://www.gov.kz/memleket/entities/energo/press/news/details/500600?lang=ru

Ministry of Energy & Infrastructure. (2023). *UAE Energy Strategy 2050.* Government of United Arab Emirates. https://u.ae/en/about-the-uae/strategies-initiatives-and-awards/strategies-plans-and-visions/environment-and-energy/uae-energy-strategy-2050

Ministry of Municipality and Environment. (2021). *Nationally determined contribution (NDC).* State of Qatar; Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/NDC/2022-06/Qatar%20NDC.pdf

MME. (2020a, August 6). *Participação especial.* Agência Nacional do Petróleo, Gás Natural e Biocombustíveis. https://www.gov.br/anp/pt-br/assuntos/royalties-e-outras-participacoes/participacao-especial

MME. (2020b, August 6). *Royalties.* Agência Nacional do Petróleo, Gás Natural e Biocombustíveis. https://www.gov.br/anp/pt-br/assuntos/royalties-e-outras-participacoes/royalties

MME. (2021a). *Hoja de ruta del hidrógeno en Colombia.* https://www.minenergia.gov.co/documents/10192/24309272/Hoja+de+Ruta+del+Hidrogeno+Colombia.pdf

MME. (2021b, October 20). *Regulatory changes related to the oil and natural gas sector.* Agência Nacional Do Petróleo, Gás Natural e Biocombustíveis. https://www.gov.br/anp/en/rounds-anp/about-the-bidding-rounds/regulatory-changes-related-to-the-oil-and-natural-gas-sector

MME. (2023a). *Metodología para definir la Hoja de Ruta de la Transición Energética Justa en Colombia.* Ministerio de Minas y Energía. https://www.minenergia.gov.co/documents/10143/MetodologiaHojaRuta-TEJ-2023.pdf

MME. (2023b, March 15). Una transición energética justa y sostenible. *Ministerio de Minas y Energía.* https://www.minenergia.gov.co/es/sala-de-prensa/noticias-index/una-transici%C3%B3n-energ%C3%A9tica-justa-y-sostenible/

MME. (2023c, March 24). MME desenvolve projeto para elevar investimentos e tornar o Brasil o quarto maior produtor de petróleo do mundo. *Ministério de Minas e Energia.* https://www.gov.br/mme/pt-br/assuntos/noticias/mme-desenvolve-projeto-para-elevar-investimentos-e-tornar-o-brasil-o-quarto-maior-produtor-de-petroleo-do-mundo

References: Chapter 3 (cont.)

MME. (2023d, August 31). Colombia nuevo amigo de la alianza internacional "Más Allá del Petróleo y el Gas-BOGA". *Ministerio de Minas y Energía.* https://www.minenergia.gov.co/es/sala-de-prensa/noticias-index/colombia-nuevo-amigo-de-la-alianza-internacional-m%C3%A1s-all%C3%A1-del-petr%C3%B3leo-y-el-gas-boga/

MME & ANH. (2022). *Balance de contratos de hidrocarburos y recursos disponibles para la transición energética justa.* Ministerio de Minas y Energía. https://minenergia.gov.co/documents/9628/DIAGNOSTICO_GENERAL_DE_CONTRATOS_DE_HIDROCARBUROS_2022.pdf

MME & EPE. (2020). *Plano Nacional de Energia 2050.* Ministério de Minas e Energia & Empresa de Pesquisa Energética. https://www.epe.gov.br/pt/publicacoes-dados-abertos/publicacoes/Plano-Nacional-de-Energia-2050

MME & EPE. (2023). *Plano Decenal de Expansão de Energia 2032.* Ministério de Minas e Energia & Empresa de Pesquisa Energética. https://www.epe.gov.br/pt/publicacoes-dados-abertos/publicacoes/plano-decenal-de-expansao-de-energia-2032

MOEFCC. (2022). *India's Long-Term Low-Carbon Development Strategy.* Ministry of Environment, Forest and Climate Change. https://unfccc.int/documents/623511

Mohamed, M. (2022, October 18). Kuwait Oil Company aims to increase natural gas production to meet local demand. *Reuters.* https://www.reuters.com/business/energy/kuwait-oil-company-aims-increase-natural-gas-production-meet-local-demand-acting-2022-09-18/

Mohanty, S., & Ratnajyoti, D. (2022, October 21). India unveils more oil blocks in upstream push but challenges ahead. *S&P Global.* https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/oil/102122-india-unveils-more-oil-blocks-in-upstream-push-but-challenges-ahead

Mohanty, S., Sahu, S., & Dutta, R. (2023, February 6). India says future energy landscape will see growth in oil, gas and renewables. *S&P Global.* https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/energy-transition/020623-india-says-future-energy-landscape-will-see-growth-in-oil-gas-and-renewables

Mojjido, P. (2023, February 21). Akk Is 43% Done, with High Ambition for 2023 Commissioning. *Africa Oil and Gas Report.* https://africaoilgasreport.com/2023/02/gas-monetization/akk-is-43-done-with-high-ambition-for-2023-commissioning/

Moloney, A. (2022, August 4). Can President Petro crack Colombia's reliance on oil and coal? | Context. *Context.* https://www.context.news/nature/can-president-petro-crack-colombias-reliance-on-oil-and-coal

Moloney, A. (2023, March 14). ANALYSIS-Can Colombia's green energy plan succeed without fossil fuel cash? *Thomson Reuters Foundation.* https://www.reuters.com/article/colombia-oil-renewables-idINL8N34W5WQ

Mooney, A., Chazan, G., Inagaki, K., & Foy, H. (2023, May 11). Germany sets stage for G7 clash with push to endorse gas. *Financial Times.* https://www.ft.com/content/4ccf9261-a4ea-4331-910d-362ed3d73ea7

Moore, W. G., & Moss, T. (2022, July 14). Europe to Africa: Gas for Me but Not for Thee. *Foreign Policy.* https://foreignpolicy.com/2022/07/14/europe-africa-energy-crisis-gas-oil-fossil-fuels-development-finance-hypocrisy-climate-summit-world-bank/

Morton, A. (2023, July 4). Australia resists Japan's lobbying for NT gas export project to be given special treatment. *The Guardian.* https://www.theguardian.com/australia-news/2023/jul/04/australia-resists-japans-lobbying-for-nt-gas-export-project-to-be-given-special-treatment

MPE. (2023). *Prop. 97 S (2022–2023): Utbygging og drift av Yggdrasil-området og Fenris, samt videreutvikling av Valhall, med status for olje- og gassvirksomheten mv.* Norwegian Ministry of Petroleum and Energy. https://www.regjeringen.no/no/dokumenter/prop.-97-s-20222023/id2969299/

Mulugetta, Y., Sokona, Y., Trotter, P. A., Fankhauser, S., Omukuti, J., Somavilla Croxatto, L., Steffen, B., Tesfamichael, M., Abraham, E., Adam, J.-P., Agbemabiese, L., Agutu, C., Aklilu, M. P., Alao, O., Batidzirai, B., Bekele, G., Dagnachew, A. G., Davidson, O., Denton, F., … Yussuff, A. (2022). Africa needs context-relevant evidence to shape its clean energy future. *Nature Energy, 7,* 1015–1022. https://doi.org/10.1038/s41560-022-01152-0

Munro, D. (2017, April 17). Qatar moves to ensure LNG dominance. *Arab Gulf States Institute in Washington.* https://agsiw.org/qatar-moves-ensure-lng-dominance/

Muttitt, G., & Kartha, S. (2020). Equity, climate justice and fossil fuel extraction: Principles for a managed phase out. *Climate Policy, 20*(8), 1024–1042. https://doi.org/10.1080/14693062.2020.1763900

Nacke, L., Cherp, A., & Jewell, J. (2022). Phases of fossil fuel decline: Diagnostic framework for policy sequencing and feasible transition pathways in resource dependent regions. *Oxford Open Energy, 1,* oiac002. https://doi.org/10.1093/ooenergy/oiac002

Nandi, J. (2022, October 29). G7 countries urge India to join Just Energy Transition partnership. *Hindustan Times.* https://www.hindustantimes.com/india-news/g7-countries-urge-india-to-join-just-energy-transition-partnership-101666982898901.html

National Bureau of Statistics Kazakhstan. (2023). *Dynamics of oil and gas and raw materials sector* [dataset]. https://stat.gov.kz/api/iblock/element/5282/file/kk/

References: Chapter 3 (cont.)

National Bureau of Statistics of China. (2023). *Energy Production in December 2022.* http://www.stats.gov.cn/english/PressRelease/202301/t20230118_1892302.html#:~:text=In%202022%2C%204.5%20billion%20tons,of%20import%20was%20slowed%20down.

National Energy Council. (2022). *Indonesia energy outlook 2021.* National Energy Council. https://den.go.id/index.php/publikasi/documentread?doc=Buku_Energi_Outlook_2022_Versi_Bhs_Inggris.pdf

Natural Resources Canada. (2020, September 28). *Trans Mountain Expansion Project.* Government of Canada. https://www.canada.ca/en/campaign/trans-mountain.html

Natural Resources Canada. (2022, December 8). *Guidelines for Canada's International Support for the Clean Energy Transition.* Government of Canada; Natural Resources Canada. https://natural-resources.canada.ca/home/guidelines-for-canadas-international-support-for-the-clean-energy-transition/24797

NDRC & NEA. (2022). *Opinions of the National Development and Reform Commission and the National Energy Administration on improving the systems, mechanisms and policy measures for energy green and low-carbon transformation.* The State Council of the People's Republic of China. http://www.gov.cn/zhengce/zhengceku/2022-02/11/content_5673015.htm

Ndwaru, J. (2022, October 25). Nigeria elections 2023: Bola Tinubu targets blockchain, taxation and oil. *The Exchange.* https://theexchange.africa/countries/nigeria-elections-2023-tinubu-blockchain-taxation-oil/

NEA. (2022). *The job of energy must be in our own hands.* National Energy Administration. http://www.nea.gov.cn/2022-01/07/c_1310413762.htm

NEA. (2023). *Notice of the National Energy Administration on Printing and Distributing the "Guiding Opinions on Energy Work in 2023."* National Energy Administration. http://zfxxgk.nea.gov.cn/2023-04/06/c_1310710616.htm

New Climate Institute & Climate Analytics. (2023). *Countdown to COP28: Time for world to focus on oil and gas phase-out, renewables target – not distractions like CCS.* https://climateactiontracker.org/publications/countdown-to-COP28/

New Telegraph. (2023, April 18). Nigeria moves to return to coal exploration. *New Telegraph*. https://newtelegraphng.com/nigeria-moves-to-return-to-coal-exploration/

NITI Aayog. (2022). *Report of the inter-ministerial committee on just transition from coal.* https://www.niti.gov.in/sites/default/files/2023-02/Report_Just-Transition-Committee_compressed.pdf

NMA. (2022). *Coal factsheet.* National Mining Agency of Colombia. https://mineriaencolombia.anm.gov.co/sites/default/files/2022-02/Fact%20Sheet%20Coal%2001%202022.pdf

Norwegian Ministry of Finance. (2019). *Energy stocks in the government pension fund global* [Report to the Storting (white paper)]. https://www.regjeringen.no/en/dokumenter/meld.-st.-14-20182019/id2631532/

Norwegian Ministry of Finance. (2021). *Long-term perspectives on the Norwegian economy 2021* [Report to the Storting (white paper)]. https://www.regjeringen.no/en/dokumenter/meld.-st.-14-20202021/id2834218/

Norwegian Ministry of Finance. (2022). *Prop. 1 LS (2022–2023): For budsjettåret 2023—Skatter, avgifter og toll 2023.* regjeringen.no. https://www.regjeringen.no/no/dokumenter/prop.-1-ls-20222023/id2931482/

References: Chapter 3 (cont.)

NPD. (2022). *Resource report 2022.* Norwegian Petroleum Directorate. https://www.npd.no/globalassets/1-npd/publikasjoner/rapporter/ressursrapporter/2022/en/resource-report-2022.pdf

NPD & MPE. (2023a, February 20). *Norwegian Petroleum: Production forecasts.* Norwegian Petroleum. https://www.norskpetroleum.no/en/production-and-exports/production-forecasts/

NPD & MPE. (2023b, May 11). *Norwegian Petroleum: The government's revenues.* Norwegian Petroleum. https://www.norskpetroleum.no/en/economy/governments-revenues/

NRGI. (2022). *National Oil Company Database.* Natural Resource Governance Institute. https://www.nationaloilcompanydata.org/

NSTA. (2021). *Projections of UK oil and gas production and expenditure—February 2021* [dataset]. Oil & Gas Authority. https://www.ogauthority.co.uk/data-centre/data-downloads-and-publications/production-projections/

NSTA. (2022a). *Process for Producing NSTA Production Projections.* North Sea Transition Authority. https://www.nstauthority.co.uk/media/8539/process-for-producing-nsta-production-projections-november-2022.pdf

NSTA. (2022b, October 7). NSTA launches 33rd offshore oil and gas licensing round. *North Sea Transition Authority.* https://www.nstauthority.co.uk/news-publications/news/2022/nsta-launches-33rd-offshore-oil-and-gas-licensing-round/

NSTA. (2023). *NSTA February 2023 oil and gas production projections and latest DESNZ and CCC demand projections* [dataset]. North Sea Transition Authority. https://www.nstauthority.co.uk/data-centre/data-downloads-and-publications/production-projections/

NUPRC. (2022). *Guidelines for management of fugitive methane and greenhouse gases emissions in the upstream oil and gas operations in Nigeria.* Nigerian Upstream Petroleum Regulatory Commission. https://www.nuprc.gov.ng/wp-content/uploads/2022/11/METHANE-GUIDELINES-FINAL-NOVEMBER-10-2022.pdf

Obi, N., Akuirene, A., Bwititi, P., Adjene, J., & Nwose, E. (2021). Community health perspective of gas flaring on communities in Delta region of Nigeria: Narrative review. *International Journal of Scientific Reports, 7*(3), 180–185. https://doi.org/10.18203/issn.2454-2156.IntJSciRep20210547

Obrador, A. M. L. (2022, June 7). *Discurso del presidente Andrés Manuel López Obrador en el Foro de las Principales Economías sobre Energía y Acción Climática* [Speech]. Major Economies Forum on Energy and Climate Action. http://www.gob.mx/sre/documentos/discurso-del-presidente-andres-manuel-lopez-obrador-en-el-foro-de-las-principales-economias-sobre-energia-y-accion-climatica

OCI. (2023). *Public Finance for Energy Database* [dataset]. https://energyfinance.org

OECD. (2022a). *Inventory of Support Measures for Fossil Fuels: Country Notes.* https://doi.org/10.1787/d757f504-en

OECD. (2022b, August). Support for fossil fuels almost doubled in 2021, slowing progress toward international climate goals, according to new analysis from OECD and IEA. *Organisation for Economic Co-Operation and Development.* https://www.oecd.org/environment/support-for-fossil-fuels-almost-doubled-in-2021-slowing-progress-toward-international-climate-goals-according-to-new-analysis-from-oecd-and-iea.htm

OECD. (2023a). *OECD inventory of support measures for fossil fuels: Colombia* (OECD Environment Statistics) [dataset]. https://doi.org/https://doi.org/10.1787/b0087584-en

OECD. (2023b). *OECD inventory of support measures for fossil fuels: Country notes.* Organisation for Economic Co-operation and Development. https://doi.org/10.1787/5a3efe65-en

OECD and IISD. (2023). *Fossil Fuel Subsidy Tracker.* https://fossilfuelsubsidytracker.org/

Office of the Prime Minister of Canada. (2021a). *Deputy Prime Minister and Minister of Finance Mandate Letter.* https://pm.gc.ca/en/mandate-letters/2021/12/16/deputy-prime-minister-and-minister-finance-mandate-letter

Office of the Prime Minister of Canada. (2021b, November 1). *Prime Minister Trudeau announces enhanced and ambitious climate action to cut pollution at the COP26 summit.* https://pm.gc.ca/en/news/news-releases/2021/11/01/prime-minister-trudeau-announces-enhanced-and-ambitious-climate

Official Information Source of the Prime Minister. (2021, December 22). *In the oil industry at the end of 2021, oil production is expected to reach 85.7 million tons—Ministry of Energy.* https://primeminister.kz/en/news/v-neftyanoy-otrasli-po-itogam-2021-goda-obem-dobychi-nefti-ozhidaetsya-na-urovne-857-mln-tonn-minenergo-22111737

Official Information Source of the Prime Minister. (2022, December 20). *Scientific organizations will be involved state geological studies of the subsoil—Brekeshev on the strengthening of the personnel reserve of the geological sector.* https://primeminister.kz/ru/news/nauchnye-organizacii-budut-vovlecheny-v-gosudarstvennoe-geologicheskoe-izuchenie-nedr-s-brekeshev-ob-usilenii-kadrovogo-rezerva-geologicheskoy-otrasli-2011435

OGA. (2021). *The OGA Strategy.* Oil & Gas Authority. https://www.nstauthority.co.uk/media/7105/the-oga-strategy.pdf

Öko-Institut. (2022). *Die deutsche Braunkohlenwirtschaft 2021: Historische Entwicklungen, Ressourcen, Technik, wirtschaftliche Strukturen und Umweltauswirkungen.* https://www.agora-energiewende.de/veroeffentlichungen/die-deutsche-braunkohlen-wirtschaft-2021/

References: Chapter 3 (cont.)

O'Manique, C., Tucker, B., & DeAngelis, K. (2022). *At a crossroads: Assessing G20 and MDB international energy finance ahead of stop funding fossils pledge deadline.* Oil Change International. https://priceofoil.org/2022/11/01/g20-at-a-crossroads/

Omarjee, L. (2023, May 4). Key energy plan will be developed in a year's time, says Ramaphosa. *Business.* https://www.news24.com/fin24/climate_future/energy/key-energy-plan-will-be-developed-in-a-years-time-says-ramaphosa-20230504

ONGC Videsh. (2023, May 15). *Ongc Videsh Limited – working globally for the energy security of India*. ONGC Videsh Limited. https://www.ongcvidesh.com/company/about-ovl/

OPEC. (2022). *Opec Annual Statistical Bulletin 2022.* Organization of the Petroleum Exporting Countries. https://asb.opec.org/index.html

Padma, T. V. (2023). India pledges $4 billion for green energy to cut carbon emissions. *Nature.* https://doi.org/10.1038/d41586-023-00285-w

Pai, S., & Ranjan, V. (2023). Understanding the arc of global just transition: Case studies from the India, South Africa and US. *SSRN Electronic Journal.* https://doi.org/10.2139/ssrn.4450353

Pant, A., Mostafa, M., & Bridle, R. (2020). *Understanding the Role of Subsidies in South Africa's Coal-Based Liquid Fuel Sector.* International Institute for Sustainable Development. https://www.iisd.org/publications/subsidies-south-africa-coal-based-liquid-fuel-sector

Paris Agreement. (2015). https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf

Parliament of Australia. (2022). *Climate Change Act 2022* (au). Australian Government. https://www.legislation.gov.au/Details/C2022A00037/

Parliament of Victoria. (2022). *Constitution Act 1975*. Victorian Legislation. https://content.legislation.vic.gov.au/sites/default/files/2022-03/75-8750aa224%20authorised.pdf

Pasricha, A. (2022, December 2). Despite Ramping Up Green Energy, India Cannot Ditch Coal. *VOA.* https://www.voanews.com/a/despite-ramping-up-green-energy-india-cannot-ditch-coal/6859419.html

Paula Rubiano A., M. (2022, November 16). How Colombia plans to keep its oil and coal in the ground. *BBC News.* https://www.bbc.com/future/article/20221116-how-colombia-plans-to-keep-its-oil-and-gas-in-the-ground

Peh, G. (2023, April 5). Keeping Indonesia's downstream coal projects afloat will require hefty government subsidies. *IEEFA.* https://ieefa.org/resources/keeping-indonesias-downstream-coal-projects-afloat-will-require-hefty-government

Pellegrini, L., & Arsel, M. (2022). The Supply Side of Climate Policies: Keeping Unburnable Fossil Fuels in the Ground. Global Environmental Politics, *22*(4), 1–14. https://doi.org/10.1162/glep_a_00691

People's Bank of China. (2022). *People's Bank of China answered reporters' questions on increasing the special re-loan quota of 100 billion yuan to support the clean and efficient utilization of coal*. https://www.gov.cn/zhengce/2022-05/04/content_5688595.htm

Petrobras. (2023). *Strategic Plan 2023–2027.* https://api.mziq.com/mzfilemanager/v2/d/25fdf098-34f5-4608-b7fa-17d60b-2de47d/9f7bccc3-0003-1e50-3d70-8d64b1c77c12?origin=1

Peyper, L. (2023, February 3). Govt urges miners to make a case for coal by investing in clean technology. *Miningmx.* https://www.miningmx.com/news/energy/51994-govt-urges-miners-to-make-a-case-for-coal-by-investing-in-clean-technology/

PIB India. (2022, July 20). Union Home and Cooperation Minister Shri Amit Shah addressed the 6th "National Seminar on Mines and Minerals" in New Delhi today. *Press Information Bureau.* https://pib.gov.in/PressReleaseIframePage.aspx-?PRID=1841023

PIB India. (2023a). Coal Ministry Successfully Auctions 87 Mines in less than Three Years. *Press Information Bureau.*

PIB India. (2023b). Union Minister of Petroleum and Natural Gas Hardeep Singh Puri re-dedicates ONGC's iconic Sagar Samrat as a Mobile Offshore Production Unit. *Press Information Bureau.*

PIB India. (2023c, May 3). Domestic Coal Production Goes up by almost 23 % during Last Five Years. *Press Information Bureau.* https://pib.gov.in/PressReleaseIframePage.aspx-?PRID=1921662#:~:text=India's%20overall%20coal%20Production%20has,dependence%20on%20substitutable%20coal%20imports

PIB India & Ministry of Coal. (2022, March 21). Coal India Ltd plans to produce one billion ton by 2023–24. *Press Information Bureau.* https://pib.gov.in/Pressreleaseshare.aspx?PRID=1807677

Pinheiro, J. (2020, July 9). Strategy flows toward natural gas. *Aramco Elements Magazine.* https://www.aramco.com/en/magazine/elements/2020/strategy-flows-toward-natural-gas

Portafolio. (2023, March 1). *Ecopetrol le dejó al país el equivalente a dos reformas tributarias.* https://www.portafolio.co/negocios/empresas/ecopetrol-le-dejo-al-pais-el-equivalente-a-dos-reformas-tributarias-579229

Powering Past Coal Alliance. (n.d.). *Members.* Powering Past Coal Alliance. Retrieved June 25, 2019, from https://poweringpastcoal.org/members

References: Chapter 3 (cont.)

PPIPE & BPPT. (2021). *Outlook Energi Indonesia 2021 – Perspektif Teknologi Energi Indonesia: Tenaga Surya untuk Penyediaan Energi Charging Station.* Pusat Pengkajian Industri Proses dan Energi & Badan Pengkajian dan Penerapan Teknologi. https://www.bppt.go.id/dokumen/outlook-energi

Presidency of Republic of South Africa. (2022). *South Africa's just energy transition investment plan (JET IP) 2023–2027.* https://www.thepresidency.gov.za/content/south-africa%27s-just-energy-transition-investment-plan-jet-ip-2023-2027

President of the Republic of Indonesia. (2022). *Percepatan Pengembangan Energi Terbarukan Untuk Penyediaan Tenaga Listrik—Perpres 112-2022.* https://drive.esdm.go.id/wl/?id=o8WDm5f2AXpP9Awt2y4CFnvB3t2JdOAf

President of the Russian Federation. (2021). *List of instructions following a meeting with members of the Government on measures to implement climate policy.* Government of the Russian Federation. http://kremlin.ru/acts/assignments/orders/67240

President of the Russian Federation. (2022, April 20). *Meeting on the current situation in the oil and gas sector.* Government of the Russian Federation. http://kremlin.ru/events/president/news/68191

President of the Russian Federation. (2023, March 21). Russian-Chinese talks. *Government of the Russian Federation.* http://en.kremlin.ru/events/president/news/70748

Presidential Climate Commission. (2022). *A Framework for a Just Transition in South Africa.* https://pccommissionflow.imgix.net/uploads/images/A-Just-Transition-Framework-for-South-Africa-2022.pdf

Prest, B. C., Fell, H., Gordon, D., & Conway, T. (2023). *Estimating the Emissions Reductions from Supply-side Fossil Fuel Interventions* (Working Paper 23–12). Resources for the Future. https://www.rff.org/publications/working-papers/estimating-the-emissions-reductions-from-supply-side-fossil-fuel-interventions/

PwC Nigeria. (2021). *The Petroleum Industry Act: Redefining the Nigerian oil and gas landscape.* PricewaterhouseCoopers Nigeria. https://www.pwc.com/ng/en/assets/pdf/nigeria-petroleum-industry-act-1.pdf

Pye, S., Bradley, S., Hughes, N., Price, J., Welsby, D., & Ekins, P. (2020). An equitable redistribution of unburnable carbon. *Nature Communications, 11,* 3968. https://doi.org/10.1038/s41467-020-17679-3

QatarEnergy. (2022a). *Climate change mitigation.* https://www.qatarenergy.qa/en/Sustainability/Pages/ClimateChangeMitigation.aspx

QatarEnergy. (2022b, November). *QatarEnergy H1 2022 Investors Update Presentation.* https://www.qatarenergy.qa/en/MediaCenter/Publications/QatarEnergy%20H1%202022%20Investors%20Presentation.pdf

QatarEnergy. (2022c, November 21). *QatarEnergy and Sinopec sign a 27-year 4 million tons per annum LNG supply agreement to China.* https://www.qatarenergy.qa/en/MediaCenter/Pages/newsdetails.aspx?ItemId=3737

QazaqGaz. (2023, April 24). *QazaqGaz and CNPC expand cooperation in the gas industry.* https://qazaqgaz.kz/en/novosti-kompanii/qazaqgaz-zhne-cnpc-gaz-salasynday-seriktestik-ayasyn-keejtude

Raimi, M. O., Sawyerr, H. O., Ezekwe, C. I., & Opasola, A. O. (2022). Quality Water, Not Everywhere: Assessing the Hydrogeochemistry of Water Quality Across Ebocha-Obrikom Oil and Gas Flaring Area in the Core Niger Delta Region of Nigeria. *Pollution, 8*(3), 751–778. https://doi.org/10.2139/ssrn.4124546

rbb24. (2023, June 13). *Wer zahlt für die Löcher in der Landschaft der Kohleländer?* https://www.rbb24.de/studiocottbus/politik/2023/06/sanierung-braunkohle-zagebaue-gruene-stiftung.html

REN21. (2023). Renewables 2023 Global Status Report. REN21. https://www.ren21.net/gsr-2023/

Reuters. (2023a, January 26). *South Africa's RBCT coal exports hit 29-year low in 2022.* https://www.reuters.com/world/africa/south-africas-rbct-coal-exports-hit-29-year-low-2022-2023-01-26/

Reuters. (2023b, January 30). *Indonesia sees record coal exports of more than 500 mln tonnes in 2023.* https://www.reuters.com/business/energy/indonesia-sees-record-coal-exports-more-than-500-mln-tonnes-2023-2023-01-30/

Reuters. (2023c, April 21). *Exclusive: Kazakhstan has ramped up oil exports bypassing Russia*. https://www.reuters.com/business/energy/kazakhstan-has-ramped-up-oil-exports-bypassing-russia-sources-2023-04-21/

Reuters. (2023d, June 23). *UPDATE 1-Australia's Tamboran signs deals to supply LNG to BP and Shell.* https://www.reuters.com/article/tamboran-rsrcs-deal-lng-idINL4N38F049

Riekeles, H. (2023). Norsk olje, globale utslipp: *Netto forbrenningsutslipp av økt norsk petroleumsproduksjon* (04). Vista Analyse. https://vista-analyse.no/no/publikasjoner/norsk-olje-globale-utslipp/

Roelf, W. (2023, May 18). South Africa circles back to shale gas as power crisis drags. *Reuters.* https://www.reuters.com/business/energy/safrica-circles-back-shale-gas-power-crisis-drags-2023-05-18/

Rui, D. H., & Strachan, F. (2021). *Hot money: Australian taxpayers financing fossil fuels.* Jubilee Australia Research Centre. https://www.jubileeaustralia.org/storage/app/uploads/public/617/f27/821/617f2782105ab563895092.pdf

References: Chapter 3 (cont.)

Rydje, O. M., & Holter, M. (2022, November 2). Oljeskattepakken kan bli over dobbelt så gunstig som tidligere antatt. Nå vil SV-leder Audun Lysbakken ha den på forhandlingsbordet. *Dagens Næringsliv.* https://www.dn.no/politikk/oljeskatte-pakken-kan-bli-over-dobbelt-sa-gunstig-som-tidligere-antatt-na-vil-sv-leder-audun-lysbakken-ha-den-pa-forhandlingsbordet/2-1-1343168

Rystad Energy. (2023). *Netto klimagassutslipp fra økt olje- og gassproduksjon på norsk sokkel.* https://www.regjeringen.no/contentassets/f5fc522f-50674c1f9e0b5db47c264dbe/netto-klimagassutslipp-fra-okt-olje-og-gassproduksjon-pa-norsk-sokkel_hovedrapport.pdf

Sambodo, M. (2023, May 3). Policy uncertainty stalls Indonesia's energy transition. *East Asia Forum.* https://www.eastasiaforum.org/2023/05/03/policy-uncertainty-stalls-indonesias-energy-transition/

Sanchez, F., Björn, N., Olle, O., & Linde, L. (2023). *Lessons from oil and gas transitions in the North Sea.* Stockholm Environment Institute. https://doi.org/10.51414/sei2023.041

Sasol. (2023). *Climate action.* Sasol. https://www.sasol.com/sustainability/environment/climate-action

Satubaldina, A. (2023, April 25). Gas Dilemma: Abundant Gas Industry in Kazakhstan Faces Critical Challenges. *The Astana Times.* https://astanatimes.com/2023/04/gas-dilemma-abundant-gas-industry-in-kazakhstan-faces-critical-challenges/

Saudi & Middle East Green Initiatives. (2021, October 23). *HRH the Crown Prince and Prime Minister announces the Kingdom of Saudi Arabia's aims to achieve net zero emissions by 2060.* https://www.greeninitiatives.gov.sa/news-and-announcements/hrh-the-crown-prince-and-prime-minister-announces-the-kingdom-of-saudi-arabia-s-aims-to-achieve-net-zero-emissions-by-2060

Schmall, E., & Krauss, C. (2022, December 7). India Chases Clean Energy, but Economic Goals Put Coal First. *The New York Times.* https://www.nytimes.com/2022/12/07/business/energy-environment/india-energy-subsidies.html

Schücking, H. (2022). *Who Is Financing Fossil Fuel Expansion In Africa?* Urgewald. https://www.urgewald.org/en/shop/who-financing-fossil-fuel-expansion-africa

Scottish Government. (n.d.). *Just Transition Commission.* Retrieved May 8, 2023, from https://www.gov.scot/groups/just-transition-commission/

Searancke, R. (2023, March 3). Equinor doubles its interest in controversial Rosebank oil project with Suncor deal. *Upstream.* https://www.upstreamonline.com/production/equinor-doubles-its-interest-in-controversial-rosebank-oil-project-with-suncor-deal/2-1-1413133

Seely, A. (2023). *Taxation of North Sea oil and gas.* House of Commons Library. https://researchbriefings.files.parliament.uk/documents/SN00341/SN00341.pdf

SEI, IISD, ODI, E3G, & UNEP. (2020). *The Production Gap: Special Report 2020.* Stockholm Environment Institute, International Institute for Sustainable Development, Overseas Development Institute, E3G, and United Nations Environment Programme. http://productiongap.org/2020report

Semieniuk, G., Holden, P. B., Mercure, J.-F., Salas, P., Pollitt, H., Jobson, K., Vercoulen, P., Chewpreecha, U., Edwards, N. R., & Viñuales, J. E. (2022). Stranded fossil-fuel assets translate to major losses for investors in advanced economies. *Nature Climate Change, 12,* 532–538. https://doi.org/10.1038/s41558-022-01356-y

SENER. (2018a). *Prospectiva de Gas Natural 2018–2032.* Secretaría de Energía. https://base.energia.gob.mx/Prospectivas18-32/PGN_18_32_F.pdf

SENER. (2018b). *Prospectiva de Petróleo Crudo y Petrolíferos 2018–2032.* Secretaría de Energía. https://base.energia.gob.mx/Prospectivas18-32/PPP_2018_2032_F.pdf

Shafira, I. D. (2023, March 21). Tok! DPR Sahkan Perpu Cipta Kerja Jadi Undang-Undang. *Tempo.* https://nasional.tempo.co/read/1705252/tok-dpr-sahkan-perpu-cipta-kerja-jadi-undang-undang

SHCP. (2021, December 6). The Ministry of Finance announces strategy to support the Petróleos Mexicanos' long term sustainability. *Secretaría de Hacienda y Crédito Público.* https://www.gob.mx/shcp/prensa/press-release-no-74-ministry-of-finance-announces-strategy-to-support-the-petroleos-mexicanos-long-term-sustainability

Sidemen, I. G. S. (2022, April 13). Indonesia Drafts Regulations on Carbon Capture and Storage and Carbon Capture Utilisation and Storage to Accelerate Project Execution. *Asia CCUS Network.* https://www.asiaccusnetwork-eria.org/articles/indonesia-drafting-ccs-and-ccus-regulation-to-accelerate-ccs-and-ccus-projects-execution

SIECESC. (2022, May 6). *Carvão mineral está associado ao desenvolvimento econômico de municípios.* Globo. https://g1.globo.com/sc/santa-catarina/especial-publicitario/siecesc/carvao-mineral-futuro-sustentavel/noticia/2022/05/06/carvao-mineral-esta-associado-ao-desenvolvimento-economico-de-municipios.ghtml

Silverstein, K. (2023, June 6). UAE's Masdar Puts Money Where Mouth Is – Into Clean Energy. *Environment+Energy Leader.* https://www.environmentalleader.com/2023/06/uaes-masdars-puts-money-where-mouth-is-into-clean-energy/

Sim, L.-C. (2023, January 12). The Gulf states: Beneficiaries of the Russia-Europe energy war? *Middle East Institute.* https://www.mei.edu/publications/gulf-states-beneficiaries-russia-europe-energy-war

Simms, P. L. (2017). Furtive Subsidies: Reframing Fossil Fuel's Regulatory Exceptionalism. *Virginia Environmental Law Journal, 35*(3), 420–473. JSTOR.

References: Chapter 3 (cont.)

Simon, J. (2023, February 5). Despite billions to get off coal, why is Indonesia still building new coal plants? *NPR.* https://www.npr.org/2023/02/05/1152823939/despite-billions-to-get-off-coal-why-is-indonesia-still-building-new-coal-plants

Singh, R. K. (2023, March 29). India Aims to Slash Coal Imports Amid Rising Local Production. *Bloomberg News.* https://www.bloomberg.com/news/articles/2023-03-29/india-targets-to-slash-coal-imports-amid-rising-local-production

Sinopec EDRI. (2022). *2060 China Energy Outlook (2022 Edition).* http://www.news.cn/energy/20221228/32799308d93947b881b3fe6a3aacc6ca/c.html

Smertina, P. (2022, August 24). LNG support liquefies. *Kommersant.* https://www.kommersant.ru/doc/5525363

Smith, M. (2020, August 20). Colombia's Oil Industry at Risk as National Security Crisis Worsens. *Oil Price.* https://oilprice.com/Energy/Energy-General/Colombias-Oil-Industry-At-Risk-As-National-Security-Crisis-Worsens.html

Sokona, Y., Mulugetta, Y., Tesfamichael, M., Kaboub, F., Niclas Hällström, Stilwell, M., Adow, M., & Besaans, C. (2023). *Just Transition: A Climate, Energy and Development Vision for Africa.* www.justtransitionafrica.org

State Council. (2021). *The State Council on Printing and Distributing Carbon Peak by 2030: Notice of action plan.* The People's Republic of China. https://www.gov.cn/zhengce/content/2021-10/26/content_5644984.htm

State of Kuwait. (2019). *Kuwait national development plan 2020–2025.* https://media.gov.kw/assets/img/Ommah22_Awareness/PDF/NewKuwait/Revised%20KNDP%20-%20EN.pdf

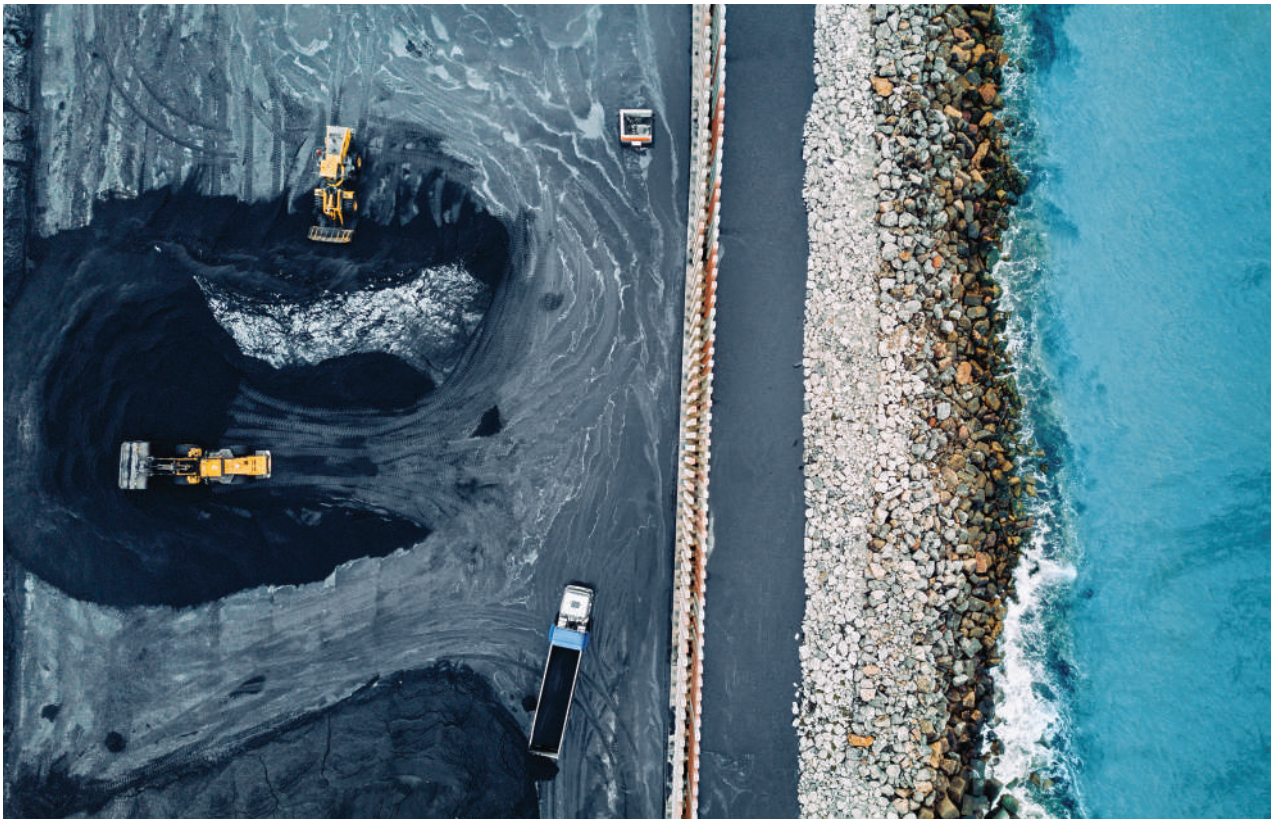
State of Kuwait. (2021a). *Nationally Determined Contributions.* Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/NDC/2022-06/Kuwait%20updating%20the%20first%20NDC-English.pdf

State of Kuwait. (2021b). *New Kuwait 2035: Kuwait National Development Plan.* http://andp.unescwa.org/plans/1166

State Revenue Committee. (2023, January 31). The State Revenue Committee of the Republic of Kazakhstan spoke about benefits under improved model contracts for complex oil and gas projects. *Ministry of Finance.* https://kgd.gov.kz/ru/news/o-lgotah-v-ramkah-uluchshennyh-modelnyh-kontraktov-po-slozhnym-neftegazovym-proektam-rasskazali

Statista. (2022). *Global LNG export capacity by country 2022* [dataset]. Statista. https://www.statista.com/statistics/1262074/global-lng-export-capacity-by-country/

Stoddard, I., Anderson, K., Capstick, S., Carton, W., Depledge, J., Facer, K., Gough, C., Hache, F., Hoolohan, C., Hultman, M., Hällström, N., Kartha, S., Klinsky, S., Kuchler, M., Lövbrand, E., Nasiritousi, N., Newell, P., Peters, G. P., Sokona, Y., … Williams, M. (2021). Three Decades of Climate Mitigation: Why Haven't We Bent the Global Emissions Curve? *Annual Review of Environment and Resources, 46*(1), 653–689. https://doi.org/10.1146/annurev-environ-012220-011104



References: Chapter 3 (cont.)

Szymendera, S. D., Sherlock, M. F., & Cilluffo, A. A. (2023). *The Black Lung Program, the Black Lung Disability Trust Fund, and the Excise Tax on Coal.* Congressional Research Service. https://crsreports.congress.gov/product/pdf/R/R45261

Tarazona, D. (2022, September 30). En Colombia se han presentado 2133 incidentes y derrames de hidrocarburos entre 2015 y junio de 2022. *Mongabay.* https://es.mongabay.com/2022/09/cuantos-incidentes-y-derrames-de-petroleo-se-han-presentado-en-colombia/

Tarazona, D. (2023, May 15). Colombia: Posible apertura de minas de carbón duplicaría emisiones de metano del sector. *Noticias Ambientales.* https://es.mongabay.com/2023/05/minas-de-carbon-duplicarian-emisiones-de-metano-colombia/

TASS. (2022a, October 21). Putin orders to prepare plans for coal exports to the East. *The Russian News Agency.* https://tass.com/economy/1525513

TASS. (2022b, November 17). Hydrocarbons, coal, metals to be Northern Sea Route's top transit cargos by 2035. *The Russian News Agency.* https://tass.com/economy/1538095

Taylor, L. (2023, January 20). Colombia announces halt on fossil fuel exploration for a greener economy. *The Guardian.* https://www.theguardian.com/world/2023/jan/20/colombia-stop-new-oil-gas-exploration-davos

Tétrault-Farber, G., & Astakhova, O. (2020, March 28). Rosneft sells Venezuelan assets to Russia after U.S. sanctions ramp up. *Reuters.* https://www.reuters.com/article/us-russia-rosneft-venezuela-idUSKBN21F0W2

The Australia Institute. (2022, March 27). *Australian fossil fuel subsidies surge to $11.6 billion in 2021-22.* https://australiainstitute.org.au/post/australian-fossil-fuel-subsidies-surge-to-11-6-billion-in-2021-22/

The Canadian Press. (2022, April 8). Federal Environment Minister Guilbeault asks Alberta counterpart to "correct" column on emissions reduction. *CBC.* https://www.cbc.ca/news/canada/calgary/federal-minister-asks-alta-counterpart-correct-column-1.6414335

The Economic Times. (2022, December 19). *India's coal production to touch 1 billion tonnes next fiscal, Govt informs Parliament.* https://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/indias-coal-production-to-touch-1-billion-tonnes-next-fiscal-govt-informs-parliament/articleshow/96344504.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

The State House. (2021, November 2). At COP26, president Buhari pledges net zero emissions by 2060, says Nigeria will maintain gas-based energy transition. *The President of the Federal Republic of Nigeria.* https://statehouse.gov.ng/news/at-cop26-president-buhari-pledges-net-zero-emissions-by-2060-says-nigeria-will-maintain-gas-based-energy-transition/

The White House. (2021a, January 20). *Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/

The White House. (2021b, January 27). *Executive Order on Tackling the Climate Crisis at Home and Abroad.* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/

The White House. (2021c, April 23). *Fact Sheet: President Biden's Leaders Summit on Climate.* https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/23/fact-sheet-president-bidens-leaders-summit-on-climate/

The White House. (2022a, March 31). *Fact Sheet: President Biden's Plan to Respond to Putin's Price Hike at the Pump.* https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/31/fact-sheet-president-bidens-plan-to-respond-to-putins-price-hike-at-the-pump/

The White House. (2022b, October 18). *Fact Sheet: President Biden to Announce New Actions to Strengthen U.S. Energy Security, Encourage Production, and Bring Down Costs.* https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/18/fact-sheet-president-biden-to-announce-new-actions-to-strengthen-u-s-energy-security-encourage-production-and-bring-down-costs/

The White House. (2022c, November 15). *Indonesia and International Partners Secure Groundbreaking Climate Targets and Associated Financing.* https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/15/indonesia-and-international-partners-secure-groundbreaking-climate-targets-and-associated-financing/

The White House. (2023a). *Inflation Reduction Act Guidebook.* https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/

The White House. (2023b, March 9). *Fact Sheet: The President's Budget Cuts Wasteful Spending on Big Pharma, Big Oil, and Other Special Interests, Cracks Down on Systemic Fraud, and Makes Programs More Cost Effective.* https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/09/fact-sheet-the-presidents-budget-cuts-wasteful-spending-on-big-pharma-big-oil-and-other-special-interests-cracks-down-on-systemic-fraud-and-makes-programs-more-cost-effective/

The White House. (2023c, March 13). *Memorandum on Withdrawal of Certain Areas off the United States Arctic Coast of the Outer Continental Shelf from Oil or Gas Leasing.* https://www.whitehouse.gov/briefing-room/presidential-actions/2023/03/13/memorandum-on-withdrawal-of-certain-areas-off-the-united-states-arctic-coast-of-the-outer-continental-shelf-from-oil-or-gas-leasing/

References: Chapter 3 (cont.)

The White House. (2023d, April 4). *Fact Sheet: Biden-Harris Administration Announces New Clean Energy Projects to Revitalize Energy Communities, Support Coal Workers, and Reduce Reliance on Competitors Like China.* https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/04/fact-sheet-biden-harris-administration-announces-new-clean-energy-projects-to-revitalize-energy-communities-support-coal-workers-and-reduce-reliance-on-competitors-like-china/

Thompson, A. (2023, February 26). Labor calls Greens bluff on gas and coal in safeguard negotiations. *The Sydney Morning Herald.* https://www.smh.com.au/politics/federal/bowen-rules-out-ban-on-new-gas-and-coal-projects-in-safeguard-negotiations-20230226-p5cnnf.html

Treasury. (2023a). *Climate-related financial disclosure* [Consultation process]. Australian Government. https://treasury.gov.au/consultation/c2022-314397

Treasury. (2023b). *Tax expenditures and insights statement.* Australian Government. https://treasury.gov.au/sites/default/files/2023-02/p2023-370286-teis.pdf

Turan Times. (2023, February 22). *In 2023, the construction of the 4th line of the Zhanaozen-Aktau gas pipeline will begin.* https://turantimes.kz/obschestvo/41271-v-2023-godu-nachnut-stroitelstvo-4-oj-nitki-magistralnogo-gazoprovoda-zhanaozen-aktau.html

UAE Ministry of Climate Change and Environment. (2022, November 11). *UAE unveils national net zero by 2050 pathway at COP27 in Sharm El Sheikh.* https://www.moccae.gov.ae/en/media-center/news/11/11/2022/uae-unveils-national-net-zero-by-2050-pathway-at-cop27-in-sharm-el-sheikh.aspx#page=1

Ugal, N. (2023, February 6). Narendra Modi: India poised for five-fold rise in gas consumption. *Upstream Online | Latest Oil and Gas News.* https://www.upstreamonline.com/production/narendra-modi-india-poised-for-five-fold-rise-in-gas-consumption/2-1-1399371

UK BEIS. (2019, June 27). UK becomes first major economy to pass net zero emissions law. *UK Department for Business, Energy & Industrial Strategy.* https://www.gov.uk/government/news/uk-becomes-first-major-economy-to-pass-net-zero-emissions-law

UK BEIS. (2020, September 3). Government launches review into future offshore oil and gas licensing regime. *UK Department for Business, Energy & Industrial Strategy.* https://www.gov.uk/government/news/government-launches-review-into-future-offshore-oil-and-gas-licensing-regime

UK BEIS. (2021a). *Aligning UK international support for the clean energy transition.* UK Department for Business, Energy & Industrial Strategy. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975753/Guidance_-_Aligning_UK_international_support_for_the_clean_energy_transition_-_March_2021_.pdf

UK BEIS. (2021b). *Designing a climate compatibility checkpoint for future oil and gas licensing in the UK continental shelf: Consultation document.* UK Department for Business, Energy & Industrial Strategy. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1042291/oil-gas-licensing-checkpoint.pdf

UK BEIS. (2021c, June 30). End to coal power brought forward to October 2024. *UK Department for Business, Energy & Industrial Strategy.* https://www.gov.uk/government/news/end-to-coal-power-brought-forward-to-october-2024

UK BEIS. (2022a). *Climate compatibility checkpoint design.* UK Department for Business, Energy & Industrial Strategy. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1105667/climate-change-checkpoint-design.pdf

UK BEIS. (2022b). *Designing a climate compatibility checkpoint for future oil and gas licensing in the UK continental shelf: Government response to the consultation.* UK Department for Business, Energy & Industrial Strategy. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1105669/checkpoint-government-response.pdf

UK BEIS. (2022c). *Uk Offshore Energy Strategic Environmental Assessment: Future Leasing/Licensing for Offshore Renewaqble Energy, Offshore Oil & Gas and Gas Storage and Associated Infrastructure* (OESEA4 Environmental Report). UK Department for Business, Energy & Industrial Strategy. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061670/OESEA4_Environmental_Report.pdf

UK BEIS & OGA. (2021). *North Sea Transition Deal.* Department for Business, Energy, and Industry Strategy; Oil & Gas Authority. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972520/north-sea-transition-deal_A_FINAL.pdf

UK CCC. (2023). *Progress in reducing emissions: 2023 report to Parliament.* UK Committee on Climate Change. https://www.theccc.org.uk/publication/2023-progress-report-to-parliament/

UK DESNZ. (2023). *Powering up Britain: Energy security plan.* Department for Energy Security and Net Zero. https://www.gov.uk/government/publications/powering-up-britain

UK DLUHC. (2022). *Called-in decision: Former Marchon Site, Pow Beck Valley and area from the former Marchon Site to St Bees coast, Whitehaven, Cumbria (ref: 3271069 - 7 December 2022).* Department for Levelling Up, Housing & Communities. https://www.gov.uk/government/publications/called-in-decision-former-marchon-site-pow-beck-valley-and-area-from-the-former-marchon-site-to-st-bees-coast-whitehaven-cumbria-ref-3271069-7

References: Chapter 3 (cont.)

UK Export Finance. (2021). *Category A project supported: Mozambique liquified natural gas (LNG) project.* https://www.gov.uk/government/publications/category-a-project-supported-mozambique-liquified-natural-gas-lng-project/category-a-project-supported-mozambique-liquified-natural-gas-lng-project

UK Government. (2021a). *Statement on international public support for the clean energy transition.* UN Climate Change Conference UK 2021. https://ukcop26.org/statement-on-international-public-support-for-the-clean-energy-transition/

UK Government. (2021b, April 20). *UK enshrines new target in law to slash emissions by 78% by 2035.* https://www.gov.uk/government/news/uk-enshrines-new-target-in-law-to-slash-emissions-by-78-by-2035

UK Government. (2022). *United Kingdom of Great Britain and Northern Ireland's Nationally Determined Contribution.* Nationally Determined Contributions Registry. https://unfccc.int/sites/default/files/NDC/2022-09/UK%20NDC%20ICTU%202022.pdf

UK Government. (2023). Statistics of government revenues from UK oil and gas production September 2023. https://www.gov.uk/government/statistics/government-revenues-from-uk-oil-and-gas-production--2/statistics-of-government-revenues-from-uk-oil-and-gas-production-september-2023#exchequer-liability-from-decommissioning

UK HMRC. (2022). *Energy (oil and Gas) Profits Levy.* HM Revenue & Customs. https://www.gov.uk/government/publications/changes-to-the-energy-oil-and-gas-profits-levy/energy-oil-and-gas-profits-levy

UK Public General Acts. (1998). *Petroleum Act 1998*. Statute Law Database. https://www.legislation.gov.uk/ukpga/1998/17/section/9A

Ulrichsen, K. C. (2020). *Qatar and the Gulf Crisis.* Oxford University Press, USA.

UNDP. (2022, November 18). *Colombia.* UNDP Climate Promise. https://climatepromise.undp.org/what-we-do/where-we-work/colombia

UNEP. (2022a). *An Eye on Methane: International Methane Emissions Observatory 2022 Report.* United Nations Environment Programme. https://wedocs.unep.org/20.500.11822/40864

UNEP. (2022b). *Emissions Gap Report 2022: The Closing Window—Climate crisis calls for rapid transformation of societies.* United Nations Environment Programme. https://www.unep.org/emissions-gap-report-2022

UNFCCC. (2021). *Glasgow Climate Pact.* https://unfccc.int/documents/310475

United Nations Secretary-General. (2023, March 20). *Secretary-General's video message for press conference to launch the Synthesis Report of the Intergovernmental Panel on Climate Change.* https://www.un.org/sg/en/content/sg/statement/2023-03-20/secretary-generals-video-message-for-press-conference-launch-the-synthesis-report-of-the-intergovernmental-panel-climate-change

UNU-INRA. (2019). *Africa's Development in the Age of Stranded Assets* [Discussion Paper]. United Nations University – Institute for Natural Resources Africa. *https://i.unu.edu/media/inra.unu.edu/publication/5247/DIscussion-paper-Africas-Development-in-the-age-of-stranded-Assets_INRAReport2019.pdf*

UPME. (2023). *Actualización Plan Energético Nacional (PEN) 2022–2052.* Ministerio de Minas y Energía. https://www1.upme.gov.co/DemandayEficiencia/Documents/PEN_2020_2050/Plan_Energetico_Nacional_2020_2050.pdf

US BLM. (2023a). *2023 Willow MDP Record of Decision.* US Bureau of Land Management. https://eplanning.blm.gov/public_projects/109410/200258032/20075029/250081211/2023%20Willow%20MDP%20Record%20of%20Decision.pdf

US BLM. (2023b). *Oil and Gas Statistics: Table 7* [dataset]. https://www.blm.gov/programs-energy-and-minerals-oil-and-gas-oil-and-gas-statistics

US BLM. (2023c). *Willow Master Development Plan: Supplemental Environmental Impact Statement – Volume 1.* US Bureau of Land Management. https://eplanning.blm.gov/public_projects/109410/200258032/20073121/250079303/Willow%20FSEIS_Vol%201_Ch%201-Ch%205.pdf

US Department of the Treasury. (2022, November 7). *U.S. Departments of the Treasury and State, and South African President Cyril Ramaphosa Announce Endorsement of the South Africa Just Energy Transition Partnership Investment Plan*. https://home.treasury.gov/news/press-releases/jy1085

US Department of the Treasury. (2023, June 9). *Government of Indonesia and International Partners Launch Just Energy Transition Partnership Secretariat to Drive Indonesia's Energy Transformation.* https://home.treasury.gov/news/press-releases/jy1278

US DOE. (2022a, March 16). DOE Issues Two LNG Export Authorizations. *US Department of Energy.* https://www.energy.gov/articles/doe-issues-two-lng-export-authorizations

US DOE. (2022b, May 13). The United Arab Emirates Joins as Sixth Member of the Net-Zero Producers Forum. *US Department of Energy.* https://www.energy.gov/articles/united-arab-emirates-joins-sixth-member-net-zero-producers-forum

US DOE. (2023a). *Liquefied Natural Gas (LNG) Exports.* US Department of Energy. https://www.energy.gov/sites/default/files/2023-04/LNG%20Snapshot%20March%2031%202023.pdf

References: Chapter 3 (cont.)

US DOE. (2023b). *Remarks as prepared for delivery by Secretary Jennifer Granholm at CERAWeek 2023*. US Department of Energy. https://www.energy.gov/articles/remarks-prepared-delivery-secretary-jennifer-granholm-ceraweek-2023

US DOI. (2021a, January 27). *Fact Sheet: President Biden to Take Action to Uphold Commitment to Restore Balance on Public Lands and Waters, Invest in Clean Energy Future.* US Department of the Interior. https://www.doi.gov/pressreleases/fact-sheet-president-biden-take-action-uphold-commitment-restore-balance-public-lands

US DOI. (2021b, March 25). Secretary Haaland Delivers Remarks at Interior's Public Forum on the Federal Oil and Gas Program. *US Department of the Interior.* https://www.doi.gov/news/secretary-haaland-delivers-remarks-interiors-public-forum-federal-oil-and-gas-program

US DOI. (2021c, August 16). Interior Issues Statement on Oil and Gas Leasing Program. *US Department of the Interior.* https://www.doi.gov/pressreleases/interior-issues-statement-oil-and-gas-leasing-program

US DOI. (2022, October 6). Interior Department Moves Forward with Leasing Provisions Mandated in Inflation Reduction Act. US *Department of the Interior.* https://www.doi.gov/pressreleases/interior-department-moves-forward-leasing-provisions-mandated-inflation-reduction-act

US DOI. (2023, March 13). Interior Department Substantially Reduces Scope of Willow Project. *US Department of the Interior.* https://www.doi.gov/pressreleases/interior-department-substantially-reduces-scope-willow-project

US EIA. (2022). U.S. LNG export capacity to grow as three additional projects begin construction. *US Energy Information Administration.* https://www.eia.gov/todayinenergy/detail.php?id=53719

US EIA. (2023a). *Annual Energy Outlook 2023.* US Energy Information Administration. http://www.eia.gov/forecasts/aeo/

US EIA. (2023b). *California State Energy Profile.* US Energy Information Administration. https://www.eia.gov/state/print.php?sid=CA

US Embassy Viet Nam. (2022, December 15). International agreement to support Vietnam's ambitious climate and energy goals. *US Embassy & Consulate in Viet Nam.* https://vn.usembassy.gov/international-agreement-to-support-vietnams-ambitious-climate-and-energy-goals/

Vladimirskaya, V. (2022, December 20). Kazakhstan intends to develop hard-to-recover reserves. *Kazakh Telegraph Agency.* https://kaztag.kz/ru/news/kazakhstan-nameren-razrabatyvat-trudnoizvlekaemye-zapasy

Wemanya, A., Adow, M., Gebel, A., Goritz, A., Ryfisch, D., & Pradipta, G. M. (2022). *Implementation of the Just Energy Transition Partnership in South Africa: Lessons Learnt for Civil Society Organizations.* Germanwatch. https://www.germanwatch.org/en/87278

Wright, S. (2019). *Energy Geopolitics in 2019.* Al Jazeera Centre for Studies. https://studies.aljazeera.net/sites/default/files/articles/reports/documents/3521f3e2613941e9bdc0fe06e-9d654a5_100.pdf

Wright, S., & Foley, M. (2022, July 7). Treasury to model economic impact of climate change after 9-year break. *The Sydney Morning Herald.* https://www.smh.com.au/politics/federal/treasury-to-model-economic-impact-of-climate-change-after-9-year-break-20220706-p5azgh.html

WTO. (2012). *Trade policy review: Kuwait*. World Trade Organization. https://www.wto.org/english/tratop_e/tpr_e/tp358_e.htm

Xi, J. (2022). *Full Text of the Report to the 20th National Congress of the Communist Party of China.* Ministry of Foreign Affairs of the People's Republic of China. https://www.fmprc.gov.cn/eng/zxxx_662805/202210/t20221025_10791908.html

Xie, E. (2021, September 25). Bank of China pledges to end funding for foreign coal projects. *South China Morning Post.* https://www.scmp.com/news/china/politics/article/3150108/bank-china-pledges-end-funding-foreign-coal-mining-and-power

Xu, M., & Nazarov, M. (2022, October 26). Infrastructure bottlenecks hamper Russia's booming coal exports to China. *Reuters.* https://www.reuters.com/markets/commodities/infrastructure-bottlenecks-hamper-russias-booming-coal-exports-china-2022-10-25/

Yanguas-Parra, P., Arond, E., Strambo, C., & Vega Araújo, J. (2021). *El ocaso del carbón y la necesidad de una transición justa en Colombia.* Stockholm Environment Insitute. https://www.sei.org/wp-content/uploads/2021/12/21121-ortiz-arond-reporte-transiciones-justas-la-guajira-y-cesar.pdf

Zawya Projects. (2022, November 7). *Kuwait to spend $44bln on oil projects till 2025.* https://www.zawya.com/en/projects/oil-and-gas/kuwait-to-spend-44bln-on-oil-projects-till-2025-report-fq2ki0ls

Learn more at
productiongap.org

SEI Stockholm Environment Institute

CLIMATE ANALYTICS

E3G

IISD

UN environment programme

2023 **Production Gap Report**

Annex 62

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Island of Palmas case (Netherlands, USA)

4 April 1928

VOLUME II pp. 829-871

NATIONS UNIES - UNITED NATIONS

XX.

ISLAND OF PALMAS CASE [1].

PARTIES: Netherlands, U.S.A.

SPECIAL AGREEMENT: January 23, 1925.

ARBITRATOR: Max Huber (Switzerland).

AWARD: The Hague, April, 1928.

Territorial sovereignty.—Contiguity and title to territory.—Continuous and peaceful display of sovereignty.—The "intertemporal" law.—Rules of evidence in international proceedings.—Maps as evidence.—Inchoate title.—Passivity in relation to occupation.—Dutch East India Company as subject of international law.—Treaties with native princes.—Subsequent practice as an element of interpretation.

[1] For bibliography, index and tables, see Volume III.

Special Agreement.

[*See beginning of Award below.*]

AWARD OF THE TRIBUNAL.

Award of the tribunal of arbitration rendered in conformity with the special agreement concluded on January 23, 1925, *between the United States of America and the Netherlands relating to the arbitration of differences respecting sovereignty over the Island of Palmas (or Miangas).—The Hague, April* 4, 1928.

An agreement relating to the arbitration of differences respecting sovereignty over the Island of Palmas (or Miangas) was signed by the United States of America and the Netherlands on January 23rd, 1925. The text of the agreement runs as follows:

The United States of America and Her Majesty the Queen of the Netherlands,

Desiring to terminate in accordance with the principles of International Law and any applicable treaty provisions the differences which have arisen and now subsist between them with respect to the sovereignty over the Island of Palmas (or Miangas) situated approximately fifty miles south-east from Cape San Augustin, Island of Mindanao, at about five degrees and thirty-five minutes (5° 35′) north latitude, one hundred and twenty-six degrees and thirty-six minutes (126° 36′) longitude east from Greenwich;

Considering that these differences belong to those which, pursuant to Article I of the Arbitration Convention concluded by the two high contracting parties on May 2, 1908, and renewed by agreements, dated May 9, 1914, March 8, 1919, and February 13, 1924, respectively, might well be submitted to arbitration,

Have appointed as their respective plenipotentiaries for the purpose of concluding the following special agreement:

The President of the United States of America: Charles Evans Hughes, Secretary of State of the United States of America, and

Her Majesty the Queen of the Netherlands: Jonkheer Dr. A. C. D. de Graeff, Her Majesty's Envoy Extraordinary and Minister Plenipotentiary at Washington,

Who, after exhibiting to each other their respective full powers, which were found to be in due and proper form, have agreed upon the following articles:

Article I.

The United States of America and Her Majesty the Queen of the Netherlands hereby agree to refer the decision of the above-mentioned

differences to the Permanent Court of Arbitration at The Hague. The arbitral tribunal shall consist of one arbitrator.

The sole duty of the Arbitrator shall be to determine whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory.

The two Governments shall designate the Arbitrator from the members of the Permanent Court of Arbitration. If they shall be unable to agree on such designation, they shall unite in requesting the President of the Swiss Confederation to designate the Arbitrator.

Article II.

Within six months after the exchange of ratifications of this special agreement, each Government shall present to the other party two printed copies of a memorandum containing a statement of its contentions and the documents in support thereof. It shall be sufficient for this purpose if the copies aforesaid are delivered by the Government of the United States at the Netherlands Legation at Washington and by the Netherlands Government at the American Legation at The Hague, for transmission. As soon thereafter as possible and within thirty days, each party shall transmit two printed copies of its memorandum to the International Bureau of the Permanent Court of Arbitration for delivery to the Arbitrator.

Within six months after the expiration of the period above fixed for the delivery of the memoranda to the parties, each party may, if it is deemed advisable, transmit to the other two printed copies of a counter-memorandum and any documents in support thereof in answer to the memorandum of the other party. The copies of the counter-memorandum shall be delivered to the parties, and within thirty days thereafter to the Arbitrator, in the manner provided for in the foregoing paragraph respecting the delivery of memoranda.

At the instance of one or both of the parties, the Arbitrator shall have authority, after hearing both parties and for good cause shown, to extend the above-mentioned periods.

Article III.

After the exchange of the counter-memoranda, the case shall be deemed closed unless the Arbitrator applies to either or both of the parties for further written explanations.

In case the Arbitrator makes such a request on either party, he shall do so through the International Bureau of the Permanent Court of Arbitration which shall communicate a copy of his request to the other party. The party addressed shall be allowed for reply three months from the date of the receipt of the Arbitrator's request, which date shall be at once communicated to the other party and to the International Bureau. Such reply shall be communicated to the other party and within thirty days thereafter to the Arbitrator in the manner provided for above for the delivery of memoranda, and the opposite party may if it is deemed advisable, have a further period of three months to make rejoinder thereto, which shall be communicated in like manner.

The Arbitrator shall notify both parties through the International Bureau of the date upon which, in accordance with the foregoing pro-

visions, the case is closed, so far as the presentation of memoranda and evidence by either party is concerned.

Article IV.

The parties shall be at liberty to use, in the course of arbitration, the English or Netherlands language or the native language of the Arbitrator. If either party uses the English or Netherlands language, a translation into the native language of the Arbitrator shall be furnished if desired by him.

The Arbitrator shall be at liberty to use his native language or the English or Netherlands language in the course of the arbitration and the award and opinion accompanying it may be in any one of those languages.

Article V.

The Arbitrator shall decide any questions of procedure which may arise during the course of the arbitration.

Article VI.

Immediately after the exchange of ratifications of this special agreement each party shall place in the hands of the Arbitrator the sum of one hundred pounds sterling by way of advance of costs.

Article VII.

The Arbitrator shall, within three months after the date upon which he declares the case closed for the presentation of memoranda and evidence, render his award in writing and deposit three signed copies thereof with the International Bureau at The Hague, one copy to be retained by the Bureau and one to be transmitted to each party, as soon as this may be done.

The award shall be accompanied by a statement of the grounds upon which it is based.

The Arbitrator shall fix the amount of the costs of procedure in his award. Each party shall defray its own expenses and half of said costs of procedure and of the honorarium of the Arbitrator.

Article VIII.

The parties undertake to accept the award rendered by the Arbitrator within the limitations of this special agreement, as final and conclusive and without appeal.

All disputes connected with the interpretation and execution of the award shall be submitted to the decision of the Arbitrator.

Article IX.

This special agreement shall be ratified in accordance with the constitutional forms of the contracting parties and shall take effect immediately upon the exchange of ratifications, which shall take place as soon as possible at Washington.

In witness whereof the respective plenipotentiaries have signed this special agreement and have hereunto affixed their seals.

Done in duplicate in the City of Washington in the English and Netherlands languages this 23rd day of January, 1925.

(*L. S.*) CHARLES EVANS HUGHES.
(*L. S.*) DE GRAEFF.

I.

The *ratifications of the above agreement* (hereafter called the Special Agreement) were exchanged at Washington on April 1st, 1925. By letters dated September 29th, 1925, the Ministry of Foreign Affairs of Her Majesty the Queen of the Netherlands and the Minister of the United States of America at The Hague asked the undersigned, Max Huber, of Zurich (Switzerland), member of the Permanent Court of Arbitration, whether he would be disposed to accept the mandate to act as sole arbitrator under the Special Agreement of January 23rd, 1925. The undersigned informed the Minister of Foreign Affairs of the Netherlands and the Minister of the United States of America at The Hague that he was willing to accept the task.

On October 16th and 23rd, 1925, the International Bureau of the Permanent Court of Arbitration transmitted to the Arbitrator the *Memoranda* of the United States of America [1] and the Netherlands [2] with the documents in support thereof. On April 23rd and 24th, 1926, the *Counter-Memoranda* of the Netherlands [3] and the United States of America [4] with documents in support thereof were transmitted to the Arbitrator through the International Bureau.

Availing himself of the authority given him under Article III of the Special Agreement, the Arbitrator transmitted through the intermediary of the International Bureau of the Permanent Court of Arbitration to each party a list of points upon which he was desirous to obtain *further written Explanations*. This request was obtained by the Netherlands on December 24th, 1926, and by the United States of America on January 6th, 1927. The Arbitrator received through the intermediary of the International Bureau the Explanations of the Netherlands [5], with documents in support thereof, on March 24th, 1927, and those of the United States of America [6] on April 22nd, 1927.

On May 19th, 1927, the Arbitrator received through the International Bureau a memorandum of the American Government, dated May 2nd, 1927.

---

[1] Memorandum of the United States, with appendix, 219 pages and 12 maps in folder.

[2] Memorandum of the Netherlands, with appendices, 83 pages, 4 maps and sketches and reproduction of photos in folder, British Admiralty Chart 2575, with inscriptions, six copies of diplomatic correspondence between the United States Department of State and the Netherlands Legation in Washington.

[3] Counter-Memorandum of the Netherlands, with appendices, 95 pages and 1 map.

[4] Counter-Memorandum of the United States, with appendix, 121 pages, 3 photos and 3 maps.

[5] Explanations of the Netherlands, 146 pages and XX annexes (25 maps and sketches, reproduction of Dampiers' Journal, copies of entries of log-books and biographical notice concerning the late Dr. Adriani).

[6] Explanations of the United States, with appendix, 68 pages.

The United States expressed the desire to make a *Rejoinder* as provided for in Article III of the Special Agreement "unless the Arbitrator prefers not to receive it, in which case none will be filed, unless one is filed by the Netherlands Government". At the same time the United States Government made an application for an extension of three months beyond the period mentioned in Article III for the filing of a Rejoinder, and invoked in support of this application the fact that the Explanations of the Netherlands were considerably more voluminous than the Memorandum, and contained a large mass of untranslated Dutch documents, and more than 25 maps.

The Netherlands Government had already on May 9th, 1927, declared that they renounced the right to submit a Rejoinder, making however the express reservation that they maintained the points of view which the American Explanations contested.

The Arbitrator, on the analogy of the rule laid down in the last paragraph of Article II, invited the Netherlands Government by a letter dated May 13th, 1927, and addressed to the International Bureau, to state their point of view in regard to the American application.

The Netherlands Government having declared that they had no objection to the extension of the time-limit in conformity with the American application, the Arbitrator, in a letter to the International Bureau dated May 23rd, 1927, informed the Parties that the extension of three months beyond the period provided for in Article III for the filing of a Rejoinder was granted.

On October 21st, 1927, the Rejoinder of the United States[1] was transmitted by the International Bureau to the Arbitrator.

No observation by either Party was made during the proceedings in regard to the fact that one of the documents provided for in the Agreement of January 23rd, 1925, was not filed within the time-limits fixed in the said Agreement.

On March 3rd, 1928, the Arbitrator informed the Parties through the International Bureau of the Permanent Court of Arbitration, that, in conformity with the last paragraph of Article III, *the case was closed.*

On this fourth day of April 1928, i.e. within the period fixed by Article VII, the three copies of the award are deposited with the International Bureau of the Permanent Court of Arbitration, at The Hague.

In conformity with the second paragraph of Article IV of the Special Agreement, the Arbitrator selected the *English language*. Having regard to the fact that geographical names are differently spelt in different documents and on different maps, the Arbitrator gives geographical names as shown on the British Admiralty Chart 2575, as being the most modern of the large scale maps laid before him. Other names and, if necessary, their variations, are given in bracket or parenthesis.

In accordance with Article VIII, paragraph 3, the costs of procedure are fixed at £140.

II.

The *subject of the dispute* is the sovereignty over the Island of Palmas (or Miangas). The Island in question is indicated with precision in the preamble to the Special Agreement, its latitude and longitude being specified. The fact that in the diplomatic correspondence prior to the conclusion of the Special Agreement, and in the documents of the arbitration proceedings, the United States refer to the "Island of Palmas" and the Netherlands to the

[1] Rejoinder of the United States, with appendix, 126 pages and 8 maps.

"Island of Miangas", does not therefore concern the identity of the subject of the dispute. Such difference concerns only the question whether certain assertions made by the Netherlands Government really relate to the island described in the Special Agreement or another island or group of islands which might be designated by the name of Miangas or a similar name.

It results from the evidence produced by either side that Palmas (or Miangas) is a single, isolated island, not one of several islands clustered together. It lies about half way between Cape San Augustin (Mindanao, Philippine Islands) and the most northerly island of the Nanusa (Nanoesa) group (Netherlands East Indies).

*

The origin of the dispute is to be found in the visit paid to the Island of Palmas (or Miangas) on January 21st, 1906, by General Leonard Wood, who was then Governor of the Province of Moro. It is true that according to information contained in the Counter-Memorandum of the United States the same General Wood had already visited the island "about the year 1903", but as this previous visit appears to have had no results, and it seems even doubtful whether it took place, that of January 21st, 1906, is to be regarded as the first entry into contact by the American authorities with the island. The report of General Wood to the Military Secretary, United States Army, dated January 26th, 1906, and the certificate delivered on January 21st by First Lieutenant Gordon Johnston to the native interrogated by the controller of the Sangi (Sanghi) and Talauer (Talaut) Islands clearly show that the visit of January 21st relates to the island in dispute.

This visit led to the statement that the Island of Palmas (or Miangas), undoubtedly included in the "archipelago known as the Philippine Islands", as delimited by Article III of the Treaty of Peace between the United States and Spain, dated December 10th, 1898 (hereinafter also called "Treaty of Paris"), and ceded in virtue of the said article to the United States, was considered by the Netherlands as forming part of the territory of their possessions in the East Indies. There followed a diplomatic correspondence, beginning on March 31st, 1906, and leading up to the conclusion of the Special Agreement of January 23rd, 1925.

*

Before beginning to consider the arguments of the Parties, we may at the outset take as established certain *facts which, according to the pleadings, are not contested.*

1. The Treaty of Peace of December 10th, 1898, and the Special Agreement of January 23rd, 1925, are the only international instruments laid before the Arbitrator which refer precisely, that is, by mathematical location or by express and unequivocal mention, to the island in dispute, or include it in or exclude it from a zone delimited by a geographical frontier-line. The scope of the international treaties which relate to the "Philippines" and of conventions entered into with native Princes will be considered in connection with the arguments of the Party relying on a particular act.

2. Before 1906 no dispute had arisen between the United States or Spain, on the one hand, and the Netherlands, on the other, in regard specifically to the Island of Palmas (or Miangas), on the ground that these Powers put forward conflicting claims to sovereignty over the said island.

3. The two Parties claim the island in question as a territory attached for a very long period to territories relatively close at hand which are incontestably under the sovereignty of the one or the other of them.

4. It results from the terms of the Special Agreement (Article I) that the Parties adopt the view that for the purposes of the present arbitration the island in question can belong only to one or the other of them. Rights of third Powers only come into account in so far as the rights of the Parties to the dispute may be derived from them.

* * *

The dispute having been submitted to arbitration by Special Agreement, each Party is called upon to establish the arguments on which it relies in support of its claim to sovereignty over the object in dispute. As regards the *order in which the Parties' arguments should be considered*, it appears right to examine first the title put forward by the United States, arising out of a treaty and itself derived, according to the American arguments, from an original title which would date back to a period prior to the birth of the title put forward by the Netherlands; in the second place, the arguments invoked by the Netherlands in favour of their title to sovereignty will be considered; finally the result of the examination of the titles alleged by the two Parties must be judged in the light of the mandate conferred on the Arbitrator by Article I, paragraph 2, of the Special Agreement.

*

In the absence of an international instrument recognized by both Parties and explicitly determining the legal position of the Island of Palmas (or Miangas), *the arguments of the Parties* may in a general way be summed up as follows:

The *United States*, as successor to the rights of Spain over the Philippines, bases its title in the first place on discovery. The existence of sovereignty thus acquired is, in the American view, confirmed not merely by the most reliable cartographers and authors, but also by treaty, in particular by the Treaty of Münster, of 1648, to which Spain and the Netherlands are themselves Contracting Parties. As, according to the same argument, nothing has occurred of a nature, in international law, to cause the acquired title to disappear, this latter title was intact at the moment when, by the Treaty of December 10th, 1898, Spain ceded the Philippines to the United States. In these circumstances, it is, in the American view, unnecessary to establish facts showing the actual display of sovereignty precisely over the Island of Palmas (or Miangas). The United States Government finally maintains that Palmas (or Miangas) forms a geographical part of the Philippine group and in virtue of the principle of contiguity belongs to the Power having the sovereignty over the Philippines.

According to the Netherlands Government, on the other hand, the fact of discovery by Spain is not proved, nor yet any other form of acquisition, and even if Spain had at any moment had a title, such title had been lost. The principle of contiguity is contested.

The Netherlands Government's main argument endeavours to show that the Netherlands, represented for this purpose in the first period of colonisation by the East India Company, have possessed and exercised rights of sovereignty from 1677, or probably from a date prior even to 1648, to the present day. This sovereignty arose out of conventions entered into with

native princes of the Island of Sangi (the main island of the Talautse (Sangi) Isles), establishing the suzerainty of the Netherlands over the territories of these princes, including Palmas (or Miangas). The state of affairs thus set up is claimed to be validated by international treaties.

The facts alleged in support of the Netherlands arguments are, in the United States Government's view, not proved, and, even if they were proved, they would not create a title of sovereignty, or would not concern the Island of Palmas.

* * *

Before considering the Parties' arguments, two points of a general character are to be dealt with, one relating to the substantive law to be applied, namely the rules on territorial sovereignty which underly the present case, and the other relating to the rules of procedure, namely the conditions under which the Parties may, under the Special Agreement, substantiate their claims.

*

In the first place the Arbitrator deems it necessary to make some general remarks on *sovereignty in its relation to territory*.

The Arbitrator will as far as possible keep to the terminology employed in the Special Agreement. The preamble refers to "sovereignty over the Island of Palmas (or Miangas)", and under Article I, paragraph 2, the Arbitrator's task is to "determine whether the Island of Palmas (or Miangas) in its entirety forms a part of Netherlands territory or of territory belonging to the United States of America". It appears to follow that sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State. Sovereignty in relation to territory is in the present award called "territorial sovereignty".

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. The special cases of the composite State, of collective sovereignty, etc., do not fall to be considered here and do not, for that matter, throw any doubt upon the principle which has just been enunciated. Under this reservation it may be stated that territorial sovereignty belongs always to one, or in exceptional circumstances to several States, to the exclusion of all others. The fact that the functions of a State can be performed by any State within a given zone is. on the other hand, precisely the characteristic feature of the legal situation pertaining in those parts of the globe which, like the high seas or lands without a master, cannot or do not yet form the territory of a State.

Territorial sovereignty is, in general, a situation recognized and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of recognition of States within fixed boundaries. If a dispute arises as to the sovereignty over a portion of territory, it is custom-

ary to examine which of the States claiming sovereignty possesses a title—cession conquest, occupation, etc.—superior to that which the other State might possibly bring forward against it. However, if the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical. This demonstration consists in the actual display of State activities, such as belongs only to the territorial sovereign.

Titles of acquisition of territorial sovereignty in present-day international law are either based on an act of effective apprehension, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary Powers or at least one of them, have the faculty of effectively disposing of the ceded territory. In the same way natural accretion can only be conceived of as an accretion to a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity. It seems therefore natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation. So true is this, that practice, as well as doctrine, recognizes—though under different legal formulae and with certain differences as to the conditions required—that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title. The growing insistence with which international law, ever since the middle of the 18th century, has demanded that the occupation shall be effective would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right. If the effectiveness has above all been insisted on in regard to occupation, this is because the question rarely arises in connection with territories in which there is already an established order of things. Just as before the rise of international law, boundaries of lands were necessarily determined by the fact that the power of a State was exercised within them, so too, under the reign of international law, the fact of peaceful and continuous display is still one of the most important considerations in establishing boundaries between States.

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.

Although municipal law, thanks to its complete judicial system, is able to recognize abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any super-State organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.

The principle that continuous and peaceful display of the functions of State within a given region is a constituent element of territorial sovereignty is not only based on the conditions of the formation of independent States and their boundaries (as shown by the experience of political history) as well as on an international jurisprudence and doctrine widely accepted; this principle has further been recognized in more than one federal State, where a jurisdiction is established in order to apply, as need arises, rules of international law to the interstate relations of the States members. This is the more significant, in that it might well be conceived that in a federal State possessing a complete judicial system for interstate matters—far more than in the domain of international relations properly so-called—there should be applied to territorial questions the principle that, failing any specific provision of law to the contrary, a *jus in re* once lawfully acquired shall prevail over *de facto* possession however well established.

It may suffice to quote among several non dissimilar decisions of the Supreme Court of the United States of America that in the case of the State of Indiana *v.* State of Kentucky (136 U.S. 479) 1890, where the precedent of the case of Rhode Island *v.* Massachusetts (4 How. 591, 639) is supported by quotations from Vattel and Wheaton, who both admit prescription founded on length of time as a valid and incontestable title.

Manifestations of territorial sovereignty assume, it is true, different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again regions accessible from, for instance, the high seas. It is true that neighbouring States may by convention fix limits to their own sovereignty, even in regions such as the interior of scarcely explored continents where such sovereignty is scarcely manifested, and in this way each may prevent the other from any penetration of its territory. The delimitation of Hinterland may also be mentioned in this connection.

If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt, or if, as e.g. in the case of an island situated in the high seas, the question arises whether a title is valid *erga omnes*, the actual continuous and peaceful display of State functions is in case of dispute the sound and natural criterium of territorial sovereignty.

*

The United States in their Counter-Memorandum and their Rejoinder maintain the view that statements without *evidence* to support them cannot be taken into consideration in an international arbitration, and that evidence is not only to be referred to, but is to be laid before the tribunal. The United States further hold that, since the Memorandum is the only document necessarily to be filed by the Parties under the Special Agreement, evidence in support of the statements therein made should have been filed at the same time. The Netherlands Government, particularly in the Explanations furnished at the request of the Arbitrator, maintains that no formal rules of evidence exist in international arbitrations and that no rule limiting the freedom of the tribunal in forming its conclusions has been established by the Special Agreement of January 23rd, 1925. They hold further that state-

ments made by a government in regard to its own acts are evidence in themselves and have no need of supplementary corroboration.

Since a divergence of view between the Parties as to the necessity and admissibility of evidence is a question of procedure, it is for the Arbitrator to decide it under Article V of the Special Agreement.

The provisions of Article II of the Special Agreement to the effect that documents in support of the Parties' arguments are to be annexed to the Memoranda and Counter-Memoranda, refers rather to the time and place at which each Party should inform the other of the evidence it is producing, but does not establish a necessary connection between any argument and a document or other piece or evidence corresponding therewith. However desirable it may be that evidence should be produced as complete and at as early a stage as possible, it would seem to be contrary to the broad principles applied in international arbitrations to exclude *a limine*, except under the explicit terms of a conventional rule, every allegation made by a Party as irrelevant, if it is not supported by evidence, and to exclude evidence relating to such allegations from being produced at a later stage of the procedure.

The provisions of the Hague Convention of 1907 for the peaceful settlement of international disputes are, under Article 51, to be applied, as the case may be, as subsidiary law in proceedings falling within the scope of that convention, or should serve at least to construe such arbitral agreements. Now, Articles 67, 68 and 69 of this convention admit the production of documents apart from that provided for in Article 63 in connection with the filing of cases, counter-cases and replies, with the consent, or at the request of the tribunal. This liberty of accepting and collecting evidence guarantees to the tribunal the possibility of basing its decisions on the whole of the facts which are relevant in its opinion.

The authorization given to the Arbitrator by Article III of the Special Agreement to apply to the Parties for further written Explanations would be extraordinary limited if such explanations could not extend to any allegations already made and could not consist of evidence which included documents and maps. The limitation to written explanations excluded oral procedure; but it is not to be construed as excluding documentary evidence of any kind. It is for the Arbitrator to decide both whether allegations do or—as being within the knowledge of the tribunal—do not need evidence in support and whether the evidence produced is sufficient or not; and finally whether points left aside by the Parties ought to be elucidated. This liberty is essential to him, for he must be able to satisfy himself on those points which are necessary to the legal construction upon which he feels bound to base his judgment. He must consider the totality of the allegations and evidence laid before him by the Parties, either *motu proprio* or at his request and decide what allegations are to be considered as sufficiently substantiated.

Failing express provision, an arbitral tribunal must have entire freedom to estimate the value of assertions made by the Parties. For the same reason, it is entirely free to appreciate the value of assertions made during proceedings at law by a government in regard to its own acts. Such assertions are not properly speaking legal instruments, as would be declarations creating rights; they are statements concerning historical facts. The value and the weight of any assertion can only be estimated in the light of all the evidence and all the assertions made on either side, and of facts which are notorious for the tribunal.

For the reasons stated above the Arbitrator is unable to construe the Special Agreement of January 23rd, 1925, as excluding the subsidiary application

of the above-mentioned articles of the Hague Convention or the taking into consideration of allegations not supported by evidence filed at the same time. No documents which are not on record have been relied upon, with the exception of the Treaty of Utrecht—invoked however in the Netherlands Counter-Memorandum—the text of which is of public notoriety and accessible to the Parties, and no allegation not supported by evidence is taken as foundation for the award. The possibility to make Rejoinder to the Explanations furnished at the request of the Arbitrator on points contained in the Memoranda and Counter-Memoranda and the extension of the time-limits for filing a Rejoinder has put both Parties in a position to state—under fair conditions—their point of view in regard to that evidence which came forth only at a subsequent stage of the proceedings.

III.

The *title alleged by the United States of America* as constituting the immediate foundation of its claim is that of *cession*, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region indicated in Article III of the said Treaty and therefore also those concerning the Island of Palmas (or Miangas).

It is evident that Spain could not transfer more rights than she herself possessed. This principle of law is expressly recognized in a letter dated April 7th, 1900, from the Secretary of State of the United States to the Spanish Minister at Washington concerning a divergence of opinion which arose about the question whether two islands claimed by Spain as Spanish territory and lying just outside the limits traced by the Treaty of Paris were to be considered as included in, or excluded from the cession. This letter, reproduced in the Explanations of the United States Government, contains the following passage:

> The metes and bounds defined in the treaty were not understood by either party to limit or extend Spain's right of cession. Were any island within those described bounds ascertained to belong in fact to Japan, China, Great Britain or Holland, the United States could derive no valid title from its ostensible inclusion in the Spanish cession. The compact upon which the United States negotiators insisted was that all Spanish title to the archipelago known as the Philippine Islands should pass to the United States—no less or more than Spain's actual holdings therein, but all. This Government must consequently hold that the only competent and equitable test of fact by which the title to a disputed cession in that quarter may be determined is simply this: "Was it Spain's to give? If valid title belonged to Spain, it passed; if Spain had no valid title, she could convey none."

Whilst there existed a divergence of views as to the extension of the cession to certain Spanish islands outside the treaty limits, it would seem that the cessionary Power never envisaged that the cession, in spite of the sweeping terms of Article III, should comprise territories on which Spain had not a valid title, though falling within the limits traced by the Treaty. It is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers.

One observation, however, is to be made. Article III of the Treaty of Paris, which is drafted differently from the preceding Article concerning Porto

Rico, is so worded that it seems as though the Philippine Archipelago, within the limits fixed by that Article, was at the moment of cession under Spanish sovereignty. As already stated the Island of Palmas lies within the lines traced by the Treaty. Article III may therefore be considered as an affirmation of sovereignty on the part of Spain as regards the Island of Palmas (or Miangas), and this right or claim of right would have been ceded to the United States, though the negotiations of 1898, as far as they are on the record of the present case, do not disclose that the situation of Palmas had been specifically examined.

It is recognized that the United States communicated, on February 3rd, 1899, the Treaty of Paris to the Netherlands, and that no reservations were made by the latter in respect to the delimitation of the Philippines in Article III. The question whether the silence of a third Power, in regard to a treaty notified to it, can exercise any influence on the rights of this Power, or on those of the Powers signatories of the treaty, is a question the answer to which may depend on the nature of such rights. Whilst it is conceivable that a conventional delimitation duly notified to third Powers and left without contestation on their part may have some bearing on an inchoate title not supported by any actual display of sovereignty, it would be entirely contrary to the principles laid down above as to territorial sovereignty to suppose that such sovereignty could be affected by the mere silence of the territorial sovereign as regards a treaty which has been notified to him and which seems to dispose of a part of his territory.

The essential point is therefore whether the Island of Palmas (or Miangas) at the moment of the conclusion and coming into force of the Treaty of Paris formed a part of the Spanish or Netherlands territory. The United States declares that Palmas (or Miangas) was Spanish territory and denies the existence of Dutch sovereignty; the Netherlands maintain the existence of their sovereignty and deny that of Spain. Only if the examination of the arguments of both Parties should lead to the conclusion that the Island of Palmas (or Miangas) was at the critical moment neither Spanish nor Netherlands territory, would the question arise whether—and, if so, how—the conclusion of the Treaty of Paris and its notification to the Netherlands might have interfered with the rights which the Netherlands or the United States of America may claim over the island in dispute.

*

As pointed out above, the United States bases its claim, as successor of Spain, in the first place on *discovery*. In this connection a distinction must be made between the discovery of the Island of Palmas (or Miangas) as such, or as a part of the Philippines, which, beyond doubt, were discovered and even occupied and colonised by the Spaniards. This latter point, however, will be considered with the argument relating to contiguity; the problem of discovery is considered only in relation to the island itself which forms the subject of the dispute.

The documents supplied to the Arbitrator with regard to the discovery of the island in question consist in the first place of a communication made by the Spanish Government to the United States Government as to researches in the archives concerning expeditions and discoveries in the Moluccas, the "Talaos" Islands, the Palaos Islands and the Marianes. The United States Government, in its Rejoinder, however states that it does not specifically rely on the papers mentioned in the Spanish note.

It is probable that the island seen when the Palaos Islands were discovered, and reported as situated at latitude 5° 48′ North, to the East of Sarangani and Cape San Augustin, was identical with the Island of Palmas (or Miangas). The Island "Meanguis" mentioned by the Spanish Government and presumed by them to be identical with the Talaos—probably Talautse or Talauer Islands—seems in reality to be an island lying more to the south, to which, perhaps by error, the name of another island has been transferred or which may be identified with the island Tangulandang (Tangulanda or Tahoelandang) just south of Siau (Siaoe), the latter island being probably identical with "Suar" mentioned in the same report as lying close by. Tangulandang is almost the southernmost of the islands situated between Celebes and Mindanao, whilst Palmas (or Miangas) is the northernmost. On Tangulandang there is a place called Minangan, the only name, as it would seem, to be found on maps of the region in question which is closely similar to Miangas and the different variations of this word. The name of "Mananga" appears as that of a place on "Tagulanda" in official documents of 1678, 1779, 1896 and 1905, but is never applied to the island itself; it is therefore not probable that there exists a confusion between Palmas (Miangas) and Minangan (Manangan) in spite of the fact that both islands belonged to Tabukan. However there may exist some connection between Minangan and the island "Meanguis", reported by the Spanish navigators.

The above-mentioned communication of the Spanish Government does not give any details as to the date of the expedition, the navigators or the circumstances in which the observations were made; it is not supported by extracts from the original reports on which it is based, nor accompanied by reproductions of the maps therein mentioned.

In its Rejoinder the United States Government gives quotations (translations) from a report of the voyages of Garcia de Loaisa which point to the fact that the Spanish explorer saw the Island of Palmas (Miangas) in October 1526.

The fact that an island marked as "I (Ilha) de (or das) Palmeiras", or by similar names (Polanas, Palmas), appears on maps at any rate as early as 1595 (or 1596) (the date of the earliest map filed in the dossier), approximately on the site of the Island of Palmas (or Miangas), shows that that island was known and therefore already discovered in the 16th century. According to the Netherlands memorandum, the same indications are found already on maps of 1554, 1558 and 1590. The Portuguese name (Ilha das Palmeiras) could not in itself decide the question whether the discovery was made on behalf or Portugal or of Spain; Linschoten's map, on which the name "I. das Palmeiras" appears, also employs Portuguese names for most of the Philippine Islands, which from the beginning were discovered and occupied by Spain.

It does not seem that the discovery of the Island of Palmas (or Miangas) would have been made on behalf of a Power other than Spain; or Portugal. In any case for the purpose of the present affair it may be admitted that the original title derived from discovery belonged to Spain; for the relations between Spain and Portugal in the Celebes Sea during the first three quarters of the 16th century may be disregarded for the following reasons: In 1581, i.e. prior to the appearance of the Dutch in the regions in question, the crowns of Spain and Portugal were united. Though the struggle for separation of Portugal from Spain had already begun in December 1640, Spain had not yet recognized the separation when it concluded in 1648 with the Netherlands the Treaty of Münster—the earliest Treaty, as will be seen

hereafter, to define the relations between Spain and the Netherlands in the regions in question. This Treaty contains special provisions as to Portuguese possessions, but alone in regard to such places as were taken from the Netherlands by the Portuguese in and after 1641. It seems necessary to draw from this fact the conclusion that, for the relations *inter se* of the two signatories of the Treaty of Münster, the same rules had to be applied both to the possessions originally Spanish and to those originally Portuguese. This conclusion is corroborated by the wording of Article X of the Treaty of Utrecht of June 26th, 1714, which expressly maintains Article V of the Treaty of Münster, but only as far as Spain and the Netherlands are concerned. It is therefore not necessary to find out which of the two nations acquired the original title, nor what the possible effects of subsequent conquests and cessions may have been on such title before 1648.

The fact that the island was originally called, not, as customarily, by a native name, but by a name borrowed from a European language, and referring to the vegetation, serves perhaps to show that no landing was made or that the island was uninhabited at the time of discovery. Indeed, the reports on record which concern the discovery of the Island of Palmas state only that an island was "seen", which island, according to the geographical data, is probably identical with that in dispute. No mention is made of landing or of contact with the natives. And in any case no signs of taking possession or of administration by Spain have been shown or even alleged to exist until the very recent date to which the reports of Captain Malone and M. Alvarez, of 1919, contained in the United States Memorandum, relate.

It is admitted by both sides that international law underwent profound modifications between the end of the Middle-Ages and the end of the 19th century, as regards the rights of discovery and acquisition of uninhabited regions or regions inhabited by savages or semi-civilised peoples. Both Parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. The effect of discovery by Spain is therefore to be determined by the rules of international law in force in the first half of the 16th century—or (to take the earliest date) in the first quarter of it, i.e. at the time when the Portuguese or Spaniards made their appearance in the Sea of Celebes.

If the view most favourable to the American arguments is adopted—with every reservation as to the soundness of such view—that is to say, if we consider as positive law at the period in question the rule that discovery as such, i.e. the mere fact of seeing land, without any act, even symbolical, of taking possession, involved *ipso jure* territorial sovereignty and not merely an "inchoate title", a *jus ad rem*, to be completed eventually by an actual and durable taking of possession within a reasonable time, the question arises whether sovereignty yet existed at the critical date, i.e. the moment of conclusion and coming into force of the Treaty of Paris.

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjets the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and

that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals. It seems therefore imcompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one State in order that the sovereignty of another may take its place does not arise.

If on the other hand the view is adopted that discovery does not create a definitive title of sovereignty, but only an "inchoate" title, such a title exists, it is true, without external manifestation. However, according to the view that has prevailed at any rate since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered. This principle must be applied in the present case, for the reasons given above in regard to the rules determining which of successive legal systems is to be applied (the so-called intertemporal law). Now, no act of occupation nor, except as to a recent period, any exercise of sovereignty at Palmas by Spain has been alleged. But even admitting that the Spanish title still existed as inchoate in 1898 and must be considered as included in the cession under Article III of the Treaty of Paris, an inchoate title could not prevail over the continuous and peaceful display of authority by another State; for such display may prevail even over a prior, definitive title put forward by another State. This point will be considered, when the Netherlands argument has been examined and the allegations of either Party as to the display of their authority can be compared.

*

In the second place the United States claim sovereignty over the Island of Palmas on the ground of recognition by Treaty. The Treaty of Peace of January 30th, 1648, called hereafter, in accordance with the practice of the Parties, the "Treaty of Münster", which established a state of peace between Spain and the States General of the United Provinces of the Netherlands, in Article V, deals with territorial relations between the two Powers as regards the East and West Indies (Article VI concerns solely the latter).

Article V, quoted in the French text published in the "Corps Universel Diplomatique du Droit des Gens", by J. Du Mont, Volume VI, Part I, 1728, page 430, runs as follows [1]:

[1] The English translation given in the Memorandum of the United States runs as follows: "Treaty of Peace between Philip IV, Catholic King of Spain, and their Lordships the States General of the United Provinces of the Netherlands. Anno 1648, January 30th.

. . . . . .

Article V.

The navigation and trade to the East and West Indies shall be kept up and conformably to the grants made or to be made for that effect; for the security

La Navigation & Trafique des Indes Orientales & Occidentales sera maintenuë, selon & en conformité des Octroys sur ce donnés, ou à donner cy-aprés; pour seureté de quoy servira le present Traicté & la Ratification d'iceluy, qui de part & d'autre en sera procurée; Et seront compris sous ledit Traicté tous Potentats, Nations & Peuples, avec lesquels lesdits Seigneurs Estats, ou ceux de la Société des Indes Orientales & Occidentales en leur nom, entre les limites de leursdits Octroys sont en Amitié et Alliance; Et un chacun, sçavoir les susdits Seigneurs Roy & Estats respectivement demeureront en possession et jouiront de telles Seigneuries, Villes, Chasteaux, Forteresses, Commerce & Pays és Indes Orientales & Occidentales, comme aussi au Bresil & sur les costes d'Asie, Afrique & Amérique respectivement, que lesdits Seigneurs Roy & Estats respectivement tiennent et possedent, en ce compris specialement les Lieux & Places que les Portugais depuis l'an mil six cent quarante & un, ont pris & occupé sur lesdits Seigneurs Estats; compris aussi les Lieux & Places qu'iceux Seigneurs Estats cy-aprés sans infraction du present Traicté viendront à conquerir & posseder; Et les Directeurs de la Société des Indes tant Orientales que Occidentales des Provinces-Unies, comme aussi les Ministres, Officiers hauts & bas, Soldats & Matelots, estans en service actuel de l'une ou de l'autre desdites Compagnies, ou aiants esté en leur service, comme aussi ceux qui hors leur service respectivement, tant en ce Pays qu'au District, desdites deux Compagnies, continuent encor, ou pourront cy-aprés estre employés, seront & demeureront libres & sans estre molestez en tous les Pays estans sous l'obeïssance dudit Seigneur Roy en l'Europe, pourront voyager, trafiquer & frequenter, comme tous autres Habitans des Pays desdits Seigneurs Estats. En outre a esté conditionné & stipulé, que les Espagnols retiendront leur Navigation en telle manière qu'ils la tiennent pour le present és Indes Orientales, sans se pouvoir estendre

---

whereof the present treaty shall serve, and the Ratification thereof on both sides, which shall be obtained; and in the said treaty shall be comprehended all potentates, nations, and people, with whom the said Lords the States, or members of the East and West India Companies in their name, within the limits of their said grants, are in friendship and alliance. And each one, that is to say, the said Lords the King and States, respectively, shall remain in possession of and enjoy such lordships, towns, castles, fortresses, commerce and countries of the East and West Indies, as well as of Brazil, and on the coasts of Asia, Africa, and America, respectively, which the said Lords the King and States, respectively, hold and possess, in this being specially comprised the spots and places which the Portuguese since the year 1641 have taken from the said Lords the States and occupied, comprising also the spots and places which the said Lords the States hereafter without infraction of the present treaty shall come to conquer and possess. And the directors of the East and West India Companies of the United Provinces, as also the servants and officers, high and low, the soldiers and seamen actually in the service of either of the said Companies, or such as have been in their service, as also such who in this country, or within the district of the said two companies, continue yet out of the service, but who may be employed afterwards, shall be and remain to be free and unmolested in all the countries under the obedience of the said Lord the King in Europe; and may sail, traffic and resort, like all the other inhabitants of the countries of the said Lord and States. Moreover it has been agreed and stipulated, that the Spaniards shall keep their navigation to the East Indies, in the same manner they hold it at present, without being at liberty to go further; and the inhabitants of those Low Countries shall not frequent the places which the Castilians have in the East Indies."

plus avant, comme aussi les Habitans de ce Pays-Bas s'abstiendront de la frequentation des Places, que les Castillans ont és Indes Orientales.

This article prescribes no frontiers and appoints no definite regions as belonging to one Power or the other. On the other hand, it establishes as a criterion the principle of possession ("demeureront en possession et jouiront de telles seigneuries .... que lesdits Seigneurs Roy et Estats tiennent et possedent").

However liberal be the interpretation given, for the period in question, to the notions of "tenir" (hold) and "posséder" (possess), it is hardly possible to comprise within these terms the right arising out of mere discovery; i.e. out of the fact that the island had been sighted. If title arising from discovery, well-known and already a matter of controversy at the period in question, were meant to be recognized by the treaty, it would probably have been mentioned in express terms. The view here taken appears to be supported by other provisions in the same article. It is stipulated therein that "les Lieux & Places qu'iceux Seigneurs Estats cy-aprés sans infraction du present Traicté viendront à conquerir et posseder" shall be placed on the same footing as those which they possessed at the moment the treaty was concluded. In view of the interpretation given by Spain and Portugal to the right of discovery, and to the Bull *Inter Caetera* of Alexander VI, 1493, it seems that the regions which the Treaty of Münster does not consider as definitely acquired by the two Powers in the East and West Indies, and which may in certain circumstances be capable of subsequent acquisition by the Netherlands, cannot fail to include regions claimed as discovered, but not possessed. It must further be remembered that Article V provides not merely a solution of the territorial question on the basis of possession, but also a solution of the Spanish navigation question on the basis of the *status quo*. Whilst Spain may not extend the limits of her navigation in the East Indies, nationals of the Netherlands are only excluded from "places" which the Spaniards hold in the East Indies. Without navigation there is no possibility of occupying and colonizing regions as yet only discovered; on the other hand, the exclusion from Spanish "places" of Netherlands navigation and commerce does not admit of an extensive interpretation; a "place", which moreover in the French of that period often means a fortified place, is in any case an actual settlement implying an actual radius of activity; Article VI, for instance, of the same treaty speaks of "lieux et places garnies de Forts, Loges et Chasteaux" (harbours, places, forts, lodgements or castles). For these reasons a title based on mere discovery cannot apply to the situation considered in Article V as already established.

Since the Treaty of Münster does not divide up the territories by means of a geographical distribution, and since it indirectly refuses to recognize title based on discovery as such, the bearing of the treaty on the present case is to be determined by the proof of possession at the critical epoch.

In connection herewith no precise elements of proof based on historical facts as to the display or even the mere affirmation of sovereignty by Spain over the Island of Palmas have been put forward by the United States. There is, however, one point to be considered in connection with the Treaty of Münster. According to a report, reproduced in the United States Explanations and made on February 7th, 1927, by the Provincial Prelacy of the Franciscan Order of Minors of the Province of St. Gregory the Great of the Philippines, the "Islands Miangis" ("Las Islas Miangis"), situated to the north-east of the "Island of Karekelan" (most likely identical with the

Nanusa N.E. of Karakelang, one of the Talauer Islands), after having been first in Portuguese, and then in Dutch possession, were taken by the Spaniards in 1606. The Spanish rule under which the Spanish Franciscan Fathers of the Philippines exercised the spiritual administration in the said islands, ended in 1666, when the Captain general of the Spanish Royal Armada dismantled all the fortified places in the Moluccas, making however before the "Dutch Governor of Malayo" a formal declaration as to the continuance of all the rights of the Spanish Crown over the places, forts and fortifications from which the Spaniards withdrew. There are further allegations as to historical facts in regard to the same region contained in a report of the Dutch Resident of Menado, dated August 12th, 1857, concerning the Talauer Islands (Talaud Islands). According to this report, in 1677 the Spaniards were driven by the Dutch from Tabukan, on the Talautse or Sangi Islands, and at that time—even "long before the coming of the Dutch to the Archipelago of the Moluccas"—the Talauer Islands (Karakelang) had been conquered by the Radjas of Tabukan.

According to the Dutch argument, considered hereafter, the Island of Palmas (or Miangas) together with the Nanusa and Talauer Islands (Talaud Islands) belonged to Tabukan. If this be exact, it may be considered as not unlikely that Miangas, in consequence of its ancient connection with the native State of Tabukan, was in 1648 in at least indirect possession of Spain. However this point has not been established by any specific proof.

But the question whether the Dutch took possession of Tabukan in 1677 in conformity with or in violation of the Treaty of Münster can be disregarded, even if—in spite of the incompleteness of the evidence laid before the Arbitrator—it were admitted that the Talautse (Sangi) Islands with their dependencies in the Talauer- and Nanusa-Islands, Palmas (or Miangas) possibly included, were "held and possessed" by Spain in 1648. For on June 26th, 1714, a new Treaty of Peace was concluded at Utrecht, which, in its Article X, stipulates that the Treaty of Münster is maintained as far as not modified and that the above-quoted Article V remains in force as far as it concerns Spain and the Netherlands.

Article X, quoted in the French text published in "Actes, Mémoires et autres pièces authentiques concernant la Paix d'Utrecht", Vol. 5, Utrecht, 1715, runs as follows:

> Le Traité de Munster du 30 janvier 1648 fait entre le feu Roi Philippe 4 & les Seigneurs Etats Generaux, servira de base au présent Traité, & aura lieu en tout, autant qu'il ne sera pas changé par les Articles suivans, & pour autant qu'il est applicable, & pour ce qui regarde les Articles 5 & 16 de ladite Paix de Munster, ils n'auront lieu qu'en ce qui concerne seulement lesdites deux hautes Puissances contractantes & leurs Sujets [1].

If—quite apart from the influence of an intervening state of war on treaty rights—this clause had not simply meant the confirmation of the principle of actual possession—at the time of the conclusion of the Treaty of Utrecht—as regulating the territorial status of the Contracting Powers in the East

[1] *Translation.* The Treaty of Münster of January 30th, 1648, concluded between the late King Philip IV and the States General, shall form the basis of the present Treaty and shall hold good in every respect in so far as it is not modified by the following articles, and in so far as it is applicable, and, as regards Articles 5 and 16 of the said Peace of Münster, these Articles shall only hold good in so far as concerns the aforesaid High Contracting Parties and their subjects.

and West Indies and if, on the contrary, a restitution of any territories acquired before the war in violation of the Treaty of Münster had been envisaged, specific provisions would no doubt have been inserted.

There is further no trace of evidence that Spain ever claimed at a later opportunity, for instance in connection with the territorial rearrangements at the end of the Napoleonic Wars, the restitution of territories taken or withheld from her in violation of the Treaties of Münster or Utrecht.

As it is not proved that Spain, at the beginning of 1648 or in June 1714, was in possession of the Island of Palmas (or Miangas), there is no proof that Spain acquired by the Treaty of Münster or the Treaty of Utrecht a title to sovereignty over the island which, in accordance with the said Treaties, and as long as they hold good, could have been modified by the Netherlands only in agreement with Spain.

It is, therefore, unnecessary to consider whether subsequently Spain by any express or conclusive action, abandoned the right, which the said Treaties may have conferred upon her in regard to Palmas (or Miangas). Moreover even if she had acquired a title she never intended to abandon, it would remain to be seen whether continuous and peaceful display of sovereignty by any other Power at a later period might not have superseded even conventional rights.

It appears further to be evident that Treaties concluded by Spain with third Powers recognizing her sovereignty over the "Philippines" could not be binding upon the Netherlands and, as such Treaties do not mention the island in dispute, they are not available even as indirect evidence.

We thus come back to the question whether, failing any Treaty which, as between the States concerned, decides unequivocally what is the situation as regards the island, the existence of territorial sovereignty is established with sufficient soundness by other facts.

*

Although the United States Government does not take up the position that Spanish sovereignty must be recognized because it was actually exercised, the American Counter-Case none the less states that "there is at least some evidence of Spanish activities in the island". In these circumstances it is necessary to consider *whether and to what extent the territorial sovereignty of Spain was manifested* in or in regard to the Island of Palmas (or Miangas). Here it may be well to refer to a passage taken from information supplied by the Spanish to the American Government and communicated by the latter to the Netherlands Legation at Washington, in a note dated April 25th, 1914. The passage in question is reproduced in the text and in the annex of the United States' Memorandum, and runs as follows:

> It appears, therefore, that this Island of Palmas or Miangas, being within the limits marked by the Bull of Alexander the Sixth, and the agreement celebrated between Spain and Portugal regarding the possession of the Maluco, must have been seen by the Spaniards on the different voyages of discovery which were made in these parts, and that it belonged to Spain, at least by right, until the Philippine Archipelago was ceded by the Treaty of Paris; but precise data of acts of dominion which Spain may have exercised in this island have not been found.
>
> This is the data and information which we have been able to find referring to said island, with which without doubt, because of the small importance it had, the discoverers did not occupy themselves, neither

afterwards the governors of the Philippines, nor the historians and chroniclers, such as Herrera and Navarrette and the fathers Colin and Pastelle of the Society of Jesus, who refer in their works to the above-mentioned data without detailing any information about the said island.

It further results from the Explanations furnished by the Government of the United States at the request of the Arbitrator that an exhaustive examination of the records which were handed over to the American authorities under Article VIII of the Treaty of Paris, namely such as pertain to judicial, notarial and administrative matters, has revealed nothing bearing on the allegations made by natives of Palmas in 1919 to Captain Malone and Mr. Alvarez on the subject of regular visits of Spanish ships, even gunboats, and on the collection of the "Cedula"-tax. This being so, no weight can be given to such allegations as to the exercise of Spanish sovereignty in recent times—quite apart from the fact that the evidence in question belongs to an epoch subsequent to the rise of the dispute.

Apart from the facts already referred to concerning the period of discovery, and the mention of a letter which was sent on July 31st, 1604, by the Spanish pilot Bartolome Pérez from the Island of Palmas and the contents of which are not known, and apart from certain allegations as to commercial relations between Palmas and Mindanao, the documents laid before the Arbitrator contain no trace of Spanish activities of any kind specifically on the Island of Palmas.

Neither is there any official document mentioning the Island of Palmas as belonging to an administrative or judicial district of the former Spanish Government in the Philippines. In a letter emanating from the Provincial Prelacy of the Franciscan Order of Minors mentioned above, it is said that the Islands of "Mata and Palmas should belong (deben pertenecer) to the group of Islands of Sarangani and consequently to the District of Dávao in the Island of Mindanao". It is further said in this letter that "the Island of Palmas, as it was near to Mindanao, must have been administered (debió ser administrada) spiritually in the last years of Spanish dominion by the fathers who resided in the District of Dávao". It results from the very terms of this letter, which places the "Islands Miangis" to the north-east of the Island Karakelang ("Karekelan"), that these statements, which suppose the existence of Mata, are not based immediately on information taken on the spot, but are rather conjectures of the author as to what seems probable.

In the Rejoinder filed by the United States Government there is an extract from a letter of the Dutch missionary Steller, dated December 9th, 1895. It appears from this letter that the Resident of Menado, at the same time as he set up the Netherlands coat of arms at Palmas (or Miangas), had had the intention to present a medal to the native Chief of the island, "because the said chief, recently detained in Mindanao on business, would not let the commanding officer of a Spanish warship force the Spanish flag upon him". These facts, supposing they are correct, are no proof of a display of sovereignty over Palmas (or Miangas); rather the contrary. If the Spanish naval authorities to whom the administrative inspection of the southern Philippine Islands belonged, were convinced that the Island of Palmas was Spanish territory, the refusal of the native chief to accept the Spanish flag would naturally have led either to direct action on the Island in order to affirm Spanish sovereignty, or, if the Netherlands rights had been invoked, to negotiations such as were the sequel to General Wood's visit in 1906.

As regards the information concerning the native language or knowledge of Spanish, even if sufficiently established, it is too vague to indicate the existence of a political and administrative connection between Palmas (or Miangas) and Mindanao.

In a telegram from General Leonard Wood to the Bureau of Insular Affairs, reproduced in the American Explanations, it is stated that "the administrative inspection of the islands in the south (i.e. of the Philippines), especially round their coasts, belonged absolutely to the naval Spanish authorities". As papers pertaining to military and naval matters were not handed over to the American authorities under the Treaty of Paris, the files relating to the said administrative inspection are not in the possession of the United States. The fact that not the ordinary provincial agencies but the navy were in charge of the inspection of the islands in the south, together with another incidentally mentioned by Major General E. S. Otis; in a report of August 31st, 1899, namely the existence of a state of war or at least of subdued hostility amongst the Moros against Spanish rule, leads to the very probable—though not necessary—conclusion that the complete absence of evidence as to display of Spanish sovereignty over the Island of Palmas is not due to mere chance, but is to be explained by the absence of interest of Spain in the establishment or the maintenance of her rule over a small island lying far off the coast of a distant and only incompletely subdued province.

It has been remarked, not without reason, that the United States, having acquired sovereignty by session only in 1898, were at some disadvantage for the collection of evidence concerning the original acquisition and the display of sovereignty over Palmas. The Arbitrator has no possibility of taking into account this situation; he can found his award only on the facts alleged and proved by the Parties, and he is bound to consider all proved facts which are pertinent in his opinion. Moreover it does not appear that the Spanish Government refused to furnish the documents requested.

*

Among the methods of indirect proof, not of the exercise of sovereignty, but of its existence in law, submitted by the United States, there is the *evidence from maps*. This subject has been very completely developed in the Memorandum of the United States and has also been fully dealt with in the Netherlands Counter-Memorandum, as well as in the United States Rejoinder. A comparison of the information supplied by the two Parties shows that only with the greatest caution can account be taken of maps in deciding a question of sovereignty, at any rate in the case of an island such as Palmas (or Miangas). Any maps which do not precisely indicate the political distribution of territories, and in particular the Island of Palmas (or Miangas) clearly marked as such, must be rejected forthwith, unless they contribute—supposing that they are accurate—to the location of geographical names. Moreover, indications of such a nature are only of value when there is reason to think that the cartographer has not merely referred to already existing maps—as seems very often to be the case—but that he has based his decision on information carefully collected for the purpose. Above all, then, official or semi-official maps seem capable of fulfilling these conditions, and they would be of special interest in cases where they do not assert the sovereignty of the country of which the Government has caused them to be issued.

If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be.

The first condition required of maps that are to serve as evidence on points of law is their geographical accuracy. It must here be pointed out that not only maps of ancient date, but also modern, even official or semi-official maps seem wanting in accuracy. Thus, a comparison of the maps submitted to the Arbitrator shows that there is doubt as to the existence or the names of several islands which should be close to Palmas (or Miangas), and in about the same latitude. The St. Joannes Islands, Hunter's Island and the Isle of Mata are shown, all or some of them, on several maps even of quite recent date, although their existence seems very doubtful. The non-existence of the Island of Mata and the identity of the St. Joannes and Hunter's Islands with Palmas, though they appear on several maps as distinct and rather distant islands, may, on the evidence laid before the Arbitrator, be considered as fairly certain.

The "*Century Atlas*" (Exhibit No. 8 of the American Memorandum) and the map published in 1902 by the *Bureau of Insular Affairs of the United States* (Exhibit No. 11), show "Mata I.", "Palmas I." and "Haycock or Hunter I". The Spanish map (Captain Montero), reproduced by the *War Department* of the United States (Exhibit No. 9) also mentions these three islands, although "Haycock I." and "Hunter I." are here different islands. The same is to be said of the map of the Challenger Expedition of 1885. The only large scale map submitted to the Arbitrator which, as appears from inscriptions on it, is directly based on researches on the spot, is that attached to the Netherlands Memorandum (British Admiralty Chart No. 2575). Now this map shows neither an island of Mata, nor of Hunter, nor of any other name in the regions where they should be, according to the other maps, and Haycock Island is indicated at two points other than that adopted in "Exhibits Nos. 8 & 11". Whatever be the accuracy of the British Admiralty Chart for the details in question, these points show that only with the greatest caution use can be made of maps as indications of the existence of sovereignty over Palmas (or Miangas). The maps which, in the view of the United States, are of an official or semi-official character and are of Spanish or American origin are that of Captain Montero and that of the *Insular Department*, referred to above (Exhibits Nos. 8 & 11). The first mentioned gives for that matter no indication as to political frontiers, and the second only reproduces the lines traced by the treaty of December 10th, 1898. They have therefore no bearing on the point in question, even apart from the evident inaccuracies, at least as regards Hunter Island, which they appear to contain precisely in the region under consideration.

As regards maps of Dutch origin, there are in particular two which, in the view of the United States, possess an official character and which might exclude Palmas (or Miangas) from the Dutch possessions. The first of these, published in 1857 by M. Bogaerts, lithographer to the Royal Military Academy, and dedicated to the Governor of that institution, if it possesses the official character attributed to it by the American Memorandum and disputed by the Netherlands Counter-Memorandum, might serve to indicate that the island was not considered at the period in question as Dutch but as Spanish territory. Anyhow, a map affords only an indication—and that a very indirect one—and, except when annexed to a legal instrument, has not the value of such an instrument, involving recognition or abandonment of

rights. The importance of this map can only be judged in the light of facts prior or subsequent to 1857, which the Netherlands Government alleges in order to prove the exercise of sovereignty over the Island of Palmas (or Miangas); these facts, together with the cartographical evidence relied upon in their support or submitted in connection with the question of the right location of the Island or Islands called "Meangis", will be considered at the same time as the Netherlands' arguments. While Bogaerts' map does not, as it stands, furnish proof of the recognition of Spanish sovereignty, it must further be pointed out that it is inaccurate as regards the group of islands marked "Meangis" and indicated on this map somewhat to the north of "Nanoesa", as well as in other points, for example the shape of Mindanao and the colouring of certain small islands.

The conclusions drawn in the United States Memorandum from the second map, i.e. the atlas published by the Ministry for the Colonies (1897-1904) appear to be refuted by the information contained in the Netherlands Counter-Memorandum. A copy of a detailed map from the same atlas is there shown which represents "P. Miangis (E. Palmas)" amongst Dutch possessions, not only by the coloured contours, but also because it indicates the Sarangani Islands as "Amerikaansch". The general map, on the other hand, reproduced as "Exhibit No. 10" in the American Memorandum, excludes the former island from Dutch territory, by a line of demarcation between the different colonial possessions. There seems to be no doubt that the special map must prevail over the general, even though the latter was published three months later.

As to the special map contained in the first edition of the same atlas (Atlas der Nederlandsche Bezittingen in Oost-Indië [1883-1885]), where the "Melangies" are reproduced as a group of islands north of the Nanusa and distinct from "Palmas", the same observations apply as to Bogaerts' map, which is fairly similar on this point. The "Explanations" filed by the Netherlands Government make it clear that the authors of the map did not rely on new and authentic information about the region here in question, but reproduced older maps.

*

In the last place there remains to be considered *title arising out of contiguity*. Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same State have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another, either by agreement between the Parties, or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the

activities of a State. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results. This would be especially true in a case such as that of the island in question, which is not relatively close to one single continent, but forms part of a large archipelago in which strict delimitations between the different parts are not naturally obvious.

There lies, however, at the root of the idea of contiguity one point which must be considered also in regard to the Island of Palmas (or Miangas). It has been explained above that in the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space. This phenomenon will be particularly noticeable in the case of colonial territories, partly uninhabited or as yet partly unsubdued. The fact that a State cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances.

It is, however, to be observed that international arbitral jurisprudence in disputes on territorial sovereignty (e.g. the award in the arbitration between Italy and Switzerland concerning the Alpe Craivarola; Lafontaine, Pasicrisie internationale, pp. 201-209) would seem to attribute greater weight to—even isolated—acts of display of sovereignty than to continuity of territory, even if such continuity is combined with the existence of natural boundaries.

As regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law a unit, and that the fate of the principal part may involve the rest. Here, however, we must distinguish between, on the one hand, the act of first taking possession, which can hardly extend to every portion of territory, and, on the other hand, the display of sovereignty as a continuous and prolonged manifestation which must make itself felt through the whole territory.

As regards the territory forming the subject of the present dispute, it must be remembered that it is a somewhat isolated island, and therefore a territory clearly delimited and individualised. It is moreover an island permanently inhabited, occupied by a population sufficiently numerous for it to be impossible that acts of administration could be lacking for very long periods. The memoranda of both Parties assert that there is communication by boat and even with native craft between the Island of Palmas (or Miangas) and neighbouring regions. The inability in such a case to indicate any acts of public administration makes it difficult to imagine the actual display of sovereignty, even if the sovereignty be regarded as confined within such narrow limits as would be supposed for a small island inhabited exclusively by natives.

IV.

The *Netherlands' arguments* contend that the East India Company established Dutch sovereignty over the Island of Palmas (or Miangas) as early as the 17th century, by means of conventions with the princes of Tabukan (Taboekan) and Taruna (Taroena), two native chieftains of the Island of Sangi (Groot Sangihe), the principal island of the Talautse Isles (Sangi Islands), and that sovereignty has been displayed during the past two centuries.

In the annexes to the Netherlands Memorandum the texts of conventions concluded by the Dutch East India Company (and, after 1795, by the Netherlands State), in 1677, 1697, 1720, 1758, 1828, 1885 and 1899 with the Princes, Radjas or Kings, as they are indiscriminately called, of Tabukan, Taruna and Kandahar (Kandhar)-Taruna. All these principalities are situated in the Northern part of the Island of Sangi (Groot Sangihe or Sanghir) and, at any rate since 1885, include, besides parts of that island, also certain small islands further north, the Nanusa Islands—all incontestably Dutch—and, according to the Netherlands, also the Island of Palmas (or Miangas). These successive contracts are one much like another; the more recent are more developed and better suited to modern ideas in economic, religious and other matters, but they are all based on the conception that the prince receives his principality as a fief of the Company or the Dutch State, which is suzerain. Their eminently political nature is confirmed by the supplementary agreements of 1771, 1779 and 1782, concerning the obligations of vassals in the event of war. The dependence of the vassal State is ensured by the important powers given to the nearest representative of the colonial Government and, in the last resort, to that Government itself. The most recent of these contracts prior to the cession of the Philippines to the United States, that of 1885, contains, besides the allocation of powers for internal administration, the following provisions also, in regard to international interests: exclusion of the Prince from any direct relations with foreign Powers, and even with their nationals in important economic matters; the currency of the Dutch Indies to be legal tender; the jurisdiction over foreigners to belong to the Government of the Dutch Indies; the vassal is bound to suppress slavery, the White Slave Traffic and piracy; he is also bound to render assistance to the shipwrecked.

Even the oldest contract, dated 1677, contains clauses binding the vassal of the East India Company to refuse to admit the nationals of other States, in particular Spain, into his territories, and to tolerate no religion other than protestantism, reformed according to the doctrine of the Synod of Dordrecht. Similar provisions are to be found in the other contracts of the 17th and 18th centuries. If both Spain and the Netherlands had in reality displayed their sovereignty over Palmas (or Miangas), it would seem that, during so long a period, collisions between the two Powers must almost inevitably have occurred.

The authenticity of these contracts cannot be questioned. The fact that true copies, certified by evidently the competent officials of the Netherlands Government, have been supplied and have been forwarded to the Arbitrator through the channels laid down in the Special Agreement, renders the production of facsimiles of texts and of signatures or seals superfluous. This observation equally applies to other documents or extracts from documents taken from the archives of the East India Company, or of the Netherlands Government. There is no reason to suppose that typographical errors in the reproduction of texts may have any practical importance for the evidence in question.

*

The fact that these contracts were renewed from time to time and appear to indicate an extension of the influence of the suzerain, seems to show that the regime of suzerainty has been effective. The sovereignty of the Netherlands over the Sangi and Talauer Islands is moreover not disputed. There is here a manifestation of territorial sovereignty normal

for such a region. The questions to be solved in the present case are the following:

Was the island of Palmas (or Miangas) in 1898 *a part of territory under Netherlands' sovereignty?*

Did this sovereignty actually exist in 1898 *in regard to Palmas (or Miangas)* and are the facts proved which were alleged on this subject?

If the claim to sovereignty is based on the continuous and peaceful display of State authority, the fact of such display must be shown precisely in relation to the disputed territory. It is not necessary that there should be a special administration established in this territory; but it cannot suffice for the territory to be attached to another by a legal relation which is not recognized in international law as valid against a State contesting this claim to sovereignty; what is essential in such a case is the continuous and peaceful display of actual power in the contested region.

According to the description of the frontiers of the territory of Taruna annexed to the contract of 1885, the list of dependencies of Taruna on the Talauer Islands mentions first the different islands of Nanusa, and ends by the words "ten slotte nog het eiland Melangis (Palmas)", "and lastly the island Melangis (Palmas)".

The similar description of frontiers attached to the contract of 1899 states that the Islands of Nanusa (including the Island of "Miangas") belong to the territory of Kandahar-Taruna. If these two mentions refer to the Island of Palmas (or Miangas), it must be recognized that that island, at any rate nominally, belongs to the vassal State in question; it is by no means necessary to prove the existence of a special contract with a chieftain of Palmas (or Miangas).

However much the opinions of the Parties may differ as to the existence of proof of the display of Dutch sovereignty over the Island of Palmas (or Miangas), the reports, furnished by both sides, of the visit of General Wood, in January 1906, show that at that time there were at least traces of continuous relations between the island in dispute and neighbouring Dutch possessions, and even traces of Dutch sovereignty. General Wood noted his surprise that the Dutch flag was flying on the beach and on the boat which came to meet the American ship. According to information gathered by him, the flag had been there for 15 years and perhaps even longer. Since the contract of 1885 with Taruna and that of 1899 with Kandahar-Taruna comprise Palmas (or Miangas) within the territories of a native State under the suzerainty of the Netherlands and since it has been established that in 1906 on the said island a state of things existed showing at least certain traces of display of Netherlands sovereignty, it is now necessary to examine what is the nature of the facts invoked as proving such sovereignty, and to what periods such facts relate. This examination will show whether or not the Netherlands have displayed sovereignty over the Island of Palmas (or Miangas) in an effective continuous and peaceful manner at a period at which such exercise may have excluded the acquisition of sovereignty, or a title to such acquisition, by the United States of America.

* * *

Before beginning to consider the facts alleged by the Netherlands in support of their arguments, there are two preliminary points, in regard to which the Parties also put forward different views, which require elucidation. These relate to questions raised by the United States: firstly the power of the

East India Company to act validly under international law, on behalf of the Netherlands, in particular by concluding so-called political contracts with native rulers; secondly the identity or non-identity of the island in dispute with the island to which the allegations of the Netherlands as to display of sovereignty would seem to relate.

*

The acts of the *East India Company* (Generale Geoctroyeerde Nederlandsch Oost-Indische Compagnie), in view of occupying or colonizing the regions at issue in the present affair must, in international law, be entirely assimilated to acts of the Netherlands State itself. From the end of the 16th till the 19th century, companies formed by individuals and engaged in economic pursuits (Chartered Companies), were invested by the State to whom they were subject with public powers for the acquisition and administration of colonies. The Dutch East India Company is one of the best known. Article V of the Treaty of Munster and consequently also the Treaty of Utrecht clearly show that the East and West India Companies were entitled to create situations recognized by international law; for the peace between Spain and the Netherlands extends to "tous Potentats, Nations & Peuples" with whom the said Companies, in the name of the States of the Netherlands, "entre les limites de leurdits Octroys sont en Amitié et Alliance". The conclusion of conventions, even of a political nature, was, by Article XXXV of the Charter of 1602, within the powers of the Company. It is a question for decision in each individual case whether a contract concluded by the Company falls within the range of simple economic transactions or is of a political and public administrative nature.

As regards *contracts between a State* or a Company such as the Dutch East India Company and *native princes or chiefs of peoples* not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties. But, on the other hand, contracts of this nature are not wholly void of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account. From the time of the discoveries until recent times, colonial territory has very often been acquired, especially in the East Indies, by means of contracts with the native authorities, which contracts leave the existing organisation more or less intact as regards the native population, whilst granting to the colonizing Power, besides economic advantages such as monopolies or navigation and commercial privileges, also the exclusive direction of relations with other Powers, and the right to exercise public authority in regard to their own nationals and to foreigners. The form of the legal relations created by such contracts is most generally that of suzerain and vassal, or of the so-called colonial protectorate.

In substance, it is not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of autonomy for the natives. In order to regularise the situation as regards other States, this organisation requires to be completed by the establishment of powers to ensure the fulfilment of the obligations imposed by international law on every State in regard to its own territory. And thus suzerainty over the native State becomes the basis of territorial sovereignty as towards other members of the community of nations. It is the sum-total of functions thus allotted either to the native authorities or to those of the colonial Power

which decides the question whether at any certain period the conditions required for the existence of sovereignty are fulfilled. It is a question to be decided in each case whether such a regime is to be considered as effective or whether it is essentially fictitious, either for the whole or a part of the territory. There always remains reserved the question whether the establishment of such a system is not forbidden by the pre-existing rights of other States.

The point of view here adopted by the Arbitrator is—at least in principle—in conformity with the attitude taken up by the United States in the note already quoted above, from the Secretary of State to the Spanish Minister, dated January 7th, 1900, and relating to two small islands lying just outside the line drawn by the Treaty of Paris, but claimed by the United States under the said Treaty. The note states that the two islands "have not hitherto been directly administered by Spain, but have been successfully claimed by Spain as a part of the dominions of her subject, the Sultan of Sulu. As such they have been administered by Sulu agencies, under some vague form of resident supervision by Spanish agencies, which latter have been withdrawn as a result of the recent war."

This system of contracts between colonial Powers and native princes and chiefs is even expressly approved by Article V of the Treaty of Münster quoted above; for, among the "Potentates, Nations and Peoples", with whom the Dutch State or Companies may have concluded treaties of alliance and friendship in the East and West Indies, are necessarily the native princes and chiefs.

The Arbitrator can therefore not exclude the contracts invoked by the Netherlands from being taken into consideration in the present case.

*

As to the *identity of the island* in dispute with the islands "Melangis (Palmas)" and "Miangas" in the contracts of 1885 and 1899 respectively, this must be considered as established by the large scale map which was sent to the Governor General of the Netherlands Indies by the Resident of Menado in January 1886 and which indicates in different colours the administrative districts on the Sangi and Talauer Islands in almost complete conformity with the description of the territory of Taruna given in the annex to the contract of 1885, save that the name of Nanusa, applied to the group of seven islands by the contract, is there given to a single island of this group, usually called Merampi (Mehampi). This large scale map, prepared evidently for administrative purposes, of which a reproduction has been filed with the Explanations of the Netherlands Government, shows an isolated island "Palmas of Melangis" which, though not quite correct in size and shape and though about 40′ too much to the south and 20′ too much to the east, cannot but correspond to Palmas (or Miangas), since the most reliable detailed modern maps, in particular the British Admiralty Chart, show no other island but Palmas (or Miangas) between the Talauer or Nanusa Islands and Mindanao.

This comparatively correct location of the island is supported by earlier maps. The map edited at Amsterdam by Covens and Mortier at a date not exactly known, but certainly during the 18th century, shows at about the place of Palmas (or Miangas) a single island with the inscription "'t regte P° Menangus" (the right island Menangus) as distinguished from the "engelsche Eilanden Menangus" and from the group of the Nanusa. This map proves that before that time uncertainty had existed as to the real

existence of one or several islands Menangus, an uncertainty evidently due in its origin to the mention of the existence of "Islands Meangis" made by the Englishman Dampier, in his book published in 1698.

In conformity with this statement by Covens and Mortier, the map contained in the book published in 1855 by the navigator Cuarteron shows a single island "Mianguis", not in exactly the place of the island in dispute, but distinct from the "Nanuse" and lying about midway between Cape San Augustin and the "Nanuse". Cuarteron's map shows "Mianguis" distinctly as a Dutch possession—by colour expressly indicated as relating to political boundaries; it is accompanied by geographical and statistical information and due to an author who travelled extensively in these parts (1841-1849), and against whose reliability not sufficient reasons have been given. Among other points the explanation gives for "Mianguis" the comparatively exact geographical location (latitude north 5° 33′ 30″ [Special Agreement 5° 35′]); longitude east of Rome 114° 42′ 00″ = 127° 12′ 53″ east of Greenwich (Special Agreement 126° 36′) and also detailed though evidently only approximative statistical information about the composition of the population. It further appears from Cuarteron's book that "Mianguis" is something apart from the Nanusa, though Cuarteron observes that the "Nanuse" Islands are little known by the geographers under the name of "Mianguis".

A proof of the fact that the Dutch authorities were quite aware of the identity of "Miangas" with the island charted on many maps as "Palmas" is to be found in the reports of the Commanders of the Dutch Government Steamer *Raaf* (November 1896) and of H.M.S. *Edi* (June 1898). These officers mention expressly the double name and give the almost exact nautical location of the island then visited.

One observation is however to be made. The island, shown on the maps and mentioned in the contracts, bears different names: Melangis, Miangas, Miangus, Mianguis. In different documents referred to in the Netherlands Memorandum and Counter-Memorandum more than a dozen other variations of the name appear, although in the opinion of the Netherlands Government they all concern the same island. These differences, sometimes considerable at first sight, are sufficiently explained by the statements of linguistic experts, produced by the Netherlands Government. The peculiarity of the native language from which the name of the island is borrowed and the difficulty of transposing the sounds of this language into a western alphabet seem not only to make comprehensible the existence of different spellings, but to explain why precisely these variations have appeared. Differences of spelling are even recorded as such in documents as early as a letter, dated May 11th, 1701, of the Governor of the Moluccas and a report, dated September 12th, 1726. Moreover, the difference of spelling would not justify the conclusion that the more or less different names referred to different islands; for in the whole region in question no other island has been mentioned to which these names—or at least most of them—would better apply; for the Island of Tangulandang, with the place Minangan already referred to, is clearly distinguished from the island of Miangas in the documents of both the 18th and the 19th centuries relating to the dependencies of Tabukan.

No evidence has been submitted to support the supposition that the island, appearing on some old maps as "'t regte Menangus" would be identical with Ariaga (Marare), which, according to a statement of Melvill van Carnbee, mentioned in the United States Memorandum, is uninhabited.

Great stress is laid in the Rejoinder of the United States on the fact that the Nanusa Isles or some islands of this group are designated by several distinguished cartographers and navigators of the 19th century as "Islands Meangis" or by some similar name, and that amongst these cartographers and sailors some are Dutchmen, in particular Baron Melvill van Carnbee. This statement which is, no doubt, exact, cannot however prove that the island Miangas mentioned as a dependency of Tabukan or Taruna or Kandahar-Taruna is to be identified with the "Is. Meangi" and therefore with the Nanusa Isles. It is clear that the cartographers referred to apply the name of "Iles Meangis" or some similar name to a group of islands. On the other hand, the island the identity of which is disputed can be but a single, distant, isolated island. The attribution of the name Meangis to the Nanusa seems to be an error, because the official documents laid before the Arbitrator which belong about to the same period as the maps mentioning the "Is. Meangis", make a clear distinction between the principal islands composing the Nanusa and the island of Miangas or Meangas or Melangis, though the latter is considered as "onderhoorig" of the Nanusa Isles. The identification of the Nanusa with "Meangis" Islands may be explained by the desire to locate somewhere the Meangis Islands, famous since Dampier's voyage. Seeing that up to very recent times an extraordinary inexactitude about the names and the location of the islands in precisely that part of the Celebes Sea is shown to exist by almost all the maps filed by the Parties, including the two maps of Melvill van Carnbee, an erroneous attribution of the name "Miangas", even by Dutch cartographers, is easily possible.

It is not excluded that the three "English Menangis Islands" which are located on some maps to the east of the "right Menangis" and of which a detailed map with indication of the depth of the surrounding sea has been filed, did in fact exist, but have disappeared in consequence of earthquakes such as reported by Cuarteron.

Finally it may be noted that the information concerning Palmas or the other islands such as St. Juan, Mata, Hunter Island, which are to be identified with it, contains, except for the most recent period, nothing which relates to the population of the island; moreover all these names, given to the island, except Mata, may have been given by navigators who did not land or get into contact with the natives. Miangas however is a native name, which the inhabitants must have communicated to the chiefs to whom they were subject and to the navigators with whom they came in touch. The name of Miangas as designating an inhabited place (negorij) is much older than the establishment of the more centralized village in 1892.

It results from these statements that, when the contracts of 1885 and 1899 mentioned, in connection with, but distinct from the Nanusa, a single island Melangis or Miangis as belonging to Taruna or Kandahar-Taruna, only the island in dispute can have been meant, and that this island has been known under these same or similar names at least since the 18th century. No plausible suggestion has been made as to what the single island "Miangas", the existence of which cannot be doubted, might be, if it is not the island in dispute.

The special map on sheet 14 (issued in 1901) of the "Atlas van Nederlandsch Oost-Indië" (1897-1904), in showing "P. Miangis (Palmas E.)" as a Dutch possession in the place indicated in the Special Agreement, is in conformity with earlier maps and information, particularly with the Government's special map of 1886. Under these circumstances no weight can be given to the fact that on Bogaerts' map of 1857 and in the atlas of Stemfort and

Siethoff (1883-85), as well as on other maps, a group of islands called Meangis, or a similar name, appears.

* * *

The preliminary questions being settled, the evidence laid before the Arbitrator by the Netherlands Government in support of its claim is now to be considered.

As regards the documents relating to the 17th *and* 18th *centuries*, which in the view of the Netherlands show that already at that date the Prince of Tabukan had not only claimed, but also actually displayed a certain authority over Palmas (or Miangas), the following must be noted:

The Netherlands Government gives great weight to the fact that Dutch navigators who, in search of the islands Meangis mentioned by Dampier, were sailing in the seas south of Mindanao and whose reports are at least in part preserved, not only came in sight of Palmas (or Miangas), but were able to state that the island belonged to the native State of Tabukan, which was under Dutch suzerainty as shown by the contracts of November 3rd, 1677, and September 26th, 1697.

The existence of Dutch rule would be proved by the fact that the Prince's flag—i.e. the Dutch East India Company's flag—was seen being waved by the people of the island when the Dutch ships *De Bye*, *Larycque* and *De Peer* were in sight of the island on November 21st, 1700, but were prevented from landing by the conditions of the sea. The commander of the *Larycque*, who had already sighted the island on November 12th of the same year, was instructed to make more precise investigations by landing, and he was able to do so on December 9th and 10th. Not only was the Prince's flag again hoisted by the natives, but the inhabitants informed the sailors that the name of the island was "Meangis". They gave to the commander a document—lost since that time—which, dating from 1681 and emanating from Marcus Lalero, the late king of Tabukan, whose existence and death are confirmed by the contract of 1697, stated the allegiance of the people of "Miangis" towards Tabukan. There exists however only an indirect report on this visit of December 10th, 1700, namely a letter dated May 11th, 1701, and sent by the Governor in Council of the Moluccas at Ternate to the Governor General and India Council. In this letter, based, no doubt, on information furnished by the commander of the *Larycque*, who had reached Ternate on December 29th, 1700, the Governor says that the island in question is the farthest of the Talauer islands and that its name, correctly spelt, is not "Meangis", but "Mayages".

These statements as well as the circumstance that all the reports without any mention of neighbouring islands, speak of a single island, the shape of which corresponds fairly with that of Palmas (or Miangas), would make it almost certain that the island in question is in fact Palmas (or Miangas), unless the nautical observations given in the report mentioned above (4° 49′; 4° 37′; 5° 9′) might point to the Nanusa group, to which the allegiance with Tabukan would equally apply. These observations, though no doubt subject to error, would however seem to offer relatively more guarantee of accuracy than those based on the length of time taken to cover a distance at sea, mainly relied upon in the Netherlands Memorandum for the location of the island. Since, however, no other single island in those parts of the Sea of Celebes seems to exist, and since it is most unlikely that the navigators would on none of the three visits in November and December have sighted

and mentioned neighbouring islands, there is at least a great probability that the island visited by the *Larycque* on December 10th, 1700, was Palmas (or Miangas).

The mention of an island "Meamgy", in connection with, but distinct from the Nanusa, appears again in a document, dated November 1st, 1701, concerning regulations as to criminal justice (suppression of vendetta and reservation of capital punishment as an exclusive prerogative of the East India Company) in the native State of Tabukan, to which the island visited December 10th, 1700, was reported to belong. The fact that the regulations for Tabukan are, by an express provision, declared applicable to the "islands of Nanusa and Meamgy thereunder included" proves that an island of the later name was known and deliberately treated as belonging to the vassal State of Tabukan.

In a report of the Governor of Ternate, dated June 11th, 1706, the island "Miangas" is mentioned as the northernmost of the dependencies of the native States of Tabukan and Taruna, in connection with "Kakarotang" (Onrata or Kakarutan on the Brit. Adm. map), one of the Nanusa, and explicitly identified with the island first seen by the *Larycque* on November 21st, 1700. Finally, another report of the Governor of Ternate, dated September 12th, 1726, mentions a decision on the question whether 80 Talauers (inhabitants of the Talauer islands) who had arrived at Taruna from the island "Meangas off (or) Mejages" were subjects of Taruna or of Tabukan. This island is expressly identified with that which was visited in 1700 by the commander of the *Larycque*.

This documentary evidence, taken together with the fact that no island called Miangas or bearing a similar name other than Palmas (or Miangas) seems to exist north of the Talautse (Sangi) and Talauer Isles, leads to the conclusion that the island Palmas (or Miangas) was in the early part of the 18th century considered by the Dutch East India Company as a part of their vassal State of Tabukan. This is the more probable for the reason that in later times, notably in an official report of 1825, the "far distant island Melangis" is mentioned again as belonging to Tabukan.

In the documents subsequent to 1825, Miangas (Melangis) appears as a dependency of Taruna, another of the vassal States in the north of Sangi (Groot Sangihe), which already in 1726 had claimed the island as its own. The date and circumstances of this transfer are not known, but it must have taken place before 1858; for a report of the Governor of Menado, dated December 31st, 1857, mentions the Nanusa and "Melangis" as parts of Taruna. This state of things has been maintained in the contracts of 1885 and 1899. From the point of view of international law, the transfer from one to another vassal State is to be considered as a purely domestic affair of the Netherlands; for their suzerainty over Tabukan and Taruna goes back far beyond the date of this transfer.

Considering that the contracts of 1676 and 1697 with Tabukan established in favour of the Dutch East India Company extensive rights of suzerainty over Tabukan and an exclusive right of intercourse with that State, and considering further that at least two characteristic acts of jurisdiction expressly relating to Miangas, in 1701 and 1726, are reported, whilst no display of sovereignty by any other Power during the same period is known, it may be admitted that at least in the first quarter of the 18th century, and probably also before that time, the Dutch East India Company exercised rights of suzerainty over Palmas (or Miangas) and that therefore the island was at

that time, in conformity with the international law of the period, under Netherlands sovereignty.

No evidence has been laid before the Arbitrator from which it would result that this state of things had already existed in 1648 and had thus been confirmed by the Treaty of Münster. It suffices to refer to what has already been said as to this Treaty in connection with the title claimed by Spain. On the one hand, it cannot be invoked as having transformed a state of possession into a conventional title *inter partes*, for the reason that Dutch possession of the island Palmas (or Miangas) is not proved to have existed at the critical date. On the other hand, it was stated that neither the Treaty of Münster nor the Treaty of Utrecht, if they are at all applicable to the case, could at present be invoked for invalidating the acquisition of sovereignty over Palmas (or Miangas) obtained by the Dutch at a date subsequent to 1648. It follows rather from what has been said about the rights of Netherlands suzerainty over Tabukan, in the early 18th century, and as to relations between Tabukan and Palmas (or Miangas), that the Treaty of Utrecht recognized these rights of suzerainty as comprising the radja of Tabukan amongst the "potentates, nations and peoples with whom the Lords States or members of the East and West India Companies are in friendship and alliance".

*

The admission of the existence of territorial sovereignty early in the 18th century and the display of such sovereignty in *the* 19th *century* and particularly in 1906, would not lead, as the Netherlands Government appears to suppose, by analogy with French, Dutch and German civil law, to the conclusion that, unless the contrary is proved, there is a presumption for the existence of sovereignty in the meantime. For the reasons given above, no presumptions of this kind are to be applied in international arbitrations, except under express stipulation. It remains for the Tribunal to decide whether or not it is satisfied of the continuous existence of sovereignty, on the ground of evidence as to its display at more or less long intervals.

There is a considerable gap in the documentary evidence laid before the Tribunal by the Netherlands Government, as far as concerns not the vassal State of Tabukan in general, but Palmas (or Miangas) in particular. There is however no reason to suppose, when the Resident van Delden, in a report of 1825, mentioned the island "Melangis" as belonging to Tabukan, that these relations has not existed between 1726 and 1825.

Van Delden's report, as well as later documents relating to the 19th century, shows that Miangas was always considered by the Dutch authorities as belonging to the Sangi and Talauer Isles and as being in a particular connection with the Nanusa. An extensive report of the Resident of Menado, dated August 12th, 1857, gives detailed statements about the administrative organisation, including the names of the villages (negorijen) and districts or presidencies (djoegoeschappen) and the number and title and names of the native officials. The island "Melangis" goes with the Nanusa, but is distinct from the island "Nanoesa" (usually called Mehampi, after the chief village) and Karaton; it is administered by one "radja", who at that time was named Sasoeh. This report leaves no room for doubt as to the legal situation of Melangis at that period, and is in conformity with the territorial description given for Palmas (or Miangas) in the contracts of 1885 and 1899 already mentioned, and also with a table, dated September 15th, 1889, showing the whole system of administrative districts in the

Talauer Islands which are dependencies of the native principalities of the Sangi Isles.

It would however seem that before 1895 the direct relations between the island and the colonial administration were very loose. In a report on a visit paid to the island in November 1895 by the Resident of Menado, it is stated that, according to the natives, no ship had ever before that time visited the island, and that no European had ever been there; the Resident himself was of opinion that he was the first colonial official who went to Palmas (or Miangas); also the commander of H.M.S. *Edi*, who patrolled the Celebes Sea in 1898, mentions that "in man's memory a steamer had never been at Miangas". The documents relating to the time before 1895 are indeed scanty, but they are not entirely lacking. A series of statements made by certain natives, chiefs and others, mostly of good age, whose memories went back far beyond 1906—at least to 1870— have been laid by the Netherlands Government before the Tribunal, two of them also in the native language used by the witnesses. It would seem to result from these depositions that the people of Miangas used to send yearly presents (pahawoea) to the radja of Taruna as token of their submission; even details about the distribution of the tribute to be collected are given. On the other hand the radja of Taruna was under the obligation to give assistance to the island in case of distress. A deposition made by a Dutch civil officer gives the list of 8 headmen who had been instituted either by the radja of Tabukan (probably Taruna) or by the Resident of Menado at Miangas until 1917.

Whatever may be the value of such depositions made all since 1924, they are at least in part supported by documentary evidence. Thus the list of headmen is confirmed as concerns the nomination of Timpala by a decree signed on September 15th, 1889, by the Resident of Menado. The most important fact is however the existence of documentary evidence as to the taxation of the people of Miangas by the Dutch authorities. Whilst in earlier times the tribute was paid in mats, rice and other objects, it was, in conformity with the contract with Taruna of 1885, replaced by a capitation tax, to be paid in money (one florin for each native man above 18 years). A table has been produced by the Netherlands Government which contains for all the dependencies of the Sangi States situated in the Talauer Islands the number of taxpayers and the amount to be paid. There "Menagasa" ranks as a part of the "Djoegoeschap" (Presidency) of the Nanusa under the dependencies of Taruna, with 88 "Hassilplichtigen" (taxpayers), paying each Fl. 1.—.

It further results from a report of the Controleur of Taruna dated November 17th, 1896, that the people of "Melangis" paid their tax by selling products on the larger islands and thus getting the money with which the new tax was to be paid. The effective payment of the tax is likewise confirmed by the commander of H.M.S. *Edi* in a report dated June 18th, 1898.

The report of the Controleur of Taruna referred to mentions the fact that on November 4th, 1896, a coat of arms was handed to the "Kapitein-laoet" (administrative head) of "Melangis", just as two days before, the same act had taken place at Karaton (Karatong), an island of the Nanusa. The report mentions that in both cases the native authorities were informed as to the meaning of this act. The distribution of coats of arms and flags as signs of sovereignty is regulated by instructions sanctioned by the Crown in 1843. The coats of arms placed at Miangas in 1896 were found in good state by H.M.S. *Edi* in 1898. The existence of a "vlaggestok" on the island is

proved by sketches made in 1895 and 1898 by officers of the Dutch ships *Raaf* and *Edi*.

The orders given, May 13th, 1898, to H.M.S. *Edi* which was to be stationed in the seas of North-East Celebes and Ternate leave no doubt that the task of the said vessel was to patrol these coasts and the Sangi and Talauer Islands, and, "if necessary, to make respected the rules for the maintenance of strict neutrality". The log-book of the ship proves that H.M.S. *Edi* twice visited Palmas (or Miangas) during the war, in June and in September 1898.

*

As regards *the* 20th *century*, it is to be observed that events subsequent to 1906 must in any case be ruled out, in accordance both with the general principles of arbitral procedure between States and with the understanding arrived at between the Parties in the note of the Department of State, dated January 25th, 1915, and the note of the Netherlands Minister at Washington, dated May 29th, 1915. The events falling between the Treaty of Paris, December 10th, 1898, and the rise of the present dispute in 1906, cannot in themselves serve to indicate the legal situation of the island at the critical moment when the cession of the Philippines by Spain took place. They are however indirectly of a certain interest, owing to the light they might throw on the period immediately preceding. It is to be noted in the first place that there is no essential difference between the relations between the Dutch authorities and the island of Palmas (or Miangas) before and after the Treaty of Paris. There cannot therefore be any question of ruling out the events of the period 1899-1906 as possibly being influenced by the existence of the said Treaty. The contract with Kandahar-Taruna of 1899 runs on the same lines as the preceding contract of 1885 with Taruna, and was in preparation already before 1898. The system of taxation, as shown by the table of the years 1904 and 1905, is the same as that instituted in 1895. The headman Timpala, instituted in 1889, was replaced by a new man only in 1917.

The assistance given in the island after the typhoon of October 1904, though in itself not necessarily a display of State functions, was considered as such—as is shown by the report of the Resident of Menado, dated December 31st, 1904—that the island "Miangis", which was particularly damaged, could only get the indispensable help through Government assistance ("van Gouvernementswege"). Reference may also be made to a relation which seems to have existed already in former times between the tribute paid by the islanders to the Sangi radjas and the assistance to be given to them in time of distress by the larger islands with their greater resources.

V.

The conclusions to be derived from the above examination of the arguments of the Parties are the following:

The claim of the United States to sovereignty over the Island of Palmas (or Miangas) is derived from Spain by way of cession under the Treaty of Paris. The latter Treaty, though it comprises the island in dispute within the limits of cession, and in spite of the absence of any reserves or protest by the Netherlands as to these limits, has not created in favour of the United States any title of sovereignty such as was not already vested in Spain. The

essential point is therefore to decide whether Spain had sovereignty over Palmas (or Miangas) at the time of the coming into force of the Treaty of Paris.

The United States base their claim on the titles of discovery, of recognition by treaty and of contiguity, i.e. titles relating to acts or circumstances leading to the acquisition of sovereignty; they have however not established the fact that sovereignty so acquired was effectively displayed at any time.

The Netherlands on the contrary found their claim to sovereignty essentially on the title of peaceful and continuous display of State authority over the island. Since this title would in international law prevail over a title of acquisition of sovereignty not followed by actual display of State authority, it is necessary to ascertain in the first place, whether the contention of the Netherlands is sufficiently established by evidence, and, if so, for what period of time.

In the opinion of the Arbitrator the Netherlands have succeeded in establishing the following facts:

a. The Island of Palmas (or Miangas) is identical with an island designated by this or a similar name, which has formed, at least since 1700, successively a part of two of the native States of the Island of Sangi (Talautse Isles).

b. These native States were from 1677 onwards connected with the East India Company, and thereby with the Netherlands, by contracts of suzerainty, which conferred upon the suzerain such powers as would justify his considering the vassal State as a part of his territory.

c. Acts characteristic of State authority exercised either by the vassal State or by the suzerain Power in regard precisely to the Island of Palmas (or Miangas) have been established as occurring at different epochs between 1700 and 1898, as well as in the period between 1898 and 1906.

The acts of indirect or direct display of Netherlands sovereignty at Palmas (or Miangas), especially in the 18th and early 19th centuries are not numerous, and there are considerable gaps in the evidence of continuous display. But apart from the consideration that the manifestations of sovereignty over a small and distant island, inhabited only by natives, cannot be expected to be frequent, it is not necessary that the display of sovereignty should go back to a very far distant period. It may suffice that such display existed in 1898, and had already existed as continuous and peaceful before that date long enough to enable any Power who might have considered herself as possessing sovereignty over the island, or having a claim to sovereignty, to have, according to local conditions, a reasonable possibility for ascertaining the existence of a state of things contrary to her real or alleged rights.

It is not necessary that the display of sovereignty should be established as having begun at a precise epoch; it suffices that it had existed at the critical period preceding the year 1898. It is quite natural that the establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of State control. This is particularly the case, if sovereignty is acquired by the establishment of the suzerainty of a colonial Power over a native State, and in regard to outlying possessions of such a vassal State.

Now the evidence relating to the period after the middle of the 19th century makes it clear that the Netherlands Indian Government considered the island distinctly as a part of its possessions and that, in the years immediately preceding 1898, an intensification of display of sovereignty took place.

Since the moment when the Spaniards, in withdrawing from the Moluccas in 1666, made express reservations as to the maintenance of their sovereign rights, up to the contestation made by the United States in 1906, no contestation or other action whatever or protest against the exercise of territorial rights by the Netherlands over the Talautse (Sangi) Isles and their dependencies (Miangas included) has been recorded. The peaceful character of the display of Netherlands sovereignty for the entire period to which the evidence concerning acts of display relates (1700-1906) must be admitted.

There is moreover no evidence which would establish any act of display of sovereignty over the island by Spain or another Power, such as might counter-balance or annihilate the manifestations of Netherlands sovereignty. As to third Powers, the evidence submitted to the Tribunal does not disclose any trace of such action, at least from the middle of the 17th century onwards. These circumstances, together with the absence of any evidence of a conflict between Spanish and Netherlands authorities during more than two centuries as regards Palmas (or Miangas), are an indirect proof of the exclusive display of Netherlands sovereignty.

This being so, it remains to be considered first whether the display of State authority might not be legally defective and therefore unable to create a valid title of sovereignty, and secondly whether the United States may not put forward a better title to that of the Netherlands.

As to the conditions of acquisition of sovereignty by way of continuous and peaceful display of State authority (so-called prescription), some of which have been discussed in the United States Counter-Memorandum, the following must be said:

The display has been open and public, that is to say that it was in conformity with usages as to exercise of sovereignty over colonial States. A clandestine exercise of State authority over an inhabited territory during a considerable length of time would seem to be impossible. An obligation for the Netherlands to notify to other Powers the establishment of suzerainty over the Sangi States or of the display of sovereignty in these territories did not exist.

Such notification, like any other formal act, can only be the condition of legality as a consequence of an explicit rule of law. A rule of this kind adopted by the Powers in 1885 for the African continent does not apply *de plano* to other regions, and thus the contract with Taruna of 1885, or with Kandahar-Taruna of 1889, even if they were to be considered as the first assertions of sovereignty over Palmas (or Miangas) would not be subject to the rule of notification.

There can further be no doubt that the Netherlands exercised the State authority over the Sangi States as sovereign in their own right, not under a derived or precarious title.

Finally it is to be observed that the question whether the establishment of the Dutch on the Talautse Isles (Sangi) in 1677 was a violation of the Treaty of Münster and whether this circumstance might have prevented the acquisition of sovereignty even by means of prolonged exercise of State authority, need not be examined, since the Treaty of Utrecht recognized the state of things existing in 1714 and therefore the suzerain right of the Netherlands over Tabukan and Miangas.

The conditions of acquisition of sovereignty by the Netherlands are therefore to be considered as fulfilled. It remains now to be seen whether the United States as successors of Spain are in a position to bring forward an equivalent or stronger title. This is to be answered in the negative.

The title of discovery, if it had not been already disposed of by the Treaties of Münster and Utrecht would, under the most favourable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation. An inchoate title however cannot prevail over a definite title founded on continuous and peaceful display of sovereignty.

The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law.

The title of recognition by treaty does not apply, because even if the Sangi States, with the dependency of Miangas, are to be considered as "held and possessed" by Spain in 1648, the rights of Spain to be derived from the Treaty of Münster would have been superseded by those which were acquired by the Treaty of Utrecht. Now if there is evidence of a state of possession in 1714 concerning the island of Palmas (or Miangas), such evidence is exclusively in favour of the Netherlands. But even if the Treaty of Utrecht could not be taken into consideration, the acquiescence of Spain in the situation created after 1677 would deprive her and her successors of the possibility of still invoking conventional rights at the present time.

The Netherlands title of sovereignty, acquired by continuous and peaceful display of State authority during a long period of time going probably back beyond the year 1700, therefore holds good.

* * *

The same conclusion would be reached, if, for argument's sake, it were admitted that the evidence laid before the Tribunal in conformity with the rules governing the present procedure did not—as it is submitted by the United States—suffice to establish continuous and peaceful display of sovereignty over the Island of Palmas (or Miangas). In this case no Party would have established its claims to sovereignty over the Island and the decision of the Arbitrator would have to be founded on the relative strength of the titles invoked by each Party.

A solution on this ground would be necessary under the Special Agreement. The terms adopted by the Parties in order to determine the point to be decided by the Arbitrator (Article I) presuppose for the present case that the Island of Palmas (or Miangas) can belong only either to the United States or to the Netherlands, and must form in its entirety a part of the territory either of the one or of the other of these two Powers, Parties to the dispute. For since, according to the terms of its Preamble, the Agreement of January 23rd, 1925, has for object to "terminate" the dispute, it is the evident will of the Parties that the arbitral award shall not conclude by a "non liquet", but shall in any event decide that the island forms a part of the territory of one or the other of two litigant Powers.

The possibility for the Arbitrator to found his decision on the relative strength of the titles invoked on either side must have been envisaged by the Parties to the Special Agreement, because it was to be foreseen that the evidence produced as regards sovereignty over a territory in the circumstances of the island in dispute might prove not to be sufficient to lead to a clear conclusion as to the existence of sovereignty.

For the reasons given above, no presumption in favour of Spanish sovereignty can be based in international law on the titles invoked by the United States as successors of Spain. Therefore, there would not be sufficient grounds for deciding the case in favour of the United States, even if it

were admitted, in accordance with their submission, that the evidence produced by the Netherlands in support of their claim either does not relate to the Island in dispute or does not suffice to establish a continuous display of State authority over the island. For, in any case, the exercise of some acts of State authority and the existence of external signs of sovereignty, e.g. flags and coat of arms, has been proved by the Netherlands, even if the Arbitrator were to retain only such evidence as can, in view of the trustworthy and sufficiently accurate nautical observations given to support it, concern solely the island of Palmas (or Miangas), namely that relating to the visits of the steamer *Raaf* in 1895, of H.M.S. *Edi* in 1898 and of General Wood in 1906.

These facts at least constitute a beginning of establishment of sovereignty by continuous and peaceful display of State authority, or a commencement of occupation of an island not yet forming a part of the territory of a State; and such a state of things would create in favour of the Netherlands an inchoate title for completing the conditions of sovereignty. Such inchoate title, based on display of State authority, would, in the opinion of the Arbitrator, prevail over an inchoate title derived from discovery, especially if this latter title has been left for a very long time without completion by occupation; and it would equally prevail over any claim which, in equity, might be deduced from the notion of contiguity. International law, like law in general, has the object of assuring the coexistence of different interests which are worthy of legal protection. If, as in the present instance, only one of two conflicting interests is to prevail, because sovereignty can be attributed to but one of the Parties, the interest which involves the maintenance of a state of things having offered at the critical time to the inhabitants of the disputed territory and to other States a certain guarantee for the respect of their rights ought, in doubt, to prevail over an interest which—supposing it to be recognized in international law—has not yet received any concrete form of development.

Supposing that, at the time of the coming into force of the Treaty of Paris, the Island of Palmas (or Miangas) did not form part of the territory of any State, Spain would have been able to cede only the rights which she might possibly derive from discovery or contiguity. On the other hand, the inchoate title of the Netherlands could not have been modified by a treaty concluded between third Powers; and such a treaty could not have impressed the character of illegality on any act undertaken by the Netherlands with a view to completing their inchoate title—at least as long as no dispute on the matter had arisen, i.e. until 1906.

Now it appears from the report on the visit of General Wood to Palmas (or Miangas), on January 21st, 1906, that the establishment of Netherlands authority, attested also by external signs of sovereignty, had already reached such a degree of development, that the importance of maintaining this state of things ought to be considered as prevailing over a claim possibly based either on discovery in very distant times and unsupported by occupation, or on mere geographical position.

This is the conclusion reached on the ground of the relative strength of the titles invoked by each Party, and founded exclusively on a limited part of the evidence concerning the epoch immediately preceding the rise of the dispute.

This same conclusion must impose itself with still greater force if there be taken into consideration—as the Arbitrator considers should be done—all the evidence which tends to show that there were unchallenged acts of

peaceful display of Netherlands sovereignty in the period from 1700 to 1906, and which—as has been stated above—may be regarded as sufficiently proving the existence of Netherlands sovereignty.

For these reasons the Arbitrator, in conformity with Article I of the Special Agreement of January 23rd, 1925, decides that: The Island of Palmas (or Miangas) forms in its entirety a part of Netherlands territory.

Done at The Hague, this fourth day of April 1928.

MAX HUBER, *Arbitrator.*

MICHIELS VAN VERDUYNEN, *Secretary General.*

Annex 63

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Trail smelter case (United States, Canada)

16 April 1938 and 11 March 1941

VOLUME III pp. 1905-1982

NATIONS UNIES - UNITED NATIONS

LX.

TRAIL SMELTER CASE [1].

PARTIES: United States of America, Canada.

SPECIAL AGREEMENT: Convention of Ottawa, April 15, 1935.

ARBITRATORS: Charles Warren (U.S.A.), Robert A. E. Greenshields (Canada), Jan Frans Hostie (Belgium).

AWARD: April 16, 1938, and March 11, 1941.

Canadian company.—Smelter operated in Canada.—Fumes.—Damages caused on United States territory.—Recourse to arbitration.—Date of damages.—Evidence.—Cause.—Effect.—Indirect and remote damage.—Violation of Sovereignty.—Interpretation of Special Agreement as to scope.—Preliminary correspondence.—Interest.—Future régime applicable.—Appointment of technical consultants.—Law applicable.—National law.—Matters of procedure.—Convention, Article IV.—Reference to American law.—Provisional decision.—Certain questions finally settled.—*Res judicata*.—Error in law.—Admissibility of revision.—Powers of tribunal.—Discovery of new facts.—Denial.—Costs of investigation.—Claim for indemnity.—Such costs no part of damage.—Claim for request to stop the nuisance.—Law applicable.—Coincidence of national and international laws.—Responsibility of States.—Air and water pollution.—Protection of sovereignty.—Institution of régime to prevent future damages.—Indemnity or compensation on account of decision or decisions rendered.

[1] For bibliography, index and tables, see end of this volume.

Special agreement.

CONVENTION FOR SETTLEMENT OF DIFFICULTIES ARISING FROM OPERATION OF SMELTER AT TRAIL, B.C. [1]

Signed at Ottawa, April 15, 1935; ratifications exchanged Aug. 3, 1935

The President of the United States of America, and His Majesty the King of Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada,

Considering that the Government of the United States has complained to the Government of Canada that fumes discharged from the smelter of the Consolidated Mining and Smelting Company at Trail, British Columbia, have been causing damage in the State of Washington, and

Considering further that the International Joint Commission, established pursuant to the Boundary Waters Treaty of 1909, investigated problems arising from the operation of the smelter at Trail and rendered a report and recommendations thereon, dated February 28, 1931, and

Recognizing the desirability and necessity of effecting a permanent settlement,

Have decided to conclude a convention for the purposes aforesaid, and to that end have named as their respective plenipotentiaries:

The President of the United States of America:
PIERRE DE L. BOAL, Chargé d'Affaires ad interim of the United States of America at Ottawa;
His Majesty the King of Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, for the Dominion of Canada:
The Right Honorable RICHARD BEDFORD BENNETT, Prime Minister, President of the Privy Council and Secretary of State for External Affairs;

Who, after having communicated to each other their full powers, found in good and due form, have agreed upon the following Articles:

ARTICLE I.

The Government of Canada will cause to be paid to the Secretary of State of the United States, to be deposited in the United States Treasury, within three months after ratifications of this convention have been exchanged, the sum of three hundred and fifty thousand dollars, United States currency, in payment of all damage which occurred in the United States, prior to the first day of January, 1932, as a result of the operation of the Trail Smelter.

ARTICLE II.

The Governments of the United States and of Canada, hereinafter referred to as "the Governments", mutually agree to constitute a tribunal hereinafter referred to as "the Tribunal", for the purpose of deciding the questions

[1] U. S. Treaty Series No. 893.

referred to it under the provisions of Article III. The Tribunal shall consist of a chairman and two national members.

The chairman shall be a jurist of repute who is neither a British subject nor a citizen of the United States. He shall be chosen by the Governments, or, in the event of failure to reach agreement within nine months after the exchange of ratifications of this convention, by the President of the Permanent Administrative Council of the Permanent Court of Arbitration at The Hague described in Article 49 of the Convention for the Pacific Settlement of International Disputes concluded at The Hague on October 18, 1907.

The two national members shall be jurists of repute who have not been associated, directly or indirectly, in the present controversy. One member shall be chosen by each of the Governments.

The Governments may each designate a scientist to assist the Tribunal.

ARTICLE III.

The Tribunal shall finally decide the questions, hereinafter referred to as "the Questions", set forth hereunder, namely:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding Question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?

ARTICLE IV.

The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice, and shall give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned.

ARTICLE V.

The procedure in this adjudication shall be as follows:

1. Within nine months from the date of the exchange of ratifications of this agreement, the Agent for the Government of the United States shall present to the Agent for the Government of Canada a statement of the facts, together with the supporting evidence, on which the Government of the United States rests its complaint and petition.

2. Within a like period of nine months from the date on which this agreement becomes effective, as aforesaid, the Agent for the Government of Canada shall present to the Agent for the Government of the United States a statement of the facts, together with the supporting evidence, relied upon by the Government of Canada.

3. Within six months from the date on which the exchange of statements and evidence provided for in paragraphs 1 and 2 of this article has been com-

pleted, each Agent shall present in the manner prescribed by paragraphs 1 and 2 an answer to the statement of the other with any additional evidence and such argument as he may desire to submit.

ARTICLE VI.

When the development of the record is completed in accordance with Article V hereof the Governments shall forthwith cause to be forwarded to each member of the Tribunal a complete set of the statements, answers, evidence and arguments presented by their respective Agents to each other.

ARTICLE VII.

After the delivery of the record to the members of the Tribunal in accordance with Article VI the Tribunal shall convene at a time and place to be agreed upon by the two Governments for the purpose of deciding upon such further procedure as it may be deemed necessary to take. In determining upon such further procedure and arranging subsequent meetings, the Tribunal will consider the individual or joint requests of the Agents of the two Governments.

ARTICLE VIII.

The Tribunal shall hear such representations and shall receive and consider such evidence, oral or documentary, as may be presented by the Governments or by interested parties, and for that purpose shall have power to administer oaths. The Tribunal shall have authority to make such investigations as it may deem necessary and expedient, consistent with other provisions of this convention.

ARTICLE IX.

The Chairman shall preside at all hearings and other meetings of the Tribunal and shall rule upon all questions of evidence and procedure. In reaching a final determination of each or any of the Questions, the Chairman and the two members shall each have one vote, and, in the event of difference, the opinion of the majority shall prevail, and the dissent of the Chairman or member, as the case may be, shall be recorded. In the event that no two members of the Tribunal agree on a question, the Chairman shall make the decision.

ARTICLE X.

The Tribunal, in determining the first question and in deciding upon the indemnity, if any, which should be paid in respect to the years 1932 and 1933, shall give due regard to the results of investigations and inquiries made in subsequent years.

Investigators, whether appointed by or on behalf of the Governments, either jointly or severally, or the Tribunal, shall be permitted at all reasonable times to enter and view and carry on investigations upon any of the properties upon which damage is claimed to have occurred or to be occurring, and their reports may, either jointly or severally, be submitted to and received by the Tribunal for the purpose of enabling the Tribunal to decide upon any of the Questions

ARTICLE XI.

The Tribunal shall report to the Governments its final decisions, together with the reasons on which they are based, as soon as it has reached its conclusions in respect to the Questions, and within a period of three months after the conclusions of proceedings. Proceedings shall be deemed to have been concluded when the Agents of the two Governments jointly inform the Tribunal that they have nothing additional to present. Such period may be extended by agreement of the two Governments.

Upon receiving such report, the Governments may make arrangements for the disposition of claims for indemnity for damage, if any, which may occur subsequently to the period of time covered by such report.

ARTICLE XII.

The Governments undertake to take such action as may be necessary in order to ensure due performance of the obligations undertaken hereunder, in compliance with the decision of the Tribunal.

ARTICLE XIII.

Each Government shall pay the expenses of the presentation and conduct of its case before the Tribunal and the expenses of its national member and scientific assistant.

All other expenses, which by their nature are a charge on both Governments, including the honorarium of the neutral member of the Tribunal, shall be borne by the two Governments in equal moieties.

ARTICLE XIV.

This agreement shall be ratified in accordance with the constitutional forms of the contracting parties and shall take effect immediately upon the exchange of ratifications, which shall take place at Ottawa as soon as possible.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this convention and have hereunto affixed their seals.

Done in duplicate at Ottawa this fifteenth day of April, in the year of our Lord, one thousand, nine hundred and thirty-five.

[*seal*] PIERRE DE L. BOAL.
[*seal*] R. B. BENNETT.

TRAIL SMELTER ARBITRAL TRIBUNAL.

DECISION

REPORTED ON APRIL 16, 1938, TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND TO THE GOVERNMENT OF THE DOMINION OF CANADA UNDER THE CONVENTION SIGNED APRIL 15, 1935.

This Tribunal is constituted under, and its powers are derived from and limited by, the Convention between the United States of America and the Dominion of Canada signed at Ottawa, April 15, 1935, duly ratified by the two parties, and ratifications exchanged at Ottawa, August 3, 1935 (hereinafter termed "the Convention").

By Article II of the Convention, each Government was to choose one member of the Tribunal, "a jurist of repute", and the two Governments were to choose jointly a Chairman who should be a "jurist of repute and neither a British subject nor a citizen of the United States".

The members of the Tribunal were chosen as follows: by the United States of America, Charles Warren of Massachusetts; by the Dominion of Canada, Robert A. E. Greenshields of the Province of Quebec; by the two Governments jointly, Jan Frans Hostie of Belgium.

Article II, paragraph 4, of the Convention provided that "the Governments may each designate a scientist to assist the Tribunal"; and scientists were designated as follows: by the United States of America, Reginald S. Dean of Missouri; and by the Dominion of Canada, Robert E. Swain of California. The Tribunal desires to record its appreciation of the valuable assistance received by it from these scientists.

The duty imposed upon the Tribunal by the Convention was to "finally decide" the following questions:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding questions?

The Tribunal met in Washington, in the District of Columbia, on June 21, 22, 1937, for organization, adoption of rules of procedure and hearing of preliminary statements. From July 1 to July 6, it travelled over and inspected the area involved in the controversy in the northern part of Stevens County in the State of Washington and it also inspected the smelter plant of the Consolidated Mining and Smelting Company of Canada, Limited, at Trail in British Columbia. It held sessions for the reception and consideration of such evidence, oral and documentary, as was presented by the Governments or by interested parties, as provided in Article VIII, in Spokane in the State of Washington, from July 7 to July 29, 1937; in Washington, in the District of Columbia, on August 16, 17, 18, 19, 1937; in Ottawa, in the Province of Ontario, from August 23 to September 18, 1937; and it heard arguments of counsel in Ottawa from October 12 to October 19, 1937.

On January 2, 1938, the Agents of the two Governments jointly informed the Tribunal that they had nothing additional to present. Under the provisions of Article XI of the Convention, it then became the duty of the Tribunal "to report to the Governments its final decisions .... and within a period of three months after the conclusion of the proceedings", *i.e.*, on April 2, 1938.

After long consideration of the voluminous typewritten and printed record and of the transcript of evidence presented at the hearings, the Tribunal formally notified the Agents of the two Governments that, in its opinion, unless the time limit should be extended, the Tribunal would be forced to give a permanent decision on April 2, 1938, on the basis of data which it considered inadequate and unsatisfactory. Acting on the recommendation of the Tribunal and under the provisions of Article XI authorizing such extension, the two Governments by agreement extended the time for the report of final decision of the Tribunal to three months from October 1, 1940.

The Tribunal is prepared now to decide finally Question No. 1, propounded to it in Article III of the Convention; and it hereby reports its final decision on Question No. 1, its temporary decision on Questions No. 2 and No. 3, and provides for a temporary régime thereunder and for a final decision on these questions and on Question No. 4, within three months from October 1, 1940.

Wherever, in this decision, the Tribunal has referred to decisions of American courts or has followed American law, it has acted pursuant to Article IV as follows: "The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America ...."

In all the consideration which the Tribunal has given to the problems presented to it, and in all the conclusions which it has reached, it has been guided by that primary purpose of the Convention expressed in the words of Article IV, that the Tribunal "shall give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned", and further expressed in the opening paragraph of the Convention as to the "desirability and necessity of effecting a permanent settlement" of the controversy.

The controversy is between two Governments involving damage occurring in the territory of one of them (the United States of America) and alleged to be due to an agency situated in the territory of the other (the Dominion of Canada), for which damage the latter has assumed by the Convention an international responsibility. In this controversy, the Tribunal is not sitting to pass upon claims presented by individuals or on behalf of one or more individuals by their Government, although individuals may come within the meaning of "parties concerned", in Article IV and of

"interested parties", in Article VIII of the Convention and although the damage suffered by individuals may, in part, "afford a convenient scale for the calculation of the reparation due to the State" (see Jugdment No. 13, Permanent Court of International Justice, Series A, No. 17, pp. 27, 28).

PART ONE.

By way of introduction to the Tribunal's decision, a brief statement, in general terms, of the topographic and climatic conditions and economic history of the locality involved in the controversy may be useful.

The Columbia River has its source in the Dominion of Canada. At a place in British Columbia named Trail, it flows past a smelter located in a gorge, where zinc and lead are smelted in large quantities. From Trail, its course is easterly and then it swings in a long curve to the International Boundary Line, at which point it is running in a southwesterly direction; and its course south of the boundary continues in that general direction. The distance from Trail to the boundary line is about seven miles as the crow flies or about eleven miles, following the course of the river (and possibly a slightly shorter distance by following the contour of the valley). At Trail and continuing down to the boundary and for a considerable distance below the boundary, mountains rise on either side of the river in slopes of various angles to heights ranging from 3,000 to 4,500 feet above sea-level, or between 1,500 to 3,000 feet above the river. The width of the valley proper is between one and two miles. On both sides of the river are a series of bench lands at various heights.

More or less half way between Trail and the boundary is a place, on the east side of the river, known as Columbia Gardens; at the boundary on the American side of the line and on the east side of the river, is a place known as Boundary; and four or five miles south of the boundary on the east bank of the river is a farm named after its owner, Stroh farm. These three places are specially noted since they are the locations of automatic sulphur dioxide recorders installed by one or other of the Governments. The town of Northport is located on the east bank of the river, about nineteen miles from Trail by the river, and about thirteen miles as the crow flies, and automatic sulphur dioxide recorders have been installed here and at a point on the west bank northerly of Northport. It is to be noted that mountains extending more or less in an easterly and westerly direction rise to the south between Trail and the boundary.

Various creeks are tributary to the river in the region of Northport, as follows: Deep Creek flowing from southwest to northwest and entering the river slightly north of Northport; opposite Deep Creek and entering on the west side of the river and flowing from the northwest, Sheep Creek; north of Sheep Creek on the west side, Nigger Creek; south of Sheep Creek on the west side, Squaw Creek; south of Northport, on the east side, flowing from the southeast, Onion Creek.

About eight miles south of Northport, following the river, is the town of Marble; and about seventeen miles, the town of Bossburg. Three miles south of Bossburg is the town of Evans; and about nine miles, the town of Marcus. South of Marcus and about forty-one miles from the boundary line is the town of Kettle Falls which, in general, may be stated to be the southern limit of the area as to which evidence was presented. All the above towns are small in population and in area.

At Marble and to the south, various other creeks enter the river from the west side—Rattlesnake Creek, Crown Creek, Flat Creek, and Fifteen Mile Creek.

Up all the creeks above mentioned, there extend tributary valleys, differing in size.

While, as stated above, the width of the valley proper of the river is from one to two miles, the width of the valley measured at an altitude of 3,000 feet above sea-level, is approximately three miles at Trail, two and one-half miles at Boundary, four miles above Northport, three and one-half miles at Marble. Near Bossburg and southward the valley at the same altitude broadens out considerably.

As to climatic conditions, it may be stated that the region is, in general, a dry one though not what is termed "arid". The average annual precipitation at Northport from 1923 to 1936 inclusive averaged slightly below seventeen inches. It varied from a minimum of 9.60 inches in 1929 to a maximum of 26.04 inches in 1927. The average crop-year precipitation over the same period is slightly over sixteen inches, with a variation from a minimum of 10.10 inches in 1929 to a maximum of 24.01 in 1927. The rainfall in the growing-season months of April, May and June at Northport, has been in 1932, 5.43 inches; in 1933, 3.03 inches; in 1934, 2.74 inches; in 1933, 2.02 inches; in 1929, 4.44 inches. The average snowfall was reported in 1915 by United States Government agents as fifty-eight inches at Northport. The average humidity varies with some regularity from day to day. In June, 1937, at Northport, it had an average maximum of 74 per cent at 5 a.m. and an average minimum of 26 per cent at 5 p.m.

The range of temperature in the different months as it appears from the records of the years 1934, 1935, and 1936, at Northport was as follows: In the months of November, December, January and February, the lowest temperature was 1° (in January, 1936), and the highest was 60° (in November 1934); in the growing-season months of April, May, June and July, the lowest temperature was 12° (in April, 1936), and the highest was 110° (in July, 1934); in the remaining months of August, September, October and March, the lowest temperature was 8° (in October, 1935), and the highest was 102° (in August, 1934).

The direction of the surface wind is, in general, from the northeast down the river valley, but this varies at different times of day and in different seasons. The subject of winds is treated in detail in a later part of this decision and need not be considered further at this point.

The history of what may be termed the economic development of the area may be briefly stated as follows: Previous to 1892, there were few settlers in this area, but homesteading and location of farms received an impetus, particularly on the east side of the river, at the time when the construction of the Spokane and Northern Railway was undertaken, which was completed between the City of Spokane and Northport in 1892, and extended to Nelson in British Columbia in 1893. In 1892, the town of Northport was founded. The population of Northport, according to the United States Census in 1900, was 787; in 1910, it was 476; in 1920, it was 906; and in 1930, it was 391. The population of the area which may be termed, in general, the "Northport Area", according to the United States Census in 1910, was 1,448; in 1920, it was 2,142; and in 1930, it was 1,121. The population of this area as divided into the Census Precincts was as follows:

	1900	*1910*	*1920*	*1930*
Boundary	74	91	73	87
Northport	845	692	1,093	510
Nigger Creek	...	27	97	29
Frontier	...	103	71	22
Cummins	...	...	244	89
Doyle	...	187	280	195
Deep Creek	65	119	87	81
Flat Creek	52	126	137	71
Williams	71	103	60	37

(It is to be noted that the precincts immediately adjacent to the boundary line were Frontier, Nigger Creek and Boundary; and that Frontier and Nigger Creek Precincts are at the present time included in the Northport Precinct.)

The area of all land in farms in the above precincts, according to the United States Census of Agriculture in 1925 was 21,551 acres; in 1930, 28,641 acres; and in 1935, 24,772 acres. The area in crop land in 1925 was 3,474 acres; in 1930, 4,285 acres; and in 1933, 4,568 acres. The farm population in 1925 was 496; in 1930, 603; and in 1935, 466.

In the precincts nearest the boundary line, *viz.*, Boundary and Northport (including Frontier and Nigger Creek prior to 1935 Census), the area of all land in farms in 1925 was 5,292 acres; in 1930, 8,040 acres; and in 1935, 5,666 acres. The area in crop land in 1925 was 798 acres; in 1930, 1,227 acres; and in 1935, 963 acres. The farm population in 1925 was 149; in 1930, 193; and in 1935, 145.

About the year 1896, there was established in Northport a business which has been termed the "Breen Copper Smelter", operated by the LeRoi Mining and Smelting Company, and later carried on by the Northport Smelting and Refining Company which was chartered in 1901. This business employed at times from five hundred to seven hundred men, although, as compared with a modern smelter like the Trail Smelter, the extent of its operations was small. The principal value of the ores smelted by it was in copper, and the ores had a high sulphur content. For some years, the somewhat primitive method of "heap roasting" was employed which consisted of roasting the ore in open piles over woodfires, frequently called in mining parlance, "stink piles". Later, this process was changed. About seventy tons of sulphur were released per day. This Northport Smelting and Refining Company intermittently continued operations until 1908. From 1908 until 1915, its smelter lay idle. In March, 1916, during the Great War, operation was resumed for the purpose of smelting lead ore, and continued until March 5, 1921, when it ceased business and its plant was dismantled. About 30 tons of sulphur per day were emitted during this time. There is no doubt that damage was caused to some extent over a more or less restricted area by the operation of this smelter plant.

The record and evidence placed before the Tribunal does not disclose in detail claims for damage on account of fumigations which were made between 1896 and 1908, but it does appear that there was considerable litigation in Stevens County courts based on such claims. It also appears in evidence that prior to 1908, the company had purchased smoke easements from sixteen owners of land in the vicinity covering 2,330 acres. It further appears that from 1916 to 1921, claims for damages were made and suits

were brought in the courts, and additional smoke easements were purchased from thirty-four owners of land covering 5,556.7 acres. These various smoke easements extended to lands lying four or five miles north and three miles south and three miles east of Northport and on both sides of the river, and they extended as far as the boundary line.

In addition to the smelting business, there have been intermittent mining operations of lead and zinc in this locality, but they have not been a large factor in adding to the population.

The most important industry in the area in the past has been the lumber industry. It had its beginning with the building of the Spokane & Northern Railway. Several saw mills were constructed and operated, largely for the purpose of furnishing ties to the railway. In fact, the growing trees—yellow pine, Douglas fir, larch, and cedar—were the most valuable asset to be transformed into ready cash. In early days, the area was rather heavily wooded, but the timber has largely disappeared and the lumber business is now of small size. It appears from the record in 1929 that, within a radius covering some thirty-five thousand acres surrounding Northport, fifteen out of eighteen sawmills had been abandoned and only three of the small type were in operation. The causes of this condition are in dispute. A detailed description of the forest conditions is given in a later part of this decision and need not be further discussed here.

As to agricultural conditions, it may be said that farming is carried on in the valley and upon the benches and mountain slopes and in the tributary valleys. The soils are of a light, sandy nature, relatively low in organic matter, although in the tributary valleys the soil is more loamy and fertile. In some localities, particularly on the slopes, natural sub-irrigation affords sufficient moisture; but in other regions irrigation is desirable in order to produce favorable results. In a report made by Dr. F. C. Wyatt, head of the Soils Department of the University of Alberta, in 1929, it is stated that "taken as a unit, the crop range of these soils is wide and embraces the crops suited to the climate conditions. Under good cultural operations, yields are good." At the same time, it must be noted that a large portion of this area is not primarily suited to agriculture. In a report of the United States Department of Agriculture, in 1913, it is stated that "there is approximately one-third of the land in the Upper Columbia Basin unsuited for agricultural purposes, either because it is too stony, too rough, too steep, or a combination of these factors. To utilize this large proportion of land and to meet the wood needs of an increasing population, the Upper Columbia Basin is forced to consider seriously the problem of reforestation and conservation." Much of the farming land, especially on the benches, is land cleared from forest growth; most of the farms contain from an eighth to a quarter of a section (80-160 acres); and there are many smaller and some larger farms.

In general, the crops grown on the farms are alfalfa, timothy, clover, grain cut green for hay, barley, oats, wheat, and a small amount of potatoes. Wild hay is cut each year to some extent. The crops, in general, are grown for feed rather than for sale, though there is a certain amount of wheat and oats sold. Much of the soil is apparently well suited to the predominant crop of alfalfa, which is usually cut at present twice a year (with a small third crop on some farms). Much of the present alfalfa has been rooted for a number of years.

Milch cattle are raised to a certain extent and they are grazed on the wild grasses on the hills and mountains in the summer months, but the dairying

business depends on existence of sufficient land under cultivation as an adjunct to the dairy to provide adequate forage for the winter months.

In early days, it was believed that, owing to soil and climatic conditions, this locality was destined to become a fruit-growing region, and a few orchards were planted. For several reasons, of which it is claimed that fumigation is one, orchards have not thrived. In 1909-1910, the Upper Columbia Company purchased two large tracts, comprising about ten thousand acres, with the intention of developing the land for orchard purposes and selling of timber in the meantime, and it established a large orchard of about 900 acres in the town of Marble. The project, as early as 1917, proved a failure.

In 1896, a smelter was started under American auspices near the locality known as Trail. In 1906, the Consolidated Mining and Smelting Company of Canada, Limited, obtained a charter of incorporation from the Canadian authorities, and that company acquired the smelter plant at Trail as it then existed. Since that time, the Canadian Company, without interruption, has operated the Smelter, and from time to time has greatly added to the plant until it has become one of the best and largest equipped smelting plants on this continent. In 1925 and 1927, two stacks of the plant were erected to 409 feet in height and the Smelter greatly increased its daily smelting of zinc and lead ores. This increased product resulted in more sulphur dioxide fumes and higher concentrations being emitted into the air; and it is claimed by one Government (though denied by the other) that the added height of the stacks increased the area of damage in the United States. In 1916, about 5,000 tons of sulphur per month were emitted; in 1924, about 4,700 tons; in 1926, about 9,000 tons—an amount which rose near to 10,000 tons per month in 1903. In other words, about 300-350 tons of sulphur were being emitted daily in 1930. (It is to be noted that one ton of sulphur is substantially the equivalent of two tons of sulphur dioxide or SO_2.)

From 1925, at least, to the end of 1931, damage occurred in the State of Washington, resulting from the sulphur dioxide emitted from the Trail Smelter.

As early as 1925 (and there is some evidence earlier) suggestions were made to the Trail Smelter that damage was being done to property in the northern part of Stevens County. The first formal complaint was made, in 1926, by one J. H. Stroh, whose farm (mentioned above) was located a few miles south of the boundary line. He was followed by others, and the Smelter Company took the matter up seriously and made a more or less thorough and complete investigation. This investigation convinced the Trail Smelter that damage had been and was being done, and it proceeded to negotiate with the property owners who had made complaints or claims with a view to settlement. Settlements were made with a number of farmers by the payment to them of different amounts. This condition of affairs seems to have lasted during a period of about two years. In June, 1928, the County Commissioners of Stevens County adopted a resolution relative to the fumigations; and on August 25, 1928, there was brought into existence an association known as the "Citizens' Protective Association". Due to the creation of this association or to other causes, no settlements were made thereafter between the Trail Smelter and individual claimants, as the articles of association contained a provision that "no member herein shall make any settlement for damages sought to be secured herein, unless the written consent of the majority of the Board of Directors shall have been first obtained".

It has been contended that either by virtue of the Constitution of the State of Washington or of a statute of that State, the Trail Smelter (a Canadian corporation) was unable to acquire ownership or smoke easements over real estate, in the State of Washington, in any manner. In regard to this statement, either as to the fact or as to the law, the Tribunal expresses no opinion and makes no ruling.

The subject of fumigations and damage claimed to result from them was first taken up officially by the Government of the United States in June, 1927, in a communication from the Consul General of the United States at Ottawa, addressed to the Government of the Dominion of Canada.

In December, 1927, the United States Government proposed to the Canadian Government that problems growing out of the operation of the Smelter at Trail should be referred to the International Joint Commission, United States and Canada, for investigation and report, pursuant to Article IX of the Convention of January 11, 1909, between the United States and Great Britain. Following an extensive correspondence between the two Governments, they joined in a reference of the matter to that Commission under date of August 7, 1928. It may be noted that Article IX of the Convention of January 11, 1909, provides that the high contracting parties might agree that "any other question or matters of difference arising between them involving the rights, obligations or interests of either in relation to the other, or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada shall be referred from time to time to the International Joint Commission for examination and report. . . . Such reports shall not be regarded as decisions of the question or matters so submitted either on the facts or on the law, and shall not, in any way, have the character of an arbitral award."

The questions referred to the International Joint Commission were five in number, the first two of which may be noted: First, the extent to which property in the State of Washington has been damaged by fumes from Smelter at Trail, B.C.; second, the amount of indemnity which would compensate United States interests in the State of Washington for past damages.

The International Joint Commission sat at Northport to take evidence and to hear interested parties in October, 1928; in Washington, D.C., in April, 1929; at Nelson in British Columbia in November, 1929; and final sittings were held in Washington, D.C., on January 22 and February 12, 1930. Witnesses were heard; reports of the investigations made by scientists were put in evidence; counsel for both the United States and Canada were heard, and briefs submitted; and the whole matter was taken under advisement by the Commission. On February 28, 1931, the Report of the Commission was signed and delivered to the proper authorities. The report was unanimous and need not be considered in detail.

Paragraph 2 of the report, in part, reads as follows:

> In view of the anticipated reduction in sulphur fumes discharged from the Smelter at Trail during the present year, as hereinafter referred to, the Commission therefore has deemed it advisable to determine the amount of indemnity that will compensate United States interests in respect of such fumes, up to and including the first day of January, 1932. The Commission finds and determines that all past damages and all damages up to and including the first day of January next, is the sum of $350,000. Said sum, however, shall not include any damage occurring after January 1, 1932.

In paragraph 4 of the report, the Commission recommended a method of indemnifying persons in Washington State for damage which might be caused by operations of the Trail Smelter after the first of January, 1932, as follows:

> Upon the complaint of any persons claiming to have suffered damage by the operations of the company after the first of January, 1932, it is recommended by the Commission that in the event of any such claim not being adjusted by the company within a reasonable time, the Governments of the United States and Canada shall determine the amount of such damage, if any, and the amount so fixed shall be paid by the company forthwith.

This recommendation, apparently, did not commend itself to the interested parties. In any event, it does not appear that any claims were made after the first of January, 1932, as contemplated in paragraph 4 of the report.

In paragraph 5 of the report, the Commission recommended that the Consolidated Mining and Smelting Company of Canada, Limited, should proceed to erect and put in operation certain sulphuric acid units for the purpose of reducing the amount of sulphur discharged from the stacks. It appears, from the evidence in the present case, that the General Manager of the company had made certain representations before the Commission as to the intentions of the company in this respect. There is a conflict of testimony as to the exact scope of these representations, but it is unnecessary now to consider the matter further, since, whatever they were, the company proceeded after 1930 to make certain changes and additions. With the intention and purpose of lessening the sulphur contents in the smoke emissions at the stacks, the following installations (amongst others) have been made in the plant since 1931; three 112 tons sulphuric acid plants in 1931; ammonia and ammonium sulphate plant in 1931; two units for reduction and absorption of sulphur in the zinc smelter, in 1936 and 1937, and an absorption plant for gases from the lead roasters in June, 1937. In addition, in an attempt to lessen injurious fumigations, a new system of control over the emission of fumes during the crop-growing season has been in operation, particularly since May, 1934. It is to be noted that the chief sulphur contents are in the gases from the lead smelter, but that there is still a certain amount of sulphur content in the fumes from the zinc smelter. As a result of the above, as well as of depressed business conditions, the tons of sulphur emitted into the air from the plants fell from about 10,000 tons per month in 1930 to about 7,200 tons in 1931, and to 3,400 tons in 1932. The emission of sulphur rose in 1933 to 4,000 tons, and in 1934 to nearly 6,300 tons, and in 1935 to 6,800 tons. In 1936, it fell to 5,600 tons; and in January to July, 1937 inclusive, it was 4,750 tons.

Two years after the signing of the International Joint Commission's Report of February 28, 1931, the United States Government on February 17, 1933, made representations to the Canadian Government that existing conditions were entirely unsatisfactory and that damage was still occurring, and diplomatic negotiations were renewed. Correspondence was exchanged between the two countries, and although that correspondence has its importance, it is sufficient here to say, that it resulted in the signing of the present Convention.

Consideration of the terms of that Convention is given more in detail in the later parts of the Tribunal's decision.

PART TWO.

The first question under Article III of the Convention which the Tribunal is required to decide is as follows:

> (1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor.

In the determination of the first part of this question, the Tribunal has been obliged to consider three points, *viz.*, the existence of injury, the cause of the injury, and the damage due to the injury.

The Tribunal has interpreted the word "occurred" as applicable to damage caused prior to January 1, 1932, in so far as the effect of the injury made itself felt after that date. The words "Trail Smelter" are interpreted as meaning the Consolidated Mining and Smelting Company of Canada, Limited, its successors and assigns.

In considering the second part of the question as to indemnity, the Tribunal has been mindful at all times of the principle of law which is set forth by the United States courts in dealing with cognate questions, particularly by the United States Supreme Court in Story Parchment Company *v.* Paterson Parchment Paper Company (1931), 282 U. S. 555 as follows: "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." (See also the decision of the Supreme Court of Michigan in Allison *v.* Chandler, 11 Michigan 542, quoted with approval by the United States Supreme Court, as follows: "But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal), because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice. . . . Juries are allowed to act upon probable and inferential, as well as direct and positive proof.")

The Tribunal has first considered the items of indemnity claimed by the United States in its Statement (p. 52) "on account of damage occurring since January 1, 1932, covering: (a) Damages in respect of cleared land and improvements thereon; (b) Damages in respect of uncleared land and improvements thereon; (c) Damages in respect of livestock; (d) Damages in respect of property in the town of Northport; (g) Damages in respect of business enterprises".

With respect to Item (a) and to Item (b), *viz.*, "Damages in respect of cleared land and improvements thereon", and "Damages in respect of uncleared land and improvements thereon", the Tribunal has reached the conclusion that damage due to fumigations has been proved to have occurred since January 1, 1932, and to the extent set forth hereafter.

Since the Tribunal has concluded that, on all the evidence, the existence of injury has been proved, it becomes necessary to consider next the cause of injury. This question resolves itself into two parts—first, the actual caus-

ing factor, and second, the manner in which the causing factor has operated. With reference to causation, the Tribunal desires to make the following preliminary general observations, as to some of the evidence produced before it.

(1) The very satisfactory data from the automatic sulphur dioxide recorders installed by each of the Governments, covering large portions of each year from 1931 to 1937, have been of great value in this controversy. These records have thrown much light upon the nature, the durations, and the concentrations of the fumigations involved; and they will prove of scientific value in any future controversy which may arise on the subject of fumigations.

(2) The experiments conducted by the United States at Wenatchee in the State of Washington and by Canada at Summerland in British Columbia, and the experiments conducted by scientists elsewhere, the results of which have been testified to at length before the Tribunal, have been of value with respect to the effects of sulphur dioxide fumigations on plant life and on the yield of crops. While the Canadian experiments were more extensive than the American, and were carried out under more satisfactory conditions, the Tribunal feels that the number of experiments was still too limited to warrant in all cases so positive conclusions as witnesses were inclined to draw from them; and on the question of the effect of fumigations on the yield of crops, it seems probable that more extensive experimentation would have been desirable, especially since, while the total number of experiments was large, the number devoted to establishing each type of result was in most cases rather small. Moreover, conditions in experimental fumigation plots can rarely exactly reproduce conditions in the field; and there was some evidence that injury occurred on various occasions to plant life in the field, under durations and degrees of concentration which never produced injury to plant life in the experimental plots.

(3) Valuable evidence as to the actual condition of crops in the field was given by experts on both sides, and by certain non-expert witnesses. Unfortunately, such field observations were not made continuously in any crop season or in all parts of the area of probable damage; and, even more unfortunately, they were not made simultaneously by the experts for the two countries, who acted separately and without comparing their conclusions with each other contemporaneously.

(4) The effects of sulphur dioxide fumigations upon the forest trees, especially upon the conifers, were testified to at great length by able experts, and their studies in the field and in the experimental plots, with reference to mortality, deterioration, retardation of ring growth and shoot growth, sulphur content of needles, production of cones and reproduction in general, have been of great value. As is usual in this type of case, though the poor condition of the trees was not controverted, experts were in disagreement as to the cause—witnesses for the United States generally finding the principal cause of injury to be sulphur dioxide fumigations, and witnesses for Canada generally attributing the injury principally to ravages of insects, diseases, winter and summer droughts, unwise methods of logging, and forest and ground fires. It is possible that each side laid somewhat too great emphasis on the causes for which it contended.

(5) Evidence was produced by both sides as to experimental tests of the sulphur contents of the soils and of the waters in the area. These tests, however, were, for the most part, too limited in number and in location to afford a satisfactory basis from which to draw absolutely positive conclusions.

In general, it may be said that the witnesses expressed contrary views and arrived at opposite conclusions, on most of the questions relating to cause of injury.

The Tribunal is of opinion that the witnesses were completely honest and sincere in their views and that the expert witnesses arrived at their conclusions as the integral result of their high technical skill. At the same time, it is apparent that remarks are very pertinent, such as were made by Judge Johnson in the United States District Court (Anderson *v.* American Smelting & Refining Co., 265 Federal Reporter 928) in 1919:

> Plaintiff's witnesses give it as their opinion and best judgment that SO_2 was the cause of the injuries appearing upon the plants in the field; defendants' witnesses in like manner express the opinion and give it as their best judgment that the injury observed was caused by something else other than SO_2. It must not be overlooked that witnesses who give opinion evidence are sometimes unconsciously influenced by their environment, and their evidence colored, if not determined, by their point of view. The weight to be given to such evidence must be determined in the light of the knowledge, the training, the power of observation and analysis, and in general the mental equipment, of each witness, assuming, as I do, that the witnesses of the respective parties were honest and intended to testify to the truth as they perceived it. . . . The expert witnesses called by plaintiffs, who made a survey of the affected area, made valuable observations; but seem to have assumed as a basis for their conclusions that leaf markings having the appearance of SO_2 injury were in fact SO_2 injury—an unwarranted generalization. . . . It is quite evident that the testimony of witnesses whose mental attitude is to account for every injury as produced by some other cause is no more convincing than the testimony of witnesses who attribute every injury similar in appearance to SO_2 injury to SO_2 as the sole and only cause. The expert witnesses of defendants manifested the same general mental attitude; that is to say, they were able to find a sufficient cause operating in any particular case other than SO_2, and therefore gave it as their opinion that such other cause was the real cause of the injury, or markings observed. The real value I find in the testimony of these opinion witnesses of the parties lies in their description of appearances and statement of the surrounding circumstances, rather than in their ultimate expressed opinions. I have no doubt of the accuracy of the experiments made by the expert and scientific witnesses called by the parties.

On the basis of the evidence, the United States contended that damage had been caused by the emission of sulphur dioxide fumes at the Trail Smelter in British Columbia, which fumes, proceeding down the valley of the Columbia River and otherwise, entered the United States. The Dominion of Canada contended that even if such fumes had entered the United States, they had caused no damage after January 1, 1932. The witnesses for both Governments appeared to be definitely of the opinion that the gas was carried from the Smelter by means of surface winds, and they based their views on this theory of the mechanism of gas distribution. The Tribunal finds itself unable to accept this theory. It has, therefore, looked for a more probable theory, and has adopted the following as permitting a more adequate correlation and interpretation of the facts which have been placed before it.

It appears from a careful study and comparison of recorder data furnished by the two Governments, that on numerous occasions fumigations occur practically simultaneously at points down the valley many miles apart—this being especially the fact during the growing season from April to October. It also appears from the data furnished by the different recorders, that the rate of gas attenuation down the river does not show a constant trend, but is more rapid in the first few miles below the boundary and more gradual further down the river. The Tribunal finds it impossible satisfactorily to account for the above conditions, on the basis of the theory presented to it. The Tribunal finds it further difficult to explain the times and durations of the fumigations on the basis of any probable surface-wind conditions.

The Tribunal is of opinion that the gases emerging from the stacks of the Trail Smelter find their way into the upper air currents, and are carried by these currents in a fairly continuous stream down the valley so long as the prevailing wind at that level is in that direction. The upper air conditions at Northport, as stated by the United States Weather Bureau in 1929 (quoted in Canadian Document A 1, page 9) are as follows :

> The 5 a.m. balloon runs show the prevailing direction, since the Weather Bureau was established in Northport, to be northeast to an altitude of 600 metres above the surface. The average velocity, up to 600 metres level, is from 2 to 5 miles per hour. Above the 600 metres level the prevailing direction is southwest and gradually shifts into the west-southwest and west. The average velocities gradually increase from 5 miles per hour to about 30 miles per hour at the highest elevation, about 700 metres.

It thus appears that the velocity and persistence of the upper air currents is greater than that of the surface winds. The Tribunal is of opinion that the fumigations which occur at various points along the valley are caused by the mixing with the surface atmosphere of this upper air stream, of which the height has yet to be ascertained more fully. This mixing follows well-recognized meteorological laws and is controlled mainly by two factors of major importance. These are: (a) differences in temperature between the air near the surface and that at higher levels—in other words, the temperature gradient of the atmosphere of the region; and (b) differences in the velocity of the upper air currents and of those near the ground.

A careful study of the time, duration, and intensity of the fumigations recorded at the various stations down the valley reveals a number of striking and significant facts. The first of these is the coincidence in point of time of the fumigations. The most frequent fumigations in the late spring, summer, and early autumn are diurnal, and occur during the early morning hours. These usually are of short duration. A characteristic curve expressing graphically this type of fumigation, rises rapidly to a maximum and then falls less rapidly but fairly sharply to a concentration below the sensitivity of the recorder. The dominant influence here is evidently the heating action of the rising sun on the atmosphere at the surface of the earth. This gives rise to temperature differences which may and often do lead to a mixing of the gas-carrying atmosphere with that near the surface. When this occurs with sufficient intensity, a fumigation is recorded at all stations at which the sulphur dioxide reaches a concentration that is not too low to be determined by the recorder. Obviously this effect of the rising sun may be

different on the east and the west side of the valley, but the possible bearing of this upon fumigations in the valley must await further study.

Another type of fumigation occurs with especial frequency during the winter months. These fumigations are not so definitely diurnal in character and are usually of longer duration. The Tribunal is of the opinion that these are due to the existence for a considerable period of a sufficient velocity of the gas-carrying air current to cause a mixing of this with the surface atmosphere. Whether or not this mixing is of sufficient extent to produce a fumigation will depend upon the rate at which the surface air is diluted by surface winds which serve to bring in air from outside the contaminated area. The fact that fumigations of this type are more common during the night, when the surface winds often subside completely, bears out this opinion. A fumigation with a lower velocity of the gas-carrying air current would then be possible.

The conclusions above together with a detailed study of the intensity of the fumigations at the various stations from Columbia Gardens down the valley, have led to deductions in regard to the rate of attenuation of concentration of sulphur dioxide with increasing distance from the Smelter which seem to be in accord both with the known facts and the present theory. The conclusion of the Tribunal on this phase of the question is that the concentration of sulphur dioxide falls off very rapidly from Trail to a point about 16 miles downstream from the Smelter, or 6 miles from the boundary line, measured by the general course of the river; and that at distances beyond this point, the concentration of sulphur dioxide is lower and falls off more gradually and less rapidly.

The attention of the Tribunal has been called to the fact that fumigations in the area of probable damage sometimes occur during rainy weather or other periods of high atmospheric humidity. It is possible that this is more than a mere coincidence and that such weather conditions are, in general, more favorable to a fumigation, but the Tribunal is not prepared at present to offer an opinion on this subject.

The above conclusions have a bearing both upon the cause and upon the degree of damage as well as upon the area of probable damage.

The Tribunal will now proceed to consider the different classes of damage to cleared and to uncleared land.

(1) With regard to cleared land used for crops, the Tribunal has found that damage through reduction in crop yield due to fumigation has occurred in varying degrees during each of the years, 1932 to 1936; and it has found no proof of damage in the year 1937.

It has found that damage has been confined to an area which differed from year to year but which did not (with the possible exception of a very small number of farms in particularly unfavorable locations) exceed in the year of most extensive damage the following limits: the two precincts of Boundary and Northport, with the possible exclusion of some properties located at the eastern end of Boundary Precinct and at the western end of Northport Precinct; those parts of Cummins and Doyle Precincts on or close to the benches of the river; the part of Marble Precinct, north of the southern limit of Sections 22, 23 and 24 of T. 39, R. 39, and the part of Flat Creek Precinct, located on or close to the benches of the river (all precints being as defined by the United States Census of Agriculture of 1935).

The properties owned by individual farmers alleged by the United States to have suffered damage are divided by the United States in its itemized schedule of damages, into three classes: (a) properties of "farmers residing

on their farms"; (b) properties of "farmers who do not reside on their farms"; (ab) properties of "farmers who were driven from their farms"; (c) properties of large owners of land. The Tribunal has not adopted this division.

The Tribunal has adopted as the measure of indemnity to be applied on account of damage in respect of cleared land used for crops, the measure of damage which the American courts apply in cases of nuisance or trespass of the type here involved, *viz.*, the amount of reduction in the value of use or rental value of the land caused by the fumigations. In the case of farm land, such reduction in the value of the use is, in general, the amount of the reduction of the crop yield arising from injury to crops, less cost of marketing the same, the latter factor being under the circumstances of this case of negligible importance. (See Ralston *v.* United Verde Copper Co., 37 Federal Reporter 2d, 180, and 46 Federal Reporter 2d, 1.) Failure of farmers to increase their seeded land in proportion to such increase in other localities, may also be taken into consideration.

The difference between probable yield in the absence of any fumigation and actual crop yield, varying as it does from year to year and from place to place, is necessarily a somewhat uncertain amount, incapable of absolute proof; and the Tribunal has been obliged to base its estimate of damage largely on the fumigation records, meteorological data, statistical data as to crop yields inside and outside the area of probable damage, and other Census records.

As regards the problems arising out of abandonment of properties by their owners, it is to be noted that practically all of such properties, listed in the questionnaire sent out by the former Agent for the United States, Mr. Metzger, appear to have been abandoned prior to the year 1932. However, in order to deal both with this problem and with the problem arising out of failure of farmers to increase their seeded land, the Tribunal, not having to adjudicate on individual claims, estimated, on the basis of the statistical data available, the average acreage on which it is reasonable to say that crops would have been seeded and harvested during the period under consideration but for the fumigations.

As regards the special category of cleared lands used for orchards, the Tribunal is of opinion that no damage to orchards by sulphur dioxide fumigation within the damaged area during the years in question has been proved.

In addition to indemnity which may be awarded for damage through reduction in the value of the use of cleared land measured by decrease in crop yield, it may be contended that special damage has occurred for which indemnity should be awarded by reason of impairment of the soil contents through increased acidity caused by sulphur dioxide fumigations acting directly on the soil or indirectly through increased sulphur content of the streams and other waters. Evidence has been given in support of this contention. The Tribunal is of opinion that such injury to the soil up to this date, due to increased acidity and affecting harmfully the production of crops or otherwise, has not been proved—with one exception, as follows: There is a small area of farming property adjacent to the boundary, west of the river, that was injured by serious increase of acidity of soil due to fumigations. Such injury, though caused, in part, prior to January 1, 1932, may have produced a continuing condition which cannot be considered as a loss for a limited time—in other words, in this respect the nuisance may be considered to have a more permanent effect, in which case, under American law (*Sedgwick on Damages* 9th Ed. (1920) Sections 932, 947), the measure of damage was not the mere reduction in the value of the use of the land but

the reduction in the value of the land itself. The Tribunal is of opinion that such injury to the soil itself can be cured by artificial means, and it has awarded indemnity with this fact in view on the basis of the data available.

In addition to indemnity which may be awarded for damage through reduction in the value of the use of cleared land measured by decrease in crop yield, the Tribunal, having in mind, within the area as determined above, a group of about forty farms in the vicinity of the boundary line, has awarded indemnity for special damage for reduction in value of the use or rental value by reason of the location of the farmers in respect to the fumigations. (See Baltimore and Potomac R. R. *v.* Fifth Baptist Church (1883), 108 U.S. 317.)

The Tribunal is of opinion that there is no justification, under doctrines of American law, for assessing damages to improvements separately from the land in the manner contended for by the United States. Any injury to improvements (other than physical injury) is to be compensated in the award of indemnity for general reduction in the value of the use or rental value of the property.

There is a contention, however, that special damage has been sustained by some owners of improvements on cleared land, in the way of rust and destruction of metal work. There was some slight evidence of such damage, and the Tribunal has included indemnity therefor in its final award; but since there is an entire absence of any evidence as to the extent or monetary amount of such injury, the indemnity cannot be considered as more than a nominal amount for each of such owners.

(2) With respect to damage to cleared land not used for crops and to all uncleared (other than uncleared land used for timber), the Tribunal has adopted as the measure of indemnity, the measure of damages applied by American courts, *viz.*, the amount of reduction in the value of the use or rental value of the land. The Tribunal is of opinion that the basis of estimate of damages contended for by the United States, *viz.*, applying to the value of uncleared land a ratio of loss measured by the reduced crop yield on cleared land, has no sanction in any decisions of American courts.

(A) As regards these lands in their use as pasture lands, the Tribunal is of opinion that there is no evidence of any marked susceptibility of wild grasses to fumigations, and very little evidence to prove the respective amounts of uncleared land devoted to wild grazing grass and barren or shrub land, or to prove the value thereof, which would be necessary in order to estimate the value of the reduction of the use of such land. The Tribunal, however, has awarded a small indemnity for damage to about 200 acres of such lands in the immediate neighborhood of the boundary.

It has been contended that the death of trees and shrubs due to fumigation has had an injurious effect on the water storage capacity of the soil and has even created some soil erosion. The Tribunal is of opinion that while there may have been some erosion of soil and impairment of water storage capacity in a limited area near the boundary, it is impossible to determine whether such damage has been due to fires or to mortality of trees and shrubs caused by fumigation.

(B) As regards uncleared land in its use as timberland, the Tribunal has found that damage due to fumigation has occurred to trees during the years 1932 to 1937 inclusive, in varying degrees, over areas varying not only from year to year but also from species to species. It has not seemed feasible to give a determination of the geographical extent of the damage except in so far as it may be stated broadly, that a territory coinciding in extent with the

Bayle cruises (hereinafter described) may be considered as an average area, although the contours of the actually damaged area do not coincide for any given species in any given year with that area and the intensity of the damage in a given year and for a given species varies, of course, greatly, according to location.

In comparing the area covered by the Bayle cruises with the Hedgcock maps of injury to conifers for the years under consideration, the Tribunal is of opinion that damage near the boundary line has occurred in a somewhat broader area than that covered by the Bayle cruises, but that on the other hand, injury, except to larch in 1936, seems to have been confined below Marble to the immediate vicinity of the river.

It is evident that for many years prior to January 1, 1932, much of the forests in the area included in the present Northport and Boundary Precincts had been in a poor condition. West and east of the Columbia River, there had been the scene of a number of serious fires; and the operations of the Northport Smelting and Refining Company and its predecessor from 1898 to 1901, from 1901 to 1908, and from 1916 to 1921, had undoubtedly had an effect, as is apparent from the decisions in suits in the courts of the State of Washington on claims for damages from fumigations in this area [1]. It is uncontroverted that heavy fumigations from the Trail Smelter which destroyed and injured trees occurred in 1930 and 1931; and there were also serious fumigations in earlier years. In the Canadian Document A 1, termed "The Deans' Report", being a report made to the International Joint Commission in September, 1929, it is stated (pp. 29, 31):

> Since a cruise of the timber in the Northport area has not been made by a forest engineer of either Government, this report does not make any recommendations for settlements of timber damage. However, a brief statement as to the timber situation is submitted.
>
> *Present condition.* Practically the entire region was covered with timber when it was first settled. Probably 90 per cent of the merchantable timber has now been removed. The timber on about one-third of the area has been cut only in part, that is to say only the more valuable species have been logged, and on a large part of the rest of the area that has been cut-over are stands too small to cut at time of logging. These so-called residual stands, together with the remaining virgin timber, make up the timber resources of the Northport area at the present time. Heavy toll of these has been taken this season by two large forest fires still smouldering as this report is being written. . . . Government forest pathologists are working to determine the zone of economic injury to timber, but their task, a difficult one at best, is incomplete. Much additional data must be collected and after that all must be compiled and analyzed, hence no attempt is made to submit a map with this report delimiting the zone of injury to forest trees. Admittedly, however, serious damage to timber has already taken place and reproduction is impaired.

---

[1] See Henry W. Sterrett *v.* Northport Smelting and Refining Co. (1902), 30 Washington Reports 164; Edwin J. Rowe *v.* Northport Smelting and Refining Co. (1904), 35 Washington Reports 101; Charles N. Park *v.* Northport Smelting and Refining Co. (1907), 47 Washington Reports 597; John O. Johnson *v.* Northport Smelting and Refining Co. (1908), 50 Washington Reports 507. These cases were not cited by counsel for either side.

"The Deans' Report" further mentioned a cruise of timber made by the Consolidated Mining and Smelting Co., in 1927 and 1928, "by a forest engineer from British Columbia", and that "it is our opinion that the timber estimate and evaluation are quite satisfactory. However, before settlements are made for such smoke damage, the work should be checked by a forest engineer, preferably of the American Government since it was first done by a Canadian. . . . It is believed, however, that a satisfactory check can be made by one man and an assistant in about three months. . . . The check cruise should be made not later than the summer of 1930."

It is to be further noted that in the official document of the State of Washington entitled *Forest Statistics, Stevens County, Washington, Forest Survey Release No.* 5, *A June,* 1937. *Progress Release,* there appears a map entitled *Forest Survey, Stevens County, Washington,* 1935, on which four types of forest lands are depicted by varied colorings and linings, and most of the lands in the area now in question are described as—"Principally Non-Restocked Old Burns and Cut-Overs; Rocky and Subalpine Areas" and "Principally Immature Forest—Recent Burns and Cut-Overs". And these terms are defined as follows (page 23): "Woodland—that portion of the forest land neither immediately or potentially productive of commercial timber. Included in this classification are: subalpine—stands above the altitude range of merchantability; rocky, non-commercial—area too steep, sterile, or rocky to produce merchantable timber." This description of timber as inaccessible, from the standpoint of logging, is further confirmed by the report made by G. J. Bayle (the forest engineer referred to in "The Deans' Report") of cruises made by him prior to 1932 (Canadian Document C 4, pp. 5,6) to the effect that much of the timber is "far away from transportation", "of very little, if any, commercial value", "sale price would not bring the cost of operating", "scattered", "located on steep slopes". On page 9 of the *Forest Survey Release No.* 5, above referred to, it is further stated:

> As a consequence of the recent serious fires principally in the north portion of the county, 52,402 acres of timberland have recently been deforested, many of which are restocking. Also concentrated in the north end of the county are 77,650 deforested acres representing approximately 6 per cent of the timberland area on which the possibilities of natural regeneration are slight. Much of this latter deforestation is thought to be the effect of alleged smelter fume damage.

(a) The Tribunal has adopted as the measure of indemnity, to be applied on account of damage in respect of uncleared land used for merchantable timber, the measure of damages applied by American courts, *viz.*, that since the destruction of merchantable timber will generally impair the value of the land itself, the measure of damage should be the reduction in the value of the land itself due to such destruction of timber; but under the leading American decisions, however, the value of the merchantable timber destroyed is, in general, deemed to be substantially the equivalent of the reduction in the value of the land (see *Sedgwick on Damages,* 9th Ed. 1920, Section 937a). The Tribunal is unable to accept the method contended for by the United States of estimating damage to uncleared timberland by applying to the value of such land as stated by the farmers (after deducting value of the timber) a ratio of loss measured by the reduced crop yield on cleared land. The Tribunal is of opinion, here as elsewhere in this decision, that, in accordance with American law, it is not restricted to the method proposed by the

United States in the determination of amount of damages, so long as its findings remain within the amount of the claim presented to it.

As, in estimating damage to timberland which occurred since January 1, 1932, it was essential to establish the amount of timber in existence on January 1, 1932, an unnecessarily difficult task has been placed upon the Tribunal, owing to the fact that the United States did not make a timber cruise in 1930 (as recommended by "The Deans' Report"); and neither the United States nor the Dominion of Canada caused any timber cruise to be made as of January 1, 1932. The cruises by witnesses supporting the claim of the United States in respect of lands owned by the State of Washington were made in 1927-1928 and in 1937. The cruises by Bayle (a witness for the Dominion of Canada) were made, partially in 1927-1928 and partially in 1936 and 1937. The affidavits of landowners filed by United States claimants in 1929 contain only figures for a date prior to such filing. Since the Bayle cruise of 1927-1928 appears to be the most detailed and comprehensive evidence of timber in the area of probable damage, the Tribunal has used it as a basis for estimate of the amount and value of timber existing January 1, 1932, after making due allowance for the heavy destruction of timber by fire, fumigation, insects, and otherwise, which occurred between the making of such cruise of 1927-1928 and January 1, 1932, and after making allowance for trees which became of merchantable size between said dates. The Tribunal has also used the Bayle cruises of 1936 and 1937 as a basis for estimates of the amount and value of timber existing on January 1, 1932.

(b) With regard to damage due to destruction and impairment of growing timber (not of merchantable size), the Tribunal has adopted the measure of damages applied by American courts, *viz.*, the reduction in value of the land itself due to such destruction and impairment. Growing timberland has a value for firewood, fences, etc., as well as a value as a source of future merchantable timber. No evidence has been presented by the United States as to the locations or as to the total amounts of such growing timber existing on January 1, 1932, or as to its distribution into types of conifers—yellow pine, Douglas fir, larch or other trees. While some destruction or impairment, deterioration, and retardation of such growing timber has undoubtedly occurred since such date, it is impossible to estimate with any degree of accuracy the amount of damage. The Tribunal has, however, taken such damage into consideration in awarding indemnity for damage to land containing growing timber.

(c) With respect to damage due to the alleged lack of reproduction, the Tribunal has carefully considered the contentions presented. The contention made by the United States that fumigation prevents germination of seed is, in the opinion of the Tribunal, not sustained by the evidence. Although the experiments were far from conclusive, Hedgcock's studies tend to show, on the contrary, that, while seedlings were injured after germination owing to drought or to fumes, the actual germination did take place.

With regard to the contention made by the United States of damage due to failure of trees to produce seed as a result of fumigation, the Tribunal is of opinion that it is not proved that fumigation prevents trees from producing sufficient seeds, except in so far as the parent-trees may be destroyed or deteriorated themselves. This view is confirmed by the Hedgcock studies on cone production of yellow pine. There is a rather striking correlation between the percentage of good, fair, and poor trees found in the Hedgcock Census studies and the percentages of trees bearing a normal amount of cones, trees bearing few cones, and trees bearing no cones in the Hedgcock cone

production studies. In so far, however, as lack of cone production since January 1, 1932, is due to death or impairment of the parent-trees occurring before that date, the Tribunal is of opinion that such failure of reproduction both was caused and occurred prior to January 1, 1932, with one possible exception as follows: From standard American writings on forestry, it appears that seeds of Douglas fir and yellow pine rarely germinate more than one year after they are shed [1], but if a tree was killed by fumigation in 1931, germination from its seeds might occur in 1932. It appears, however, that Douglas fir and yellow pine only produce a good crop of seeds once in a number of years. Hence, the Tribunal concludes that the loss of possible reproduction from seeds which might have been produced by trees destroyed by fumigation in 1931 is too speculative a matter to justify any award of indemnity.

It is fairly obvious from the evidence produced by both sides that there is a general lack of reproduction of both yellow pine and Douglas fir over a fairly large area, and this is certainly due to some extent to fumigations. But, with the data at hand, it is impossible to ascertain to what extent this lack of reproduction is due to fumigations or to other causes such as fires occurring repeatedly in the same area or destruction by logging of the cone-bearing trees. It is further impossible to ascertain to what extent lack of reproduction due to fumigations can be traced to mortality or deterioration of the parent-trees which occurred since the first of January, 1932. It may be stated, in general terms, that the loss of reproduction due to the forest being depleted will only become effective when the amount of these trees per acre falls below a certain minimum [2]. But the data at hand do not enable the Tribunal to say where and to what extent a depletion below this minimum occurred through fumigations in the years under consideration. An even approximate appraisal of the damage is further complicated by the fact that there is evidence of reproduction of lodgepole pine, cedar, and larch, even close to the boundary and in the Columbia River Valley, at least in some locations. This substitution may not be due entirely to fumigations, as it appears from standard American works on conifers that reproduction of yellow pine is often patchy; that when yellow pine is substantially destroyed in a given area, it is generally supplanted by another species of trees; and that lodgepole pine in particular has a tendency to invade and take full possession of yellow pine territory when a fire has occurred. While the other species are inferior, their reproduction is, nevertheless, a factor which has to be taken into account; but here again quantitative data are entirely lacking. It is further to be noted that the amount of rainfall is an important factor in the reproduction of yellow pine, and that where the normal annual rainfall is but little more than eighteen inches, yellow pine does not appear to thrive. It appears in evidence that the annual precipitation at Northport, in a period of fourteen years from 1923 to 1936, averaged slightly below seventeen inches. With all these considerations in mind, the

[1] See "Life of Douglas Fir Seed in the Forest Floor", by Leo A. Isaac, Journal of Forestry. Vol. 23 (1935), pp. 61-66; "The Pine Trees in the Rocky Mountain Region", by G. B. Sudworth, United States Department of Agriculture Bulletin (1917); "Timber Growing and Logging Practice in the Douglas Fir Region", by T. T. Munger and W. B. Greely, United States Department of Agriculture Technical Bulletin (1927). As to yellow pine and rainfall, see "Western Yellow Pine in Oregon", by T. T. Munger, United States Department of Agriculture Technical Bulletin (1917).

[2] Applied Silviculture in the United States, by R. H. Westveld (1935).

Tribunal has, however, taken lack of reproduction into account to some extent in awarding indemnity for damage to uncleared land in use for timber.

On the basis of the foregoing statements as to damage and as to indemnity for damage with respect to cleared land and uncleared land, the Tribunal has awarded with respect to damage to cleared land and to uncleared land (other than uncleared land used for timber), an indemnity of sixty-two thousand dollars ($62,000); and with respect to damage to uncleared land used for timber an indemnity of sixteen thousand dollars ($16,000) —being a total indemnity of seventy-eight thousand dollars ($78,000). Such indemnity is for the period from January 1, 1932, to October 1, 1937.

There remain for consideration three others items of damage claimed in the United States Statement: (Item c) "Damages in respect of livestock"; (Item d) "Damages in respect of property in the town of Northport"; (Item g) "Damages in respect of business enterprises".

(3) With regard to "damages in respect of livestock", claimed by the United States, the Tribunal is of opinion that the United States has failed to prove that the presence of fumes from the Trail Smelter has injured either the livestock or the milk or wool productivity of livestock since January 1, 1932, through impaired quality of crop or grazing. So far as the injury to livestock is due to reduced yield of crop or grazing, the injury to livestock is due to reduced yield of crop or grazing, the injury is compensated for in the indemnity which is awarded herein for such reduction of yield.

(4) With regard to "damages in respect of property in the town of Northport", the same principles of law apply to assessment of indemnity to owners of urban land as apply to owners of farm and other cleared land, namely, that the measure of damage is the reduction in the value of the use or rental value of the property, due to fumigations. The Tribunal is of opinion that there is no proof of damage to such urban property; that even if there were such damage, there is no proof of facts sufficient to enable the Tribunal to estimate the reduction in the value of the use or rental value of such property; and that it cannot adopt the method contended for by the United States of calculating damages to urban property.

(5) With regard to "damages in respect of business enterprises", the counsel for the United States in his Answer and Argument (p. 412) stated: "The business men unquestionably have suffered loss of business and impairment of the value of good will because of the reduced economic status of the residents of the damaged area." The Tribunal is of opinion that damage of this nature "due to reduced economic status" of residents in the area is too indirect, remote, and uncertain to be appraised and not such for which an indemnity can be awarded. None of the cases cited by counsel (pp. 412-423) sustain the proposition that indemnity can be obtained for an injury to or reduction in a man's business due to inability of his customers or clients to buy, which inability or impoverishment is caused by a nuisance. Such damage, even if proved, is too indirect and remote to become the basis, in law, for an award of indemnity. The Tribunal is also of opinion that if damage to business enterprises has occurred since January 1, 1932, the burden of proof that such damages was due to fumes from the Trail Smelter has not been sustained and that an award of indemnity would be purely speculative.

(6) The United States in its Statement (pp. 49-50) alleges the discharge by the Trail Smelter, not only of "smoke, sulphurous fumes, gases", but

also of "waste materials", and says that "the Trail Smelter disposes of slag in such a manner that it reaches the Columbia River and enters the United States in that stream", with the result that the "waters of the Columbia River in Stevens County are injuriously affected", thereby. No evidence was produced on which the Tribunal could base any findings as regards damage, if any, of this nature. The Dominion of Canada has contended that this item of damage was not within the meaning of the words "damage caused by the Trail Smelter", as used in Article III of the Convention. It would seem that this contention is based on the fact that the preamble of the Convention refers exclusively to a complaint of the Government of the United States to the Government of Canada "that fumes discharged from the Smelter .... have been causing damage in the State of Washington" (see Answer of Canada, p. 8). Upon this contention and its legal validity, the Tribunal does not feel that it is incumbent upon it to pass at the present time.

(7) The United States in its Statement (p. 52) presents two further items of damages claimed by it, as follows: (Item e) which the United States terms "damages in respect of the wrong done the United States in violation of sovereignty"; and (Item f) which the United States terms "damages in respect of interest on $350,000 eventually accepted in satisfaction of damage to January 1, 1932, but not paid until November 2, 1935".

With respect to (Item e), the Tribunal finds it unnecessary to decide whether the facts proven did or did not constitute an infringement or violation of sovereignty of the United States under international law independently of the Convention, for the following reason: By the Convention, the high contracting parties have submitted to this Tribunal the questions of the existence of damage caused by the Trail Smelter in the State of Washington, and of the indemnity to be paid therefor, and the Dominion of Canada has assumed under Article XII, such undertakings as will ensure due compliance with the decision of this Tribunal. The Tribunal finds that the only question to be decided on this point is the interpretation of the Convention itself. The United States in its Statement (p. 59) itemizes under the claim of damage for "violation of sovereignty" only money expended "for the investigation undertaken by the United States Government of the problems created in the United States by the operation of the Smelter at Trail". The Tribunal is of opinion that it was not within the intention of the parties, as expressed in the words "damage caused by the Trail Smelter" in Article III of the Convention, to include such moneys expended. This interpretation is confirmed by a consideration of the proceedings and of the diplomatic correspondence leading up to the making of the Convention. Since the United States has not specified any other damage based on an alleged violation of its sovereignty, the Tribunal does not feel that it is incumbent upon it to decide whether, in law and in fact, indemnity for such damage could have been awarded if specifically alleged. Certainly, the present controversy does not involve any such type of facts as the persons appointed under the Convention of January 23, 1934, between the United States of America and the Dominion of Canada felt to justify them in awarding to Canada damages for violation of sovereignty in the *I'm Alone* award of January 5, 1935. And in other cases of international arbitration cited by the United States, damages awarded for expenses were awarded, not as compensation

for violation of national sovereignty, but as compensation for expenses incurred by individual claimants in prosecuting their claims for wrongful acts by the offending Government.

In his oral argument, the Agent for the United States, Mr. Sherley, claimed repayment of the aforesaid expenses of investigations on a further and separate ground, *viz.*, as an incident to damages, saying (Transcript, p. 5157): "Costs and interest are incident to the damage, the proof of the damage which occurs through a given act complained of", and again (Transcript, p. 5158): "The point is this, that it goes as an incident to the award of damage." The Tribunal is unable to accept this view. While in cases involving merely the question of damage to individual claimants, it may be appropriate for an international tribunal to award costs and expenses as an incident to other damages proven (see cases cited by the Agent for the United States in the Answer and Argument, pp. 431, 437, 453-465, and at the oral argument in Transcript, p. 5153), the Tribunal is of opinion that such costs and expenses should not be allowed in a case of arbitration and final settlement of a long pending controversy between two independent Governments, such as this case, where each Government has incurred expenses and where it is to the mutual advantage of the two Governments that a just conclusion and permanent disposition of an international controversy should be reached.

The Agent for the United States also cited cases of litigation in courts of the United States (Answer and Argument, p. 439, and Transcript, p. 5152), in which expenses incurred were ordered by the court to be paid. Such cases, the Tribunal is of opinion, are inapplicable here.

The Tribunal is, therefore, of opinion that neither as a separable item of damage nor as an incident to other damages should any award be made for that which the United States terms "violation of sovereignty".

(8) With respect to (Item f), "damages in respect of interest on $350,000 eventually accepted in satisfaction of damage to January 1, 1932, but not paid until November 2, 1935", the Tribunal is of opinion that no payment of such interest was contemplated by the Convention and that by payment within the term provided by Article I thereof, the Dominion of Canada has completely fulfilled all obligations with respect to the payment of the sum of $350,000. Hence, such interest cannot be allowed.

In conclusion, the Tribunal answers Question 1 in Article III, as follows: Damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and up to October 1, 1937, and the indemnity to be paid therefor is seventy-eight thousand dollars ($78,000), and is to be complete and final indemnity and compensation for all damage which occurred between such dates. Interest at the rate of six per centum per year will be allowed on the above sum of seventy-eight thousand dollars ($78,000) from the date of the filing of this report and decision until date of payment. This decision is not subject to alteration or modification by the Tribunal hereafter.

The fact of existence of damage, if any, occurring after October 1, 1937, and the indemnity to be paid therefor, if any, the Tribunal will determine in its final decision.

PART THREE.

As to Question No. 2, in Article III of the Convention, which is as follows:

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

the Tribunal decides that until the date of the final decision provided for in Part Four of this present decision, the Trail Smelter shall refrain from causing damage in the State of Washington in the future to the extent set forth in such Part Four until October 1, 1940, and thereafter to such extent as the Tribunal shall require in the final decision provided for in Part Four.

PART FOUR.

As to Question No. 3, in Article III of the Convention, which is as follows:

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

the Tribunal is unable at the present time, with the information that has been placed before it, to determine upon a permanent régime, for the operation of the Trail Smelter. On the other hand, in view of the conclusions at which the Tribunal has arrived (as stated in an earlier part of this decision) with respect to the nature, the cause, and the course of the fumigations, and in view of the mass of data relative to sulphur emissions at the Trail Smelter, and relative to meteorological conditions and fumigations at various points down the Columbia River Valley, the Tribunal feels that the information now available does enable it to predict, with some degree of assurance, that a permanent régime based on a more adequate and intensive study and knowledge of meteorological conditions in the valley, and an extension and improvement of the methods of operation of the plant and its control in closer relation to such meteorological conditions, will effectively prevent future significant fumigations in the United States, without unreasonably restricting the output of the plant.

To enable it to establish a permanent régime based on the more adequate and intensive study and knowledge above referred to, the Tribunal establishes the following temporary régime.

(1) For the purpose of administering an experimental period, to continue to a date not later than October 1, 1940, the Tribunal will appoint two Technical Consultants, and in case of vacancy will appoint the successor. Such Technical Consultants to be appointed in the first place shall be Reginald S. Dean and Robert E. Swain, and they shall cease to act as Advisers to the Tribunal under the Convention during such trial period.

(2) The Tribunal directs that, before May 1, 1938, a consulting meteorologist, adequately trained in the installation and operation of the necessary type of equipment, be employed by the Trail Smelter, the appointment to be subject to the approval of the Technical Consultants. The Tribunal directs that, beginning May 1, 1938, such meteorological observations as may be deemed necessary by the Technical Consultants shall be made, under

their direction, by the meteorologist, the scientific staff of the Trail Smelter, or otherwise. The purpose of such observations shall be to determine, by means of captive balloons and otherwise, the weather conditions and the height, velocity, temperature, and other characteristics of the gas-carrying and other air currents and of the gas emissions from the stacks.

(3) The Tribunal further directs that beginning May 1, 1938, there shall be installed and put in operation and maintained by the Trail Smelter, for the purpose of providing information which can be used in determining present and prospective wind and other atmospheric conditions, and in making a prompt application of those observations to the control of the Trail Smelter plant operation:

(a) Such observation stations as the Technical Consultants deem necessary.

(b) Such equipment at the stacks as the Technical Consultants may find necessary to give adequate information of gas conditions and in connection with the stacks and stack effluents.

(c) Sulphur dioxide recorders, stationary and portable (the stationary recorders not to exceed three in number).

(d) The Technical Consultants shall have the direction of and authority over the location in both the United States and the Dominion of Canada, and over the installation, maintenance and operation of all apparatus provided for in Paragraph 2 and Paragraph 3. They may require from the meteorologist and from the Trail Smelter regular reports as to the operation of all such apparatus.

(e) The Technical Consultants may require regular reports from the Trail Smelter as to the methods of operation of its plant in such form and at such times as they shall direct; and the Trail Smelter shall conduct its smelting operations in conformity with the directions of the Technical Consultants and of the Tribunal, based on the result of the data obtained during the period hereinafter named; and the Technical Consultants and the Tribunal may change or modify at any time its or their instructions as to such operations.

(f) It is the intent and purpose of the Tribunal that the administration of the observations, experiments, and operations above provided for shall be as flexible as possible, and subject to change or modification by the Technical Consultants and by the Tribunal, to the end that conditions as they at any time may exist, may be changed as circumstances require.

(4) The Technical Consultants shall make report to the Tribunal at such dates and in such manner as it shall prescribe as to the results obtained and conclusions formed from the observations, experiments, and operations above provided for.

(5) The observations, experiments, and operations above provided for shall continue on a trial basis through the remainder of the crop-growing season of 1938, the crop-growing seasons of 1939 and 1940, and the winter seasons of 1938-1939 and 1939-1940 and until October 1, 1940, unless the Tribunal shall find it practicable or necessary to terminate such trial period at an earlier date.

(6) At the end of the trial period above provided for, or at the end of such shorter trial period as the Tribunal may find to be practicable or necessary, the Tribunal in a final decision will determine upon a permanent régime and upon the indemnity and compensation, if any, to be paid under the Convention. Such final decision, under the agreements for extension,

heretofore entered into by the two Governments under Article XI of the Convention, shall be reported to the Governments within three months after the date of the end of the trial period.

(7) The Tribunal shall meet at least once in the year 1939, to consider reports and to take such action as it may deem necessary.

(8) In case of disagreement between the Technical Consultants, they shall refer the matter to the Tribunal for its decision, and all persons and the Trail Smelter affected hereunder shall act in conformity with such decision.

(9) In order to lessen, as far as possible, the fumigations during the interval of time extending from May 1, 1938, to October 1, 1938 (during which time or during part of which time, it is possible that the observations and experiments above provided for may not be in full operation), the Tribunal directs that the Trail Smelter shall be operated with the following limitations on the sulphur emissions—it being understood that the Tribunal is not at present ready to make such limitations permanent, but feels that they will for the present probably reduce the chance or possibility of injury in the area of probable damage.

(a) For the periods April 25 to May 10 and June 22 to July 6, which are periods of greater sensitivity to sulphur dioxide for certain crops and trees in that area, not more than 100 tons per day of sulphur shall be emitted from the stacks of the Trail Smelter.

(b) As a further precaution, and for the entire period until October 1, 1938, the sulphur dioxide recorder at Columbia Gardens and the sulphur dioxide recorder at the Stroh farm (or any other point approved by the Technical Consultants) shall be continuously operated, and observations of relative humidity shall also be taken at both recorder stations. When, between the hours of sunrise and sunset, the sulphur dioxide concentration at Columbia Gardens exceeds one part per million for three consecutive 20-minute periods, and the relative humidity is 60 per cent or higher, the Trail Smelter shall be notified immediately; and the sulphur emission from the stacks of the plant maintained at 5 tons of sulphur per hour or less until the sulphur dioxide concentration at the Columbia Gardens recorder station falls to 0.5 part per million.

(c) This regulation may be suspended temporarily at any time by order of the Technical Consultants or of the Tribunal, if in its operation it shall interfere with any particular program of investigation which is in progress.

(10) For the carrying out of the temporary régime herein prescribed by the Tribunal, the Dominion of Canada shall undertake to provide for the payment of the following expenses thereof: (a) the Tribunal will fix the compensation of the Technical Consultants and of such clerical or other assistants as it may find necessary to employ; (b) statements of account shall be rendered by the Technical Consultants to the Tribunal and approved by the Chairman in writing; (c) the Dominion of Canada shall deposit to the credit of the Tribunal from time to time in a financial institution to be designated by the Chairman of the Tribunal, such sums as the Tribunal may find to be necessary for the payment of the compensation, travel, and other expenses of the Technical Consultants and of the clerical or other assistants; (d) written report will be made by the Tribunal to the Dominion of Canada of all the sums received and expended by it, and any sum not expended shall be refunded by the Tribunal to the Dominion of Canada at the conclusion of the trial period.

(11) The terms "Tribunal", and "Chairman", as used herein, shall be deemed to mean the Tribunal, and the Chairman, as it or they respectively may be constituted at any future time under the Convention.

The term "Trail Smelter", as used herein, shall be deemed to mean the Consolidated Mining and Smelting Company of Canada, Limited, or its successors and assigns.

Nothing in the above paragraphs of Part Four of this decision shall relieve the Dominion of Canada from any obligation now existing under the Convention with reference to indemnity or compensation, if any, which the Tribunal may find to be due for damage, if any, occurring during the period from October 1, 1937 (the date to which indemnity for damage is now awarded) to October 1, 1940, or to such earlier date at which the Tribunal may render its final decision.

(*Signed*)
JAN HOSTIE.

(*Signed*)
CHARLES WARREN.

(*Signed*)
R. A. E. GREENSHIELDS.

DECISION

REPORTED ON MARCH 11, 1941, TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND TO THE GOVERNMENT OF THE DOMINION OF CANADA, UNDER THE CONVENTION SIGNED APRIL 15, 1935.

This Tribunal is constituted under, and its powers are derived from and limited by, the Convention between the United States of America and the Dominion of Canada signed at Ottawa, April, 15, 1935, duly ratified by the two parties, and ratifications exchanged at Ottawa, August 3, 1935 (hereinafter termed "the Convention").

By Article II of the Convention, each Government was to choose one member of the Tribunal and the two Governments were to choose jointly a chairman who should be neither a British subject nor a citizen of the United States. The members of the Tribunal were chosen as follows: by the United States of America, Charles Warren of Massachusetts; by the Dominion of Canada, Robert A.E. Greenshields of the Province of Quebec; by the two Governments jointly, Jan Frans Hostie of Belgium.

Article II, paragraph 4, of the Convention provided that "the Governments may each designate a scientist to assist the Tribunal"; and scientists were designated as follows: by the United States of America, Reginald S. Dean of Missouri; and by the Dominion of Canada, Robert E. Swain of California. In November, 1940, Victor H. Gottschalk of Washington, D.C., was designated by the United States as alternate to Reginald S. Dean. The Tribunal desires to record its appreciation of the valuable assistance received by it from these scientists.

The Tribunal herewith reports its final decisions.

The controversy is between two Governments involving damage occurring, or having occurred, in the territory of one of them (the United States of America) and alleged to be due to an agency situated in the territory of the other (the Dominion of Canada). In this controversy, the Tribunal did not sit and is not sitting to pass upon claims presented by individuals or on behalf of one or more individuals by their Government, although individuals may come within the meaning of "parties concerned", in Article IV and of "interested parties", in Article VIII of the Convention and although the damage suffered by individuals did, in part, "afford a convenient scale for the calculation of the reparation due to the State" (see Judgment No. 13, Permanent Court of International Justice, Series A, No. 17, pp. 27, 28). (*Cf.* what was said by the Tribunal in the decision reported on April 16, 1938, as regards the problems arising out of abandonment of properties, Part Two, Clause (1).)

As between the two countries involved, each has an equal interest that if a nuisance is proved, the indemnity to damaged parties for proven damage shall be just and adequate and each has also an equal interest that unproven or unwarranted claims shall not be allowed. For, while the United States' interests may now be claimed to be injured by the operations of a Canadian corporation, it is equally possible that at some time in the future Canadian

interests might be claimed to be injured by an American corporation. As has well been said: "It would not be to the advantage of the two countries concerned that industrial effort should be prevented by exaggerating the interests of the agricultural community. Equally, it would not be to the advantage of the two countries that the agricultural community should be oppressed to advance the interest of industry."

Considerations like the above are reflected in the provisions of the Convention in Article IV, that "the desire of the high contracting parties" is "to reach a solution just to all parties concerned". And the phraseology of the questions submitted to the Tribunal clearly evinces a desire and an intention that, to some extent, in making its answers to the questions, the Tribunal should endeavor to adjust the conflicting interests by some "just solution" which would allow the continuance of the operation of the Trail Smelter but under such restrictions and limitations as would, as far as foreseeable, prevent damage in the United States, and as would enable indemnity to be obtained, if in spite of such restrictions and limitations, damage should occur in the future in the United States.

In arriving at its decision, the Tribunal has had always to bear in mind the further fact that in the preamble to the Convention, it is stated that it is concluded with the recognition of "the desirability and necessity of effecting a permanent settlement".

The duty imposed upon the Tribunal by the Convention was to "finally decide" the following questions:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding questions?

The Tribunal met in Washington, in the District of Columbia, on June 21, 22, 1937, for organization, adoption of rules of procedure and hearing of preliminary statements. From July 1 to July 6, it travelled over and inspected the area involved in the controversy in the northern part of Stevens County in the State of Washington and it also inspected the smelter plant of the Consolidated Mining and Smelting Company of Canada, Limited, at Trail in British Columbia. It held sessions for the reception and consideration of such evidence, oral and documentary, as was presented by the Governments or by interested parties, as provided in Article VIII, in Spokane in the State of Washington, from July 7 to July 29, 1937; in Washington, in the district of Columbia, on August 16, 17, 18, 19, 1937; in Ottawa, in the Province of Ontario, from August 23 to September 18, 1937; and it heard arguments of counsel in Ottawa from October 12 to October 19, 1937.

On January 2, 1938, the Agents of the two Governments jointly informed the Tribunal that they had nothing additional to present. Under the provisions of Article XI of the Convention, it then became the duty of the

Tribunal "to report to the Governments its final decisions . . . . within a period of three months after the conclusion of the proceedings", *i.e.* on April 2, 1938.

After long consideration of the voluminous typewritten and printed record and of the transcript of evidence presented at the hearings, the Tribunal formally notified the Agents of two the Governments that, in its opinion, unless the time limit should be extended, the Tribunal would be forced to give a permanent decision on April 2, 1938, on the basis of data which it considered inadequate and unsatisfactory. Acting on the recommendation of the Tribunal and under the provisions of Article XI authorizing such extension, the two Governments by agreement extended the time for the report of final decision of the Tribunal to three months from October 1, 1940.

On April 16, 1938, the Tribunal reported its "final decision" on Question No. 1, as well as its temporary decisions on Questions No. 2 and No. 3, and provided for a temporary régime thereunder. The decision reported on April 16, 1938, will be referred to hereinafter as the "previous decision".

Concerning Question No. 1, in the statement presented by the Agent for the Government of the United States, claims for damages of $1,849,156.16 with interest of $250,855.01—total $2,100,011.17—were presented, divided into seven categories, in respect of (*a*) cleared land and improvements; (*b*) of uncleared land and improvements; (*c*) live stock; (*d*) property in the town of Northport; (*e*) wrong done the United States in violation of sovereignty, measured by cost of investigation from January 1, 1932, to June 30, 1936; (*f*) interest on $350,000 accepted in satisfaction of damage to January 1, 1932, but not paid on that date; (*g*) business enterprises. The area claimed to be damaged contained "more than 140,000 acres", including the town of Northport.

The Tribunal disallowed the claims of the United States with reference to items (*c*), (*d*), (*e*), (*f*) and (*g*) but allowed them, in part, with respect to the remaining items (*a*) and (*b*).

In conclusion (end of Part Two of the previous decision), the Tribunal answered Question No. 1 as follows:

> Damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and up to October 1, 1937, and the indemnity to be paid therefor is seventy-eight thousand dollars ($78,000), and is to be complete and final indemnity and compensation for all damage which occurred between such dates. Interest at the rate of six per centum per year will be allowed on the above sum of seventy-eight thousand dollars ($78,000) from the date of the filing of this report and decision until date of payment. This decision is not subject to alteration or modification by the Tribunal hereafter. The fact of existence of damage, if any, occurring after October 1, 1937, and the indemnity to be paid therefor, if any, the Tribunal will determine in its final decision

Answering Questions No. 2 and No. 3, the Tribunal decided that, until a final decision should be made, the Trail Smelter should be subject to a temporary régime (described more in detail in Part Four of the present decision) and a trial period was established to a date not later than October 1, 1940, in order to enable the Tribunal to establish a permanent régime based on a "more adequate and intensive study", since the Tribunal felt that the information that had been placed before it did not enable it to determine at that time with sufficient certainty upon a permanent régime.

In order to supervise the conduct of the temporary régime and in accordance with Part Four, Clause (1) of the previous decision, the Tribunal appointed two Technical Consultants, Dr. R. S. Dean and Professor R. E. Swain. As further provided in said Part Four (Clause 7), the Tribunal met at Washington, D.C., with these Technical Consultants from April 24, 1939, to May 1, 1939, to consider reports of the latter and determine the further course to be followed during the trial period (see Part Four of the present decision).

It had been provided in the previous decision that a final decision on the outstanding questions would be rendered within three months from the termination of the trial period therein prescribed, *i.e.*, from October 1, 1940, unless the trial period was ended sooner. The trial period was not terminated before October 1, 1940. As the Tribunal deemed it necessary after the intervening period of two and a half years to receive supplementary statements from the Governments and to hear counsel again before determining upon a permanent régime, a hearing was set for October 1, 1940. Owing, however, to disruption of postal communications and other circumstances, the supplementary statement of the United States was not transmitted to the Dominion of Canada until September 25, 1940, and the public meeting was, in consequence, postponed.

The Tribunal met at Boston, Massachusetts, on September 26 and 27, 1940, for adoption of additional rules of procedure. It met at Montreal, P.Q., with its scientific advisers, from December 5 to December 8, 1940, to consider the Final Report they had rendered in their capacity as Technical Consultants (see Part Four of this decision). It held its public meeting and heard arguments of counsel in Montreal, from December 9 to December 12, 1940.

The period within which the Tribunal shall report its final decisions was extended by agreement of the two Governments until March 12, 1941.

I.

By way of introduction to the Tribunal's decision, a brief statement, in general terms, of the topographic and climatic conditions and economic history of the locality involved in the controversy may be useful.

The Columbia River has its source in the Dominion of Canada. At a place in British Columbia named Trail, it flows past a smelter located in a gorge, where zinc and lead are smelted in large quantities. From Trail, its course is easterly and then it swings in a long curve to the international boundary line, at which point it is running in a southwesterly direction; and its course south of the boundary continues in that general direction. The distance from Trail to the boundary line is about seven miles as the crow flies or about eleven miles, following the course of the river (and possibly a slightly shorter distance by following the contour of the valley). At Trail and continuing down to the boundary and for a considerable distance below the boundary, mountains rise on either side of the river in slopes of various angles to heights ranging from 3,000 to 4,500 feet above sea-level, or between 1,500 to 3,000 feet above the river. The width of the valley proper is between one and two miles. On both sides of the river are a series of bench lands at various heights.

More or less half way between Trail and the boundary is a place, on the east side of the river, known as Columbia Gardens; at the boundary, on the east side of the river and on the south side of its affluent, the Pend-d'Oreille,

are two places respectively known as Waneta and Boundary; the former is on the Canadian side of the boundary, the latter on the American side; four or five miles south of the boundary, and on the west side of the river, is a farm, named after its owner, Fowler Farm (Section 22, T. 40, R. 40), and on the east side of the river, another farm, Stroh Farm, about five miles south of the boundary.

The town of Northport is located on the east bank of the river, about nineteen miles from Trail by the river, and about thirteen miles as the crow flies. It is to be noted that mountains extending more or less in an easterly and westerly direction rise to the south between Trail and the boundary.

Various creeks are tributary to the river in the region of Northport, as follows: Deep Creek flowing from southeast to northwest and entering the river slightly north of Northport; opposite Deep Creek and entering on the west side of the river and flowing from the northwest, Sheep Creek; north of Sheep Creek on the west side, Nigger Creek; south of Sheep Creek on the west side, Squaw Creek; south of Northport, on the east side, flowing from the southeast, Onion Creek.

About eight miles south of Northport, following the river, is the town of Marble; and about seventeen miles, the town of Bossburg. Three miles south of Bossburg is the town of Evans; and about nine miles, the town of Marcus. South of Marcus and about forty-one miles from the boundary line is the town of Kettle Falls which, in general, may be stated to be the southern limit of the area as to which evidence was presented. All the above towns are small in population and in area.

At Marble and to the south, various other creeks enter the river from the west side--Rattlesnake Creek, Crown Creek, Flat Creek, and Fifteen Mile Creek.

Up all the creeks above mentioned, there extend tributary valleys, differing in size.

While, as stated above, the width of the valley proper of the river is from one to two miles, the width of the valley measured at an altitude of 3,000 feet above sea-level, is approximately three miles at Trail, two and one-half miles at Boundary, four miles above Northport, three and one-half miles at Marble. Near Bossburg and southward, the valley at the same altitude broadens out considerably.

As to climatic conditions, it may be stated that the region is, in general, a dry one though not what is termed "arid". The average annual precipitation at Northport from 1923 to 1940 inclusive averaged somewhat above seventeen inches. It varied from a minimum of 9.60 inches in 1929 to a maximum of 26.04 inches in 1927. The rainfall in the growing-season months of April, May and June at Northport, has been in 1938, 2.30 inches; in 1939, 3.78 inches, and in 1940, 3.24 inches. The average humidity varies with some regularity from day to day. In June, 1937, at Northport, it had an average maximum of 74% at 5 a.m. and an average minimum of 26% at 5 p.m.

The range of temperature in the different months as it appears from the records of the years 1934 to 1940 inclusive, at Northport was as follows: in the months of November, December, January and February, the lowest temperature was -19° (in January, 1937), and the highest was 60° (in November, 1934); in the growing-season months of April, May, June and July, the lowest temperature was 12° (in April, 1936), and the highest was 110° (in July, 1934); in the remaining months of August, September, October and March, the lowest temperature was 8° (in October, 1935 and March, 1939), and the highest was 104° (in September, 1938).

The direction of the surface wind is, in general, from the northeast down the river valley, but this varies at different times of day and in different seasons. The subject of winds is further treated in Part Four of this decision and, in detail, in the Final Report of the Technical Consultants.

The history of what may be termed the economic development of the area may be briefly stated as follows: Previous to 1892, there were few settlers in this area, but homesteading and location of farms received an impetus, particularly on the east side of the river, at the time when the construction of the Spokane and Northern Railway was undertaken, which was completed between the City of Spokane and Northport in 1892, and extended to Nelson in British Columbia in 1893. In 1892, the town of Northport was founded. In 1900, the population of this town was 787. It fell in 1910 to 476 but rose again, in 1920, to 906. In 1930, it had fallen to 391. The population of the precincts nearest the boundary line, *viz.*, Boundary and Northport (including Frontier and Nigger Creek Precincts prior to 1931) was 919 in 1900; 913 in 1910; 1,304 in 1920; 648 in 1930 and 651 in 1940. In these precincts, the area of all land in farms in 1925 was 5,292 acres; in 1930, 8,040 acres; in 1935, 5,666 acres and in 1940, 7,175 acres. The area in crop-land in 1925 was 798 acres; in 1930, 1,227 acres; in 1935, 963 acres and in 1940, about 900 acres [1]. In two other precincts east of the river and south of the boundary, Cummins and Doyle, the population in 1940 was 293, the area in farms was 6,884 acres and the area in crop-land was about 1,738 acres [2].

About the year 1896, there was established in Northport a business which has been termed the "Breen Copper Smelter", operated by the LeRoi Mining and Smelting Company, and later carried on by the Northport Smelting and Refining Company which was chartered in 1901. This business employed at times from five hundred to seven hundred men, although as compared with a modern smelter like the Trail Smelter, the extent of its operations was small. The principal value of the ores smelted by it was in copper, and the ores had a high sulphur content. For some years, the somewhat primitive method of "heap roasting" was employed which consisted of roasting the ore in open piles over woodfires, frequently called in mining parlance, "stink piles". Later, this process was changed. About seventy tons of sulphur were released per day. This Northport Smelting and Refining Company intermittently continued operations until 1908. From 1908 until 1915, its smelter lay idle. In March, 1916, operation was resumed for the purpose of smelting lead ore, and continued until March 5, 1921, when it ceased business and its plant was dismantled. About 30 tons of sulphur per day were emitted during this time. There is no doubt that damage was caused to some extent over a more or less restricted area by the operation of this smelter plant.

In addition to the smelting business, there have been intermittent mining operations of lead and zinc in this locality, but they have not been a large factor in adding to the population.

---

[1] For the Precinct of Boundary, the acreage of crop-land, idle or fallow, was omitted from the reports received by the Tribunal of the 1940 Census figures, the statement being made that it was "omitted to avoid disclosure of individual operations".

[2] For the Precinct of Cummins, the acreage of crop failure and of crop-land, idle or fallow, is only approximately correct, the census figures making similar omissions and for the same reason.

The most important industry in the area formerly was the lumber industry. It had its beginning with the building of the Spokane and Northern Railway. Several saw mills were constructed and operated, largely for the purpose of furnishing ties to the railway. In fact, the growing trees—yellow pine, Douglas fir, larch, and cedar—were the most valuable asset to be transformed into ready cash. In early days, the area was rather heavily wooded, but the timber has largely disappeared and the lumber business is now of small size. On about 57,000 acres on which timber cruises were made in 1927-1928 and in 1936 in the general area, it may be doubtful whether there is today more than 40,000 thousands of board feet of merchantable timber.

As to agricultural conditions, it may be said that farming is carried on in the valley and upon the benches and mountain slopes and in the tributary valleys. The soils are of a light, sandy nature, relatively low in organic matter, although in the tributary valleys the soil is more loamy and fertile. In some localities, particularly on the slopes, natural sub-irrigation affords sufficient moisture; but in other regions irrigation is desirable in order to produce favorable results. In a report made by Dr. F. C. Wyatt, head of the Soils Department of the University of Alberta, in 1929, it is stated that "taken as a unit, the crop range of these soils is wide and embraces the crops suited to the climate conditions. Under good cultural operations, yields are good." At the same time, it must be noted that a large portion of this area is not primarily suited to agriculture. In a report of the United States Department of Agriculture, in 1913, it is stated that "there is approximately one-third of the land in the Upper Columbia Basin unsuited for agricultural purposes, either because it is too stony, too rough, too steep, or a combination of these factors. To utilize this large proportion of land and to meet the wood needs of an increasing population, the Upper Columbia Basin is forced to consider seriously the problem of reforestation and conservation." Much of the farming land, especially on the benches, is land cleared from forest growth; most of the farms contain from an eighth to a quarter of a section (80-160 acres); and there are many smaller and some larger farms.

In general, the crops grown on the farms are alfalfa, timothy, clover, grain cut green for hay, barley, oats, wheat, and a small amount of potatoes. Wild hay is cut each year to some extent. The crops, in general, are grown for feed rather than for sale, though there is a certain amount of wheat and oats sold. Much of the soil is apparently well suited to the predominant crop of alfalfa, which is usually cut at present twice a year(with a small third crop on some farms). Much of the present alfalfa has been rooted for a number of years.

Milch cattle are raised to a certain extent and they are grazed on the wild grasses on the hills and mountains in the summer months, but the dairying business depends on existence of sufficient land under cultivation as an adjunct to the dairy to provide adequate forage for the winter months.

In early days, it was believed that, owing to soil and climatic conditions, this locality was destined to become a fruit-growing region, and a few orchards were planted. For several reasons, of which it is claimed that fumigation is one, orchards have not thrived. In 1909-1910, the Upper Columbia Company purchased two large tracts, comprising about ten thousand acres, with the intention of developing the land for orchard purposes and selling of timber in the meantime, and it established a large orchard of about 900 acres in the town of Marble. The project, as early 1917, proved a failure.

II.

In 1896, a smelter was started under American auspices near the locality known as Trail, B.C. In 1906, the Consolidated Mining and Smelting Company of Canada, Limited, obtained a charter of incorporation from the Canadian authorities, and that company acquired the smelter plant at Trail as it then existed. Since that time, the Canadian company, without interruption, has operated the Smelter, and from time to time has greatly added to the plant until it has become one of the best and largest equipped smelting plants on the American continent. In 1925 and 1927, two stacks of the plant were erected to 409 feet in height and the Smelter greatly increased its daily smelting of zinc and lead ores. This increased production resulted in more sulphur dioxide fumes and higher concentrations being emitted into the air. In 1916, about 5,000 tons of sulphur per month were emitted; in 1924, about 4,700 tons; in 1926, about 9,000 tons—an amount which rose near to 10,000 tons per month in 1930. In other words, about 300-350 tons of sulphur were being emitted daily in 1930. (It is to be noted that one ton of sulphur is substantially the equivalent of two tons of sulphur dioxide or SO_2.)

From 1925, at least, to 1937, damage occurred in the State of Washington, resulting from the sulphur dioxide emitted from the Trail Smelter as stated in the previous decision.

The subject of fumigations and damage claimed to result from them was referred by the two Governments on August 7, 1928, to the International Joint Commission, United States and Canada, under Article IX of the Convention of January 11, 1909, between the United States and Great Britain, providing that the high contracting parties might agree that "any other question or matters of difference arising between them involving the rights, obligations or interests of either in relation to the other, or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada shall be referred from time to time to the International Joint Commission for examination and report. Such reports shall not be regarded as decisions of the question or matters so submitted either on the facts or on the law, and shall not, in any way, have the character of an arbitral award."

The questions referred to the International Joint Commission were five in number, the first two of which may be noted: first, the extent to which property in the State of Washington has been damaged by fumes from the Smelter at Trail B.C.; second, the amount of indemnity which would compensate United States' interests in the State of Washington for past damages.

The International Joint Commission sat at Northport, at Nelson, B.C., and in Washington, D.C., in 1928, 1929 and 1930, and on February 28, 1931, rendered a unanimous report which need not be considered in detail.

After outlining the plans of the Trail Smelter for extracting sulphur from the fumes, the report recommended (Part I, Paragraphs (*a*) and (*c*)) that "the company be required to proceed as expeditiously as may be reasonably possible with the works above referred to and also to erect with due dispatch such further sulphuric acid units and take such further or other action as may be necessary, if any, to reduce the amount and concentration of SO_2 fumes drifting from its said plant into the United States until it has reduced the amount by some means to a point where it will do no damage in the United States".

The same Part I, Paragraph (*g*) gave a definition of "damage":

> The word "damage", as used in this document shall mean and include such damage as the Governments of the United States and Canada may deem appreciable, and for the purposes of paragraphs (*a*) and (*c*) hereof, shall not include occasional damage that may be caused by SO_2 fumes being carried across the international boundary in air pockets or by reason of unusual atmospheric conditions. Provided, however, that any damage in the State of Washington howsoever caused by said fumes on or after January 1, 1932, shall be the subject of indemnity by the company to any interests so damaged. . . .

Paragraph 2 read, in part, as follows:

> In view of the anticipated reduction in sulphur fumes discharged from the smelter at Trail during the present year, as hereinafter referred to, the Commission therefore has deemed it advisable to determine the amount of indemnity that will compensate United States interests in respect to such fumes, up to and including the first day of January, 1932. The Commission finds and determines that all past damages and all damages up to and including the first day of January next, is the sum of $350,000. Said sum, however, shall not include any damage occurring after January 1, 1932.

This report failed to secure the acceptance of both Governments. A sum of $350,000 has, however, been paid by the Dominion of Canada to the United States.

Two years after the filing of the above report, the United States Government, on February 17, 1933, made representations to the Canadian Government that existing conditions were entirely unsatisfactory and that damage was still occurring and diplomatic negotiations were entered into which resulted in the signing of the present Convention.

The Consolidated Mining and Smelting Company of Canada, Limited, proceeded after 1930 to make certain changes and additions in its plant, with the intention and purpose of lessening the sulphur contents of the fumes, and in an attempt to lessen injurious fumigations, a new system of control over the emission of fumes during the crop growing season came into operation about 1934. To the three sulphuric acid plants in operation since 1932, two others have recently been added. The total capacity is now of 600 tons of sulphuric acid per day, permitting, if these units could run continually at capacity, the fixing of approximately 200 tons of sulphur per day. In addition, from 1936, units for the production of elemental sulphur have been put into operation. There are at present three such units with a total capacity of 140 tons of sulphur per day. The capacity of absorption of sulphur dioxide is now 600 tons of sulphur dioxide per day (300 tons from the zinc plant gases and 300 tons from the lead plant gases). As a result, the maximum possible recovery of sulphur dioxide, with all units in full operation has been brought to a figure which is about equal to the amount of that gas produced by smelting operations at the plant in 1939. However, the normal shutdown of operating units for repairs, the power supply, ammonia available, and the general market situation are factors which influence the amount of sulphur dioxide treated.

In 1939, 360 tons, and in 1940, 416 tons, of sulphur per day were oxidized to sulphur dioxide in the metallurgical processes at the plant. Of the above,

for 1939, 253 tons, and for 1940, 289 tons per day, of the sulphur which was oxidized to sulphur dioxide was utilized. One hundred and seven tons

NORTHPORT

(FUMIGATIONS IN HOURS AND MINUTES AT THE CONCENTRATIONS NOTED IN FIRST COLUMN)

1938	April		May		June		July		August		Sept.	
Concentrations p.p.m.	h.	m.	h.	m.	h.	m.	h.	m.	h.	m.	h.	m.
.11-.25	6	0	0	0	0	20	5	50	10	40	28	20
.26-.50	0	50	0	0	0	0	1	40	3	0	6	0
above .50	0	10	0	0	0	0	0	0	0	5	0	20
Maximum p.p.m.	.66		.08		.15		.33		.61		.51	
1939												
.11-.25	1	40	10	0	9	20	5	20	5	0	25	0
.26-.50	0	0	0	0	2	0	0	0	2	0	3	40
above .50	0	0	0	0	0	0	0	0	0	0	0	0
Maximum p.p.m.	.16		.21		.30		.24		.33		.36	
1940												
.11-.25	16	20	32	40	5	40	9	20	10	0	23	10
.26-.50	2	0	0	0	0	0	0	0	0	0	0	0
above .50	0	0	0	0	0	0	0	0	0	0	0	0
Maximum p.p.m.	.37		.23		.22		.19		.17		.23	

WANETA

(FUMIGATIONS IN HOURS AND MINUTES AT THE CONCENTRATIONS NOTED IN FIRST COLUMN)

1938	June		July		August		September	
Concentrations p.p.m.	h.	m.	h.	m.	h.	m.	h.	m.
.11-.25	13	0	18	40	20	40	56	30
.26-.50	0	50	1	20	3	20	5	20
above .50	0	20	0	0	5	0	0	20
Maximum p.p.m.	.52		.30		1.63		.75	

1939	April		May		June		July		August		Sept.	
	h.	m.	h.	m.	h.	m.	h.	m.	h.	m.	h.	m.
.11-.25	11	55	10	0	20	20	10	40	13	20	16	50
.26-.50	4	40	5	40	8	20	5	0	6	20	9	20
above .50	0	20	0	0	1	20	0	0	0	40	1	40
Maximum p.p.m.	.52		.46		.79		.39		.56		.59	

1940	June		July		August		September	
	h.	m.	h.	m.	h.	m.	h.	m.
.11-.25	5	20	18	20	27	20	28	0
.26-.50	0	0	6	40	4	40	8	40
above .50	0	0	0	0	0	40	0	0
Maximum p.p.m.	.15		.49		.64		.42	

and 127 tons of sulphur per day for those two years, respectively, were emitted as sulphur dioxide to the atmosphere.

The tons of sulphur emitted into the air from the Trail Smelter fell from about 10,000 tons per month in 1930 to about 7,200 tons in 1931 and 3,400 tons in 1932 as a result both of sulphur dioxide beginning to be absorbed and of depressed business conditions. As depression receded, this monthly average rose in 1933 to 4,000 tons, in 1934 to nearly 6,300 tons and in 1935 to 6,800 tons. In 1936, however, it had fallen to 5,600 tons; in 1937, it further fell to 4,850 tons; in 1938, still further to 4,230 tons to reach 3,250 tons in 1939. It rose again, however, to 3,875 tons in 1940.

During the period since January 1, 1932, automatic recorders for registering the presence of sulphur dioxide in the air, as well as the length of fumigations and the maximum concentration in parts per million (p.p.m.) and one hundredth of parts per million, were maintained by the United States on the east side of the river at Northport from 1932 to 1937; and at Boundary in 1932, 1933, and in parts of 1934 and 1935; at Evans, south of Northport, from 1932 to 1934 and parts of 1935; and at Marble, in 1932 and 1933 and part of 1934; and the United States had at various times in 1939 and 1940 a portable recorder at Fowler Farm. The Dominion of Canada maintained recorders at Stroh Farm from 1932 to 1937 and from January to May 1938, and at a point opposite Northport on the west side of the River from 1937 to 1940—both of these recorders being in United States territory; and in Canadian territory, at Waneta, June to December, 1938, January to March, 1939, and June to December 1940, and at Columbia Gardens from May 1937 to December 1940.

Data compiled from the Northport recorder during the growing seasons from April to September, 1938, 1939, and 1940, and from the Waneta recorder during the growing seasons while it was operated from June to September 1938 and 1940, and April to September, 1939, show the number of hours and minutes in each month during which fumes were present at the various concentrations of .11 to .25, .26 to .50, and above .50.

PART TWO.

The first question under Article III of the Convention is: "(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor."

This question has been answered by the Tribunal in its previous decision, as to the period from January 1, 1932 to October 1, 1937, as set forth above.

Concerning this question, three claims are now propounded by the United States.

I.

The Tribunal is requested to "reconsider its decision with respect to expenditures incurred by the United States during the period January 1, 1932, to June 30, 1936". It is claimed that "in this respect the United States is entitled to be indemnified in the sum of $89,655, with interest at the rate of five per centum per annum from the end of each fiscal year in which the several amounts were expended to the date of the Tribunal's final decision".

This claim was dealt with in the previous decision (Part Two, Clause (7)) and was disallowed.

The indemnity found by the Tribunal to be due for damage which had occurred since the first day of January, 1932, up to October 1, 1937, *i.e.*, $78,000, was paid by the Dominion of Canada to the United States and received by the latter without reservations. (Record, Vol. 56, p. 6468.) The decision of the Tribunal in respect of damage up to October 1, 1937, was thus complied with in conformity with Article XII of the Convention. If it were not, in itself, final in this respect, the decision would have assumed a character of finality through this action of the parties.

But this finality was inherent in the decision. Article XI of the Convention says: "The Tribunal shall report to the Governments its final decisions .... as soon as it has reached its conclusions in respect to the questions...." and Article XII of the Convention, "The Governments undertake to take such action as may be necessary in order to ensure due performance of the obligations undertaken hereunder, in compliance with the decision of the Tribunal."

There can be no doubt that the Tribunal intended to give a final answer to Question I for the period up to October 1, 1937. This is made abundantly clear by the passage quoted above, in particular by the words: "This decision is not subject to alteration or modification by the Tribunal hereafter."

It might be argued that the words "as soon as it reached its conclusions in respect to the questions" show that the "final decisions" mentioned in Article XI of the Convention were not to be final until all the questions should have been answered.

In proceeding as it did the Tribunal did not act exclusively on its own interpretation of the Convention. It stated to the Governments its intention of granting damages for the period down to October 1, 1937, whilst ordering further investigations before establishing a permanent régime. It is with this understanding that both Governments, by an exchange of letters between the Minister of the United States at Ottawa and the Secretary of State of the Dominion of Canada (March 14, 1938, March 22, 1938), concurred in the extension of time requested.

This interpretation of Article XI of the Convention, moreover, is not in contradiction with the intention of the parties as expressed in the Convention. It was not foreseen at the time that further investigations might be needed, after the hearings had been ended, as proved to be the case. But the duty was imposed upon the Tribunal to reach a solution just to all parties concerned. This result could not have been achieved if the Tribunal had been forced to give a permanent decision as to a régime on the basis of data which it and both its scientific advisers considered inadequate and unsatisfactory. And, on the other hand, it is obvious that equity would not have been served if the Tribunal, having come to the conclusion that damage had occurred after January 1, 1937, had withheld its decision granting damages for more than two and one half years.

The Tribunal will now consider whether its decision concerning Question No. 1, up to October 1, 1937, constitutes *res judicata*.

As Dr. James Brown Scott (*Hague Court Reports*, p. XXI) expressed it: ".... in the absence of an agreement of the contending countries excluding the law of nations, laying down specifically the law to be applied, international law is the law of an international tribunal". In deciding in conformity with international law an international tribunal may, and, in fact, frequently does apply national law; but an international tribunal will not depart from the rules of international law in favor of divergent rules of

national law unless, in refusing to do so, it would undoubtedly go counter to the expressed intention of the treaties whereupon its powers are based. This would particularly seem to be the case in matters of procedure. In this respect attention should be paid to the rules of procedure adopted by this Tribunal with the concurrence of both Agents on June 22, 1937, wherein it is said (Article 16): "With regard to any matter as to which express provision is not made in these rules, the Tribunal shall proceed as international law, justice and equity may require." Undoubtedly such provisions could not prevail against the Convention, but they show, at least, how, in the common opinion of the Tribunal and of the Agents, Article IV of the Convention was understood at the time. According to the latter, the Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice. This text does not bind the Tribunal to apply national law and practice to the exclusion of international law and practice.

It is further to be noted that the words "the law and practice followed in the United States" are qualified by "in dealing with cognate questions". Unless these latter words are disregarded, they mean a limitation of the reference to national law. What this limitation is, becomes apparent when one refers to the questions set forth in the previous article. These questions are questions of damage caused by smelter fumes, of indemnity therefor, of measures or régime to be adopted or maintained by the Smelter with or without indemnity or compensation. They may be questions of law or questions of practice. The practice followed, for instance, in injunctions dealing with problems of smelter fumes may be followed in so far as the nature of an arbitral tribunal permits. But general questions of law and practice, such as the authority of the *res judicata* and the exceptions thereto, are not "cognate questions" to those of Article III.

This interpretation is confirmed by the correspondence exchanged between parties, as far as it is part of the record. On February 22, 1934, the Canadian Government declared (letter of the Secretary of State for External Affairs to the Minister of the United States at Ottawa) that it "would be entirely satisfied to refer the Tribunal to the principles of law as recognized and applied by the courts of the United States of America in such matters". Now, the matters referred to in that sentence are determined by the preceding sentences:

> The use of the word "injury" is likely to cause misunderstanding which should be removed when the actual terms of the issue are settled for inclusion in the Convention. In order to avoid such misunderstanding, it would seem to be desirable to use the word "damage" in place of "injury" and further, either to define the word actually used by a definition to be incorporated in the Convention or else by reference to the general principles of the law which are applied by the courts in the two countries in dealing with cognate matters.

This passage shows that the "cognate questions" parties had in mind in drafting the Convention were primarily those questions which in cases between private parties, find their answer in the law of nuisances.

That the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law.

If it is true that international relations based on law and justice require arbitral or judicial adjudication of international disputes, it is equally true

that such adjudication must, in principle, remain unchallenged, if it is to be effective to that end.

Numerous and important decisions of arbitral tribunals and of the Permanent Court of International Justice show that this is, in effect, a principle of international law. It will be sufficient, at this stage, to refer to some of the more recent decisions.

In the decisions of an arbitral tribunal constituted under the statute of the Permanent Court of Arbitration concerning the Pious Funds of California (October 14, 1902, *Hague Court Reports*, 1916, p. 3) the question was whether the claim of the United States on behalf of the Archbishop of San Francisco and the Bishop of Monterey was governed by the principle of *res judicata* by virtue of the arbitral award of Sir Edward Thornton. This question was answered in the affirmative.

The Fabiani case (French-Venezuelan Claims Commission, Ralston's Report, Decision of Umpire Plumley, p. 110) is of particular interest for the present case.

There had been an award by the President of the Swiss Confederation allowing part of a claim by France on behalf of Fabiani against Venezuela and disallowing the rest. As the terms of reference to the second arbitral tribunal were broader than to the first, it was contended by the claimants "that of the sums denied allowance by the honorable Arbitrator of Bern there are certain portions so disposed of by him as to be still in force against the respondent Government under the general terms of the protocol constituting this Commission". The first Arbitrator had eliminated all claims based on alleged arbitrary acts (*faits du prince*) of executive authorities as not being included in the matter submitted to his jurisdiction which he found limited by treaty to "denial of justice", a concept which he interpreted as confined to acts and omissions of judicial authorities. It was argued, on behalf of claimants, that "the doctrine and jurisprudence are for a long time unanimous upon this incontestable principle that a declaration of incompetency can never produce the effect of *res judicata* upon the foundation of the law". Umpire Plumley rejected these contentions. "In the interest of peace", a limitation had been imposed upon diplomatic action by a treaty the meaning whereof had been "finally and conclusively" settled "as applied to the Fabiani controversy" by the first award. The definition of denial of justice and the determination of the responsibility of the respondent Government were not questions of jurisdiction. And the Umpire concluded that "the compromise arranged between the honorable Governments . . . . followed by the award of the honorable President of the Swiss Confederation . . . . were 'acting together' a complete, final and conclusive disposition of the entire controversy on behalf of Fabiani".

Again in the case of the claim of the Orinoco Steamship Company between the United States and Venezuela, an arbitral tribunal constituted under the statute of the Permanent Court of Arbitration (October 25, 1910, *American Journal of International Law*, V, p. 230) emphasized the importance in international disputes of the principle of *res judicata*. The first question for the arbitral tribunal to decide was whether the decision previously rendered by an umpire in this case "in view of all the circumstances and under the principles of international law" was "not void, and whether it must be considered to be so conclusive as to preclude a re-examination of the case on its merits". As we will presently see, the tribunal held that the decision was partially void for excess of power. This, however, was rigidly limited and the principle affirmed as follows: ". . . . it is assuredly in the interest of peace

and the development of the institution of international arbitration so essential to the well-being of nations, that, in principle, such a decision be accepted, respected and carried out by the parties without reservation".

In three successive advisory opinions, regarding the delimitation of the Polish Czechoslovak frontier (Question of Jaworzina, No. 8, Series B, p. 38), the delimitation of the Albanian frontier at the Monastery of Saint Naoum (No. 9, Series B, p. 21, 22), and the Polish Postal service in the Free City of Danzig (No. 11, Series B, p. 24), the Permanent Court of International Justice based its appreciation of the legal effects of international decisions of an arbitral character on the underlying principle of *res judicata*.

This principle was affirmed in the judgment of the Court on the claim of Belgium against Greece on behalf of the *Société Commerciale de Belgique* (Series A/B, No. 78, p. 174), wherein the Court said: ". . . . since the arbitral awards to which these submissions relate are, according to the arbitration clause under which they were made, 'final and without appeal', and since the Court has received no mandate from the parties in regard to them, it can neither confirm nor annul them either wholly or in part".

In the well-known case of Frelinghuysen *v.* Key (110 U.S. 63, 71, 72), the Supreme Court of the United States, speaking of an award of the United States Mexican Claims Commission, under the Convention of July 4, 1868, whereby (Art. V) parties agreed, *inter alia*, to consider the result of the proceedings as a "full, perfect, and final settlement of every claim", said: "As between the United States and Mexico, the awards are final and conclusive until set aside by agreement between the two Governments or otherwise."

There is no doubt that in the present case, there is *res judicata*. The three traditional elements for identification: parties, object and cause (Permanent Court of International Justice, Judgment 11, Series A, No. 13, Dissenting Opinion by M. Anzilotti, p. 23) are the same. (*Cf.* Permanent Court of International Justice, Series B, No. 11, p. 30.)

Under the Statute of the Permanent Court of International Justice whereby (Article 59) "The decision of the Court has no binding force except between the parties and in respect of that particular case", the Permanent Court of International Justice, in an interpretative judgment (Judgment No. 11, Series A, No. 13, pp. 18, 20—Chorzów Case), expressed the opinion that the force of *res judicata* was inherent even in what was an incidental decision on a preliminary point, the ownership of the Oberschlesische Company. The minority judge, M. Anzilotti, pointed out that "under a generally accepted rule which is derived from the very conception of *res judicata*, decisions on incidental or preliminary questions which have been rendered with the sole object of adjudicating upon the parties' claims are not binding in another case" (same decision, p. 26). Later on, in the same case (Judgment 13, Series A, No. 17, Dissenting Opinion of M. Ehrlich, pp. 75, 76), M. Ehrlich, the dissenting national judge appointed by Poland, adopted this statement. But M. Anzilotti (Judgment 11, Series A, No. 13, Dissenting Opinion, p. 27) did not expressly answer in the negative the question which he formulated, namely: "Does this general rule also cover the case of an action for indemnity following upon a declaratory judgment in which the preliminary question has been decided?" It is true that, when the case came up again on the question of indemnity (Judgment 13, Series A, No. 17, pp. 31, 32), the Court seems to have avoided—as M. Ehrlich pointed out—the assertion that there was *res judicata* and reserved the effect of its incidental decision "as regards the right of ownership

under municipal law". But the Court said: ". . . . it is impossible that the Oberschlesische's right to the Chorzów factory should be looked upon differently for the purposes of that judgment (the previous Judgment No. 7 wherein it was decided that the attitude of the Polish Government in respect of the Oberschlesische was not in conformity with international law) and in relation to the claim for reparation based on the same judgment", thus admitting in effect (M. Anzilotti now concurring) that it was bound by its previous decision.

In the present case, the decision was not preliminary or incidental. Neither was it a decision on a question of jurisdiction. There is some authority (Tiedemann *v.* Poland, *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, Tome VII (1928), p. 702), in support of the contention that a decision upon the question of jurisdiction only, may, under certain circumstances, be reversed by the same court; and it might be argued, as, in fact, was done by France in the Fabiani case, that a decision merely denying jurisdiction can never constitute *res judicata* as regards the merits of the case at issue. But assuming the first contention to be correct as the second undoubtedly is, that would not affect the issue in the present case. Here, as in the Fabiani case, the decision was not one denying jurisdiction.

The United States does not contend that the previous decision is void for excess of power, but asks for reconsideration and revision, as far as the costs of investigation are concerned, on account of a material error of law (Record, p. 6540).

In the absence of agreement between parties, the first question concerning a request tending to revision of a decision constituting *res judicata*, is: can such a request ever be granted in international law, unless special powers to do so have been expressly given to the tribunal?

The Convention for the Pacific Settlement of Disputes signed at The Hague, October 18, 1907 (Article 83) says: "The parties can reserve in the compromis the right to demand the revision of the award." In that case only, does the article apply. But, on the other hand, the Statute of the Permanent Court of International Justice (Article 61) does not require the grant of such special powers to the Court.

In the Jaworzina case (Advisory Opinions, Series B, No. 8, p. 37), the Permanent Court of International Justice expressed the opinion that the Conference of Ambassadors, which had acted in a quasi-arbitral capacity, did not retain the power to modify its decision, as it had fulfilled the task entrusted to it by giving the latter. In the case of Saint Naoum Monastery, however (Advisory Opinions, Series B, No. 9, p. 21), the Court seemed less positive as to the possibility of a revision in the absence of an express reservation to that effect.

Arbitral decisions do not give to the question an unanimous answer. Thus, in the United States Mexican Mixed Claims Commission of 1868, whilst Umpire Lieber, on a motion for rehearing, re-examined the case, Umpire Thornton, in the Weil, LaAbra, and other cases, refused a rehearing, *inter alia* on the ground that the provisions of the Convention in effect debarred him from rehearing cases which he had already decided (Moore, *International Arbitrations*, 1329, 1357). In the single case of Schreck, however, he granted a request of one of the Agents to reconsider his decision. The case also of A. A. Green (Moore, *International Arbitrations*, 1358) was reconsidered by the Umpire and that of G. Moore (Moore, *International Arbitrations*, 1357) by the two Commissioners. In the Lazare case (Haiti *v.* United States), the Arbitrator, Mr. Justice Strong, refused a rehearing, "solely for

the reason", that in his opinion, his "power over the award was at an end" when it "had passed from his hands and been filed in the State Department". (Moore, *International Arbitrations*, 1793.) In the Sabotage cases, before the American-German Mixed Claims Commission, the Umpire, Mr. Justice Roberts, granted a rehearing, although there was no express provision in the agreement empowering the Commission to do so (December 15, 1933, Documents, p. 1122, *American Journal of International Law*, 1940, pp. 154, 164).

Whether final, in part, or not, the previous decision did not give final answers to all the questions. The Tribunal, by that decision, did not become *functus officio*. Part of its task was yet before it when the request for revision was presented. Under those circumstances, the difficulties and uncertainties do not arise that might present themselves where an arbitral tribunal, having completed its task and finally adjourned, would be requested to reconsider its decision.

The Tribunal, therefore, decides that, at this stage, at least, the Convention does not deny it the power to grant a revision. (*Cf.* D. V. Sandifer, *Evidence before International Tribunals*, 1939, p. 299.)

The second question is whether revision should be granted; and this question subdivides itself into two separate parts: first, whether the petition for revision should be entertained, and second, if entertained, whether the previous decision should be revised in view of the considerations presented by the United States.

It is the rule under the Hague Convention for the Pacific Settlement of Disputes (Article 83) that the question whether a revision should be entertained must be dealt with separately. Such is also the rule according to Article 61 of the Statute of the Permanent Court of International Justice. It is true that, in the case of the Orinoco Steamship Company, the arbitral tribunal did not consider separately the question whether the previous award was void and the question of the merits; but the decision, in that respect, does not seem to conform to the compromis which clearly separated the two questions.

In the Sabotage cases and in other cases before the Mixed Claims Commission, United States and Germany, a contrary practice had prevailed. But when the question of revision came to a head, the Umpire, Mr. Justice Roberts (decision of December 15, 1933, Documents, p. 1115; *American Journal of International Law*, 1940, pp. 157-158), said: "I am convinced as the matter is now viewed in retrospect that it would have been fairer to both the parties, definitely to pass in the first instance upon the question of the Commission's power. . . . Orderly procedure would have required that these issues be decided by the Umpire before the filing of the tendered evidence. The American Agent has . . . . filed a very large quantity of evidence which . . . . I have thought it improper to examine." As the position apparently required further elucidation, a motion was presented to determine "whether the next hearing shall be merely of a preliminary nature" (Documents, p. 1159). The Umpire decided that it should, saying: "Germany insists that the preliminary question be determined separately. I am of opinion this is her right."

The Tribunal is of opinion that this procedure should be followed.

As said above, the petition is founded upon an alleged error in law. It is contended by the United States that the Tribunal erred in the interpretation of the Convention when it decided that the monies expended for the investigation undertaken by the United States Government of the problems created in the United States by the operation of the Smelter at Trail could not be

included within the "damage caused by the Trail Smelter" (Article III (1) of the Convention, Record, p. 6030). Statements by the Tribunal that the controversy did not involve "any such type of facts as the persons appointed" in the *I'm Alone* case "felt to justify them in awarding to Canada damages for violation of sovereignty" and that in cases where a private claim was espoused "damages awarded for expenses were awarded, not as compensation for violation of national sovereignty, but as compensation for expenses incurred by individual claimants in prosecuting their claims for wrongful acts by the offending Government" were also challenged, although petitioner added that possibly these further statements might be regarded as dicta. (Record, p. 6040.) It was further argued that the solution adopted by the Tribunal was not a "solution just to all parties concerned", as required by Article IV of the Convention.

According to the Hague Convention (Article 83), a request tending to the revision of an award can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the award and which at the time the discussion was closed was unknown to the Tribunal and to the party demanding the revision.

It is noteworthy that, at the first Hague Conference, the United States Delegation submitted a proposal whereby every party was entitled to a second hearing before the same judges within a certain period of time "if it declares that it can call new witnesses or raise questions of law not raised or decided at the first hearing". This proposal was, however, considered as weakening unduly the principle of *res judicata*. The text, as it now stands, was adopted as a compromise between the American view and the views of those who, such as de Martens, were opposed to any revision. The Statute of the Permanent Court of International Justice (Article 61) substantially coincides with the Hague Convention: "An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the court and also to the party claiming revision, always provided that such ignorance was not due to negligence." In presenting this text, the report of the Advisory Committee of Jurists (*Procès-Verbaux*, p. 744) said very aptly: "The right of revision is a very important right and affects adversely in the matter of *res judicata* a point which for the sake of international peace should be considered as finally settled. Justice, however, has certain legitimate requirements." These requirements were provided for in the text which enables the court to bring its decision in harmony with justice in cases where, through no fault of the claimant, essential facts remained undisclosed or where fraud was subsequently discovered. No error of law is considered as a possible basis for revision, either by the Hague Convention or by the Statute of the Permanent Court of International Justice.

The Permanent Court of International Justice left open, in the Saint Naoum case (Series B, p. 21), the question whether, in the absence of express provision, an award could be revised "in the event of the existence of an essential error being proved or of new facts being relied on".

Except for those cases where a second hearing before the same or another Tribunal was agreed upon between the Governments or their Agents in the case, there are few cases of awards where rehearing or revision was granted.

In the Green case, quoted above (Moore, *International Arbitrations*, 1358), the Umpire granted a rehearing because certain evidence which was before the Commissioners was not transmitted to him. In the case of George

Moore, also quoted above (Moore, *International Arbitrations*, 1357), a new document was produced. In the latter case, the Commissioners stated that it was their practice to grant revision where new evidence was such as ought undoubtedly to produce a change in the minds of the Commission except where there might be some gross laches or injustice would probably be done to the defendant Government. In the single case of Schreck, also quoted above (Moore, *International Arbitrations*, 1357), Umpire Thornton reconsidered his decision at the request of the Agent of the claimant Government and, in this case, the revision was granted because he found that he had clearly committed an error in law. Because a claimant was born in Mexico, he had taken for granted that he had Mexican nationality. "The Agent of the United States produced the appropriate law of Mexico, by which it appeared that the assumption was clearly erroneous."

In the case of the Orinoco S. S. Company where, it will be remembered, the question before the arbitral tribunal was whether the award in a previous arbitration was void, the defendant State, Venezuela, argued that the decision was not void as the compromis was valid, there had been no excess of power, nor alleged corruption of the judges, nor any "essential error" in the decision.

There were several claims the rejection of which by the Umpire in the first arbitration, Mr. Barge, was considered separately. The main claim had been disallowed on three grounds: the first was the interpretation of a contract between the Venezuelan Government and a concessionaire; the second was a so-called Calvo clause and the third was lack of compliance both with the contract and with Venezuelan law in omitting to notify to the Venezuelan Government the cession of the contract.

Under the terms of reference, the first arbitrators were to decide "on a basis of absolute equity without regard to objections of a technical nature or to the provisions of local legislations". It was clearly apparent from the circumstances of the case that the second and third grounds were entirely irreconcilable with these terms. Nevertheless, the second arbitral tribunal did not upset the findings of Umpire Barge as regards the main claim. The second award said: .

> Whereas the appreciation of the facts of the case and the interpretation of the documents were within the competence of the Umpire and, as his decisions, when based on such interpretation, are not subject to revision by this Tribunal, whose duty it is, not to say if the case has been well or ill judged, but whether the award must be annulled; that if an arbitral decision could be disputed on the ground of erroneous appreciation, appeal and revision, which the Conventions of The Hague of 1899 and 1907 made it their object to avert, would be the general rule.

Other and much smaller claims, however, had been disallowed exclusively on grounds two and three. Here the decision was considered void for excess of power.

The Sabotage cases were re-opened on the allegation that the decisions had been induced by fraud and the decisions were revised when this was proved. This obviously falls within the limits set up both by the Hague Convention and by the Statute of the Permanent Court of International Justice. The following passage of the decision of the Umpire, Mr. Justice Roberts, relied upon by the petitioner in this case, is therefore in the nature of a dictum:

> I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does

not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to re-open and correct a decision to accord with the facts and the applicable legal rules.

This statement may be entirely justified by circumstances special to the Mixed Claims Commission, in particular by the practice followed *ab initio* by this Commission, apparently with the concurrence, until the Sabotage cases reached their last stages, of the Umpire, the Commissioners and the Agents, but in so far as it does not refer to the correction of possible errors arising from a slip or accidental omission, it does not express the opinion generally prevailing as to the position in international law, stated for instance in the following passage of a recent decision: ".... in order to justify revision it is not enough that there has taken place an error on a point of law or in the appreciation of a fact, or in both. It is only lack of knowledge on the part of the judge and of one of the parties of a material and decisive fact which may in law give rise to the revision of a judgment" (de Neuflize *v.* Disconto Gesellschaft, *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, t. VII, 1928, 629) [1].

A mere error in law is no sufficient ground for a petition tending to revision.

The formula "essential error" originated in a text voted by the International Law Institute in 1876. From its inception, its very authors were divided as to its meaning. It is thought significant that the arbitral tribunal in the Orinoco case avoided it; the Permanent Court in the Saint Naoum case alluded to it. The Government of the Kingdom of the Serbs, Croats and Slovenes alleged essential error both in law and in fact (Series C, No. 5, II, p. 57, Pleadings by Mr. Spalaikovitch), but what the Court had in mind in the passage quoted above (see p. 36 of the present decision), was only a possible error in fact. The paragraph where this passage appears begins with the words: "This decision has also been criticized on the ground that it was based on erroneous information or adopted without regard to certain essential facts."

The Tribunal is of opinion that the proper criterion lies in a distinction not between "essential" errors in law and other such errors, but between "manifest" errors, such as that in the Schreck case or such as would be committed by a tribunal that would overlook a relevant treaty or base its decision on an agreement admittedly terminated, and other errors in law. At least, this is as far as it might be permissible to go on the strength of precedents and practice. The error of interpretation of the Convention alleged by the petitioner in revision is not such a "manifest" error. Further criticisms need not be considered. The assumption that they are justified would not suffice to upset the decision.

For these reasons, the Tribunal is of opinion that the petition must be denied.

II (*a*).

The Tribunal is requested to say that damage has occurred in the State of Washington since October 1, 1937, as a consequence of the emission of sulphur dioxide by the smelters of the Consolidated Mining and Smelting

[1] This decision refers to the rules of procedure of the Franco-German Mixed Arbitral Tribunals but these rules themselves are expressive of the opinion generally prevailing as to the position in international law.

Company at Trail, B.C., and that an indemnity in the sum of $34,807 should be paid therefor.

It is alleged that acute damage has been suffered, in 1938-1940, in an area of approximately 6,000 acres and secondary damage, during the same period, in an area of approximately 27,000 acres. It is also alleged that damage has been suffered in the town of Northport, situated in the latter area. On the basis of investigations made in 1939 and 1940, the area of acute damage is claimed to extend on the western bank of the Columbia River to a point approximately due north of the mouth of Deep Creek, the average width of this area on this bank being about 1½ miles, and on the eastern bank of the river, to a point somewhat to the south of the northern limit of Section 20, T. 40, R. 41, the width of this area on that bank varying from approximately 1¼ miles at the border to ¼ mile at its lower end. The area of secondary damage is claimed to extend on both banks of the river to about one mile below Northport; it extends laterally, at the boundary, westward to the western limit of Section 2, T. 40, R. 40, and eastward to the eastern limit of Section 1, T. 40, R. 41; it extends along Cedar Creek above Section 14, T. 40, R. 41, along Nigger Creek to the middle of Section 9, T. 40, R. 40, along Little Sheep Creek to the middle of Section 10, T. 40, R. 39, along Big Sheep Creek to the western limit of Section 15, T. 40, R. 39, and along Deep Creek, to the southeastern corner of Section 14, T. 39, R. 40. It is to be noted that the area of damage alleged by the United States in its original statement of case was about 144,000 acres.

Damage is claimed, as to the area of acute damage, on the basis of $0.8525 per acre, on all lands whether cleared or not cleared and whether used for crops, timber or other purposes. It is equally claimed, as to the area of secondary damage, on the basis of $1.0511, on all lands. It is alleged that damage occurred, in 1932-1937, in the area of acute damage to the extent of $17,050; in the area of secondary damage, to the extent of $189,200 and in the town of Northport, to the extent of $8,750. The damage for 1938-1940 is supposed to be 0.3 of the first amount in the area of acute damage, and 0.15 of the second and the third amount, respectively, in the area of secondary damage and in the town of Northport.

The request for an indemnity in the sum of $34,807 is based on the final paragraph of Part Two of the previous decision, quoted above, where it is said that the Tribunal would determine in its final decision the fact of the existence of damage, if any, occurring after October 1, 1937, and the indemnity to be paid therefor.

The present report covers the period until October 1, 1940.

The Tribunal has considered not only the pertinent evidence (including data from the recorders located by the United States and by Canada) introduced at the hearings at Washington, D.C., Spokane and Ottawa in 1937, but also the following: (*a*) the Reports of the Technical Consultants appointed by the Tribunal to superintend the experimental period from April 16, 1938, to October 1, 1940, as well as their reports of the personal investigations in the area at various times within that period; (*b*) the candid reports of his investigations in the area in 1939 and 1940 by the scientist for the United States, Mr. Griffin; (*c*) the monthly sulphur balance sheets of the operations of the Smelter; (*d*) all data from the recorders located at Columbia Gardens, Waneta, Northport, and Fowler's Farm; (*e*) the census data and all other evidence produced before it.

The Tribunal has examined carefully the records of all fumigations specifically alleged by the United States as having caused or been likely to cause

damage, as well as the records of all other fumigations which may be considered likely to have caused damage. In connection with each such instance, it has taken into detailed consideration, with a view of determining the fact or probability of damage, the length of the fumigation, the intensity of concentration, the combination of length and intensity, the frequency of fumigation, the time of day of occurrence, the conditions of humidity or drouth, the season of the year, the altitude and geographical locations of place subjected to fumigation, the reports as to personal surveys and investigations and all other pertinent factors.

As a result, it has come to the conclusion that the United States has failed to prove that any fumigation between October 1, 1937, and October 1, 1940, has caused injury to crops, trees or otherwise.

II (*b*).

The Tribunal is finally requested as to Question I to find with respect to expenditures incurred by the United States during the period July 1, 1936, to September 1, 1940, that the United States is entitled to be indemnified in the sum of $38,657.79 with interest at the rate of five per centum per annum from the end of each fiscal year in which the several amounts were expended to the date of the Tribunal's final decision.

So far as claim is made for indemnity for costs of investigations undertaken between July 1, 1936, and October 1, 1937, it cannot be allowed for the reasons stated above with reference to costs of investigations from January 1, 1932, to June 30, 1936. The Tribunal, therefore, will now consider the question of the costs of investigations made since October 1, 1937.

Under Article XIV, the Convention took effect immediately upon exchange of ratifications. Ratifications were exchanged at Ottawa on August 3, 1935. Thus, the Convention was in force at the beginning of the period covered by this claim. Under the Convention (Article XIII) each Government shall pay the expenses of the presentation and conduct of its case before the Tribunal. Whatever may have been the nature of the expenditures previously incurred, the Tribunal finds that monies expended by the United States in the investigation, preparation and proof of its case after the Convention providing for arbitral adjudication, including the aforesaid provision of Article XIII, had been concluded and had entered into force, were in the nature of expenses of the presentation of the case. An indemnity cannot be granted without reasonable proof of the existence of an injury, of its cause and of the damage due to it. The presentation of a claim for damages includes, by necessary implication, the collection in the field of the data and the preparation required for their presentation as evidence in support of the statement of facts provided for in Article V of the Convention.

It is argued that where injury has been caused and the continuance of this injury is reasonably feared, investigation is needed and that the cost of this investigation is as much damageable consequence of the injury as damage to crops and trees. It is argued that the indemnity provided for in Question No. 1 necessarily comprises monies spent on such investigation.

There is a fundamental difference between expenditure incurred in mending the damageable consequences of an injury and monies spent in ascertaining the existence, the cause and the extent of the latter.

These are not part of the damage, any more than other costs involved in seeking and obtaining a judicial or arbitral remedy, such as the fees of

counsel, the travelling expenses of witnesses, etc. In effect, it would be quite impossible to frame a logical distinction between the costs of preparing expert reports and the cost of preparing the statements and answers provided for in the procedure. Obviously, the fact that these expenditures may be incurred by different agencies of the same government does not constitute a basis for such a logical distinction.

The Convention does not warrant the inclusion of the cost of investigations under the heading of damage. On the contrary, apart from Article XIII, both the text of the Convention and the history of its conclusion disprove any intention of including them therein.

The damage for which indemnity should be paid is the damage caused by the Trail Smelter in the State of Washington. Investigations in the field took place there and it happens that experiments were conducted in that State. But these investigations were conducted by Federal agencies. The "damage"—assuming *ex hypothesi* that monies spent on the salaries and expenditures of the investigators should be so termed—was therefore caused, not in one State in particular, but in the entire territory of the Union.

The word "damage" is used in several passages of the Convention. It may not have everywhere the same meaning but different meanings should not be given to it in different passages without some foundation either in the text itself or on its history. It first occurs in the preamble where it is said that "fumes discharged from the Smelter .... have been causing damage in the State of Washington". It then appears in Article I, where it is said that the $350,000 to be paid to the United States will be "in payment of all damage which occurred in the United States .... as a result of the operation of the Trail Smelter". In Article III itself, the word appears twice. The Tribunal is asked "whether damage caused by the Trail Smelter in the State of Washington has occurred" and "whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent". Article X secures to qualified investigators access to the properties "upon which damage is claimed to have occurred or to be occurring". Finally, Article XI deals with "indemnity for damage .... which may occur subsequently to the period of time covered by the report of the Tribunal".

The underlying trend of thought strongly suggests that, in all these passages, the word "damage" has the same meaning, although in Article X, its scope is limited to damage to property by the context.

The preamble states that the damage complained of is damage caused by fumes in the State of Washington and there is every reason to admit that this, and this alone, is what is meant by the same word when it is used again in the text of the Convention.

Although no part of the report of the Joint Commission was formally adopted by both Governments, there is no doubt that, when the sum of $350,000 mentioned in Article I was agreed upon, parties had in mind the indemnity suggested by that Commission. It was, at least, in fact, a partial acceptance of the latter's suggestions. (See letters of the Minister of the United States at Ottawa to the Secretary of State for External Affairs of Canada, of January 30, 1934, and of the latter to the former of February 17, 1934.) There is also no doubt that, in the sum of $350,000 suggested by the Commission, no costs of investigation were included. This is conclusively proved by Paragraphs 2 and 3 of the Report of the International Joint Commission where it is recommended that this sum should be held by the Treasury of the United States as a trust fund to be distributed to the persons

"damaged by.... fumes" by an appointee of the Governor of the State of Washington and where it is said that no allowance was included for indemnity for damage to the lands of the Government of the United States. If, with that report before them, parties intended to include costs of investigations in the word "damage", as used in Article III, they would no doubt have expressed their intention more precisely.

It was argued in this connection on behalf of the United States that, whilst the terms of reference to the International Joint Commission spoke of the "extent to which property in the State of Washington has been damaged", the terms of reference to the arbitral Tribunal do not contain the same limitation to property. It is, however, to be noted that, whilst no indemnity was actually claimed for damage to the health of the inhabitants, the existence of such damage was asserted by interested parties at the time. (See letter of the Minister of the United States at Ottawa to the Secretary of State for External Affairs of Canada, of January 30, 1934.) The difference in the terms of reference may further be accounted for by the circumstance that the case was presented to this Tribunal, not as a sum of individual claims for damage to private properties, espoused by the Government, but as a single claim for damage to the national territory.

If, under the Convention, the monies spent by the United States on investigations cannot be looked upon as damage, no indemnity can be claimed therefor, under the latter, even if such expenses could not properly be included in the "expenses of the presentation and conduct" of the case. If there were a gap in the Convention, the claim ought to be disallowed, as it is unsupported by international practice.

When a State espouses a private claim on behalf of one of its nationals, expenses which the latter may have incurred in prosecuting or endeavoring to establish his claim prior to the espousal are sometimes included and, under appropriate conditions, may legitimately be included in the claim. They are costs, incidental to damage, incurred by the national in seeking local remedy or redress, as it is, as a rule, his duty to do, if, on account of injury suffered abroad, he wants to avail himself of the diplomatic protection of his State. The Tribunal, however, has not been informed of any case in which a Government has sought before an international jurisdiction or been allowed by an international award or judgment indemnity for expenses by it in preparing the proof for presenting a national claim or private claims which it had espoused; and counsel for the United States, on being requested to cite any precedent for such an adjudication, have stated that they know of no precedent. Cases cited were instances in which expenses allowed had been incurred by the injured national, and all except one prior to the presentation of the claim by the Government [1].

---

[1] Santa Clara Estates Company, British Venezuelan Commission of 1903 (Ralston's Report, pp. 397, 402); Orinoco Steamship Company (United States) *v.* Venezuela (Ralston's Report, p. 107); United States-Venezuelan Arbitration at The Hague, 1909, p. 249 (Foreign Relations of the United States, 1911, p. 752); Compagnie Générale des Asphaltes de France, British-Venezuelan Arbitration (Ralston's Report, pp. 331, 340); H. J. Randolph Hemming under the Special Agreement of August 18, 1910 (Nielsen's Report, pp. 620, 622); Shufeldt (United States *v.* Guatemala), Department of State Arbitration Series No. 3, p. 881; Mather and Glover *v.* Mexico (Moore, International Arbitrations, pp. 3231-3232); Patrick H. Cootey *v.* Mexico (Moore, International Arbitrations, pp. 2769-2970); The Louisa (Moore, International Arbitrations,

In the absence of authority established by settled precedents, the Tribunal is of opinion that, where an arbitral tribunal is requested to award the expenses of a Government incurred in preparing proof to support its claim, particularly a claim for damage to the national territory, the intent to enable the Tribunal to do so should appear, either from the express language of the instrument which sets up the arbitral tribunal or as a necessary implication from its provision. Neither such express language nor implication is present in this case.

It is to be noted from the above, that even if the Tribunal had the power to re-open the case as to the expenditures by the United States from January 1, 1932, to October 1, 1937, the Tribunal would have reached the same conclusion as to such expenditures and would have been obliged to affirm its decision made in the Report filed on April 16, 1938.

Since the Tribunal has, in its previous decision, answered Question No. 1 with respect to the period from the first day of January, 1932, to the first day of October, 1937, it now anwers Question No. 1 with respect to the period from the first day of October, 1937, to the first day of October, 1940, as follows:

(1) No damage caused by the Trail Smelter in the State of Washington has occurred since the first day of October, 1937, and prior to the first day of October, 1940, and hence no indemnity shall be paid therefor.

PART THREE.

The second question under Article III of the Convention is as follows:

> In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

Damage has occurred since January 1, 1932, as fully set forth in the previous decision. To that extent, the first part of the preceding question has thus been answered in the affirmative.

As has been said above, the report of the International Joint Commission (1 (*g*)) contained a definition of the word "damage" excluding "occasional damage that may be caused by SO_2 fumes being carried across the international boundary in air pockets or by reason of unusual atmospheric conditions", as far, at least, as the duty of the Smelter to reduce the presence of that gas in the air was concerned.

The correspondence between the two Governments during the interval between that report and the conclusion of the Convention shows that the problem thus raised was what parties had primarily in mind in drafting Question No. 2. Whilst Canada wished for the adoption of the report, the United States stated that it could not acquiesce in the proposal to limit consideration of damage to damage as defined in the report (letter of the Minister of the United States of America at Ottawa to the Secretary of State for External Affairs of the Dominion of Canada, January 30, 1934). The view was expressed that "so long as fumigations occur in the State of Wash-

---

p. 4325); Dr. John Baldwin *v.* Mexico (Moore, International Arbitrations, pp. 3235-3240); Robert H. May *v.* Guatemala (Foreign Relations of the United States, 1900, p. 674); Salvador Commercial Company *v.* Guatemala (Foreign Relations of the United States, 1902. pp. 859-873).

ington with such frequency, duration and intensity as to cause injury", the conditions afforded "grounds of complaint on the part of the United States, regardless of the remedial works.... and regardless of the effect of those works" (same letter).

The first problem which arises is whether the question should be answered on the basis of the law followed in the United States or on the basis of international law. The Tribunal, however, finds that this problem need not be solved here as the law followed in the United States in dealing with the quasi-sovereign rights of the States of the Union, in the matter of air pollution, whilst more definite, is in conformity with the general rules of international law.

Particularly in reaching its conclusions as regards this question as well as the next, the Tribunal has given consideration to the desire of the high contracting parties "to reach a solution just to all parties concerned".

As Professor Eagleton puts in (*Responsibility of States in International Law*, 1928, p. 80): "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." A great number of such general pronouncements by leading authorities concerning the duty of a State to respect other States and their territory have been presented to the Tribunal. These and many others have been carefully examined. International decisions, in various matters, from the Alabama case onward, and also earlier ones, are based on the same general principle, and, indeed, this principle, as such, has not been questioned by Canada. But the real difficulty often arises rather when it comes to determine what, *pro subjecta materie*, is deemed to constitute an injurious act.

A case concerning, as the present one does, territorial relations, decided by the Federal Court of Switzerland between the Cantons of Soleure and Argovia, may serve to illustrate the relativity of the rule. Soleure brought a suit against her sister State to enjoin use of a shooting establishment which endangered her territory. The court, in granting the injunction, said: "This right (sovereignty) excludes.... not only the usurpation and exercise of sovereign rights (of another State).... but also an actual encroachment which might prejudice the natural use of the territory and the free movement of its inhabitants." As a result of the decision, Argovia made plans for the improvement of the existing installations. These, however, were considered as insufficient protection by Soleure. The Canton of Argovia then moved the Federal Court to decree that the shooting be again permitted after completion of the projected improvements. This motion was granted. "The demand of the Government of Soleure", said the court, "that all endangerment be absolutely abolished apparently goes too far." The court found that all risk whatever had not been eliminated, as the region was flat and absolutely safe shooting ranges were only found in mountain valleys; that there was a federal duty for the communes to provide facilities for military target practice and that "no more precautions may be demanded for shooting ranges near the boundaries of two Cantons than are required for shooting ranges in the interior of a Canton". (R. O. 26 I, p. 450, 451; R. O. 41, I, p. 137; see D. Schindler, "The Administration of Justice in the Swiss Federal Court in Intercantonal Disputes", *American Journal of International Law*, Vol. 15 (1921), pp. 172-174.)

No case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal nor does the Tribunal know of any such case. The nearest analogy is that of water pollution. But, here also, no decision of an international tribunal has been cited or has been found.

There are, however, as regards both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States.

In the suit of the State of Missouri *v.* the State of Illinois (200 U.S. 496, 521) concerning the pollution, within the boundaries of Illinois, of the Illinois River, an affluent of the Mississippi flowing into the latter where it forms the boundary between that State and Missouri, an injunction was refused. "Before this court ought to intervene", said the court, "the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side. (See Kansas *v.* Colorado, 185 U.S. 125.)" The court found that the practice complained of was general along the shores of the Mississippi River at that time, that it was followed by Missouri itself and that thus a standard was set up by the defendant which the claimant was entitled to invoke.

As the claims of public health became more exacting and methods for removing impurities from the water were perfected, complaints ceased. It is significant that Missouri sided with Illinois when the other riparians of the Great Lakes' system sought to enjoin it to desist from diverting the waters of that system into that of the Illinois and Mississippi for the very purpose of disposing of the Chicago sewage.

In the more recent suit of the State of New York against the State of New Jersey (256 U.S. 296, 309), concerning the pollution of New York Bay, the injunction was also refused for lack of proof, some experts believing that the plans which were in dispute would result in the presence of "offensive odors and unsightly deposits", other equally reliable experts testifying that they were confidently of the opinion that the waters would be sufficiently purified. The court, referring to Missouri *v.* Illinois, said: ".... the burden upon the State of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."

What the Supreme Court says there of its power under the Constitution equally applies to the extraordinary power granted this Tribunal under the Convention. What is true between States of the Union is, at least, equally true concerning the relations between the United States and the Dominion of Canada.

In another recent case concerning water pollution (283 U.S. 473), the complainant was successful. The City of New York was enjoined, at the request of the State of New Jersey, to desist, within a reasonable time limit, from the practice of disposing of sewage by dumping it into the sea, a practice which was injurious to the coastal waters of New Jersey in the vicinity of her bathing resorts.

In the matter of air pollution itself, the leading decisions are those of the Supreme Court in the State of Georgia *v.* Tennessee Copper Company and

Ducktown Sulphur, Copper and Iron Company, Limited. Although dealing with a suit against private companies, the decisions were on questions cognate to those here at issue. Georgia stated that it had in vain sought relief from the State of Tennessee, on whose territory the smelters were located, and the court defined the nature of the suit by saying: "This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity, the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."

On the question whether an injunction should be granted or not, the court said (206 U.S. 230):

> It (the State) has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.... It is not lightly to be presumed to give up quasi-sovereign rights for pay and .... if that be its choice, it may insist that an infraction of them shall be stopped. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account.... it is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they may have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.... Whether Georgia, by insisting upon this claim, is doing more harm than good to her own citizens, is for her to determine. The possible disaster to those outside the State must be accepted as a consequence of her standing upon her extreme rights.

Later on, however, when the court actually framed an injunction, in the case of the Ducktown Company (237 U.S. 474, 477) (an agreement on the basis of an annual compensation was reached with the most important of the two smelters, the Tennessee Copper Company), they did not go beyond a decree "adequate to diminish materially the present probability of damage to its (Georgia's) citizens".

Great progress in the control of fumes has been made by science in the last few years and this progress should be taken into account.

The Tribunal, therefore, finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

The decisions of the Supreme Court of the United States which are the basis of these conclusions are decisions in equity and a solution inspired by them, together with the régime hereinafter prescribed, will, in the opinion of the Tribunal, be "just to all parties concerned", as long, at least, as the present conditions in the Columbia River Valley continue to prevail.

Considering the circumstances of the case, the Tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter. Apart from the undertakings in the Convention, it is,

therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.

The Tribunal, therefore, answers Question No. 2 as follows: (2) So long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington; the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals. The indemnity for such damage should be fixed in such manner as the Governments, acting under Article XI of the Convention, should agree upon.

PART FOUR.

The third question under Article III of the Convention is as follows: "In the light of the answer to the preceding question, what measures or régime, if any, should be adopted and maintained by the Trail Smelter?"

Answering this question in the light of the preceding one, since the Tribunal has, in its previous decision, found that damage caused by the Trail Smelter has occurred in the State of Washington since January 1, 1932, and since the Tribunal is of opinion that damage may occur in the future unless the operations of the Smelter shall be subject to some control, in order to avoid damage occurring, the Tribunal now decides that a régime or measure of control shall be applied to the operations of the Smelter and shall remain in full force unless and until modified in accordance with the provisions hereinafter set forth in Section 3, Paragraph VI of the present part of this decision.

SECTION 1.

The Tribunal in its previous decision, deferred the establishment of a permanent régime until more adequate knowledge had been obtained concerning the influence of the various factors involved in fumigations resulting from the operations of the Trail Smelter.

For the purpose of administering an experimental period, to continue to a date not later than October 1, 1940, during which studies could be made of the meteorological conditions in the Columbia River Valley, and of the extension and improvements of the methods for controlling smelter operations in closer relation to such meteorological conditions, the Tribunal, as said before, appointed two Technical Consultants, who directed the observations, experiments and operations through the remainder of the crop-growing season of 1938, the crop-growing seasons of 1939 and 1940 and the winter seasons of 1938-1939 and 1939-1940. The Tribunal appointed as Technical Consultants the two scientists who had been designated by the Governments to assist the Tribunal, Dr. R. S. Dean and Professor R. E. Swain.

The previous decision directed that during the trial period, a consulting meteorologist, to be appointed with the approval of the Technical Consultants, should be employed by the Trail Smelter. On May 4, 1938, Dr. J. Patterson was thus appointed. On May 1, 1939, Dr. Patterson resigned to take up meteorological service in the Canadian Air Force, and Dr. E. W. Hewson was given leave from the Dominion Meteorological Service and appointed in his stead.

The previous decision further directed the installation, operation and maintenance of such observation stations, of such equipment at the stacks and of such sulphur dioxide recorders (the permanent recorders not to exceed three in number) as the Technical Consultants would deem necessary.

The Technical Consultants were empowered to require regular reports from the Trail Smelter as to the methods of operation of its plant and the latter was to conduct its smelting operations in conformity with the directions of the Technical Consultants and of the Tribunal; these instructions could and, in fact, were modified from time to time on the result of the data obtained.

As further provided in the previous decision, the Technical Consultants regularly reported to the Tribunal which, as said before, met in 1939 to consult verbally with them about the temporary régime.

The previous decision finally prescribed that the Dominion of Canada should undertake to provide for the payment of the expenses resulting from this temporary régime.

On May 4, 1938, the Tribunal authorized and directed the employment of Dr. John P. Nielsen, an American citizen, engaged for three years in post-graduate work at Stanford University, in chemistry and plant physiology, as an assistant to the Technical Consultants; Dr. Nielsen continued in this capacity until October 1, 1938.

Through the authority vested in it by the Tribunal, this technical staff was enabled to study the influence of meteorological conditions on dispersion of the sulphurous gases emitted from the stacks of the smelter. This involved the establishment, operation, and maintenance of standard and newly designed meteorological instruments and of sulphur-dioxide recorders at carefully chosen localities in the United States and the Dominion of Canada, and the design and construction of portable instruments of various types for the observation of conditions at numerous surface locations in the Columbia River Valley and in the atmosphere over the valley. Observations on height, velocity, temperature, sulphur dioxide content, and other characteristics of the gas-carrying air currents, were made with the aid of captive balloons, pilot balloons and airplane flights. These observations were begun in May, 1938, and after information as to the inter-relation between meteorological conditions and sulphur-dioxide distribution had been obtained, the observations were continued throughout several experimental régimes of smelter operation during 1939 and 1940.

Periodic examination of crops and timber in the area claimed to be affected were made at suitable times by members of the technical staff.

The full details of the projects undertaken, the methods of study used, and the results obtained may be found in the final report entitled *Meteorological Investigations near Trail, B.C.*, 1938-1940, *by Reginald S. Dean and Robert E. Swain* (an elaborate document of 374 pages accompanied by numerous scientific charts, graphs and photographs, copies of which have been filed with the two Governments and have been made a part of the record by the Tribunal).

The Tribunal expresses the hope that the two Governments may see fit to make this valuable report available to scientists and smelter operators generally, either by printing or other form of reproduction.

SECTION 2.

(*a*)

The investigations during the experimental period make it clear that in the carrying out of a régime, automatic recorders should be located and maintained for the purpose of aiding in control of the emission of fumes at the Smelter and to provide data for observation of the effect of the controls on fumigations.

The investigations carried out by the Technical Consultants have confirmed the idea that the dissipation of the sulphur dioxide gas emitted from the Smelter takes place by eddy-current diffusion. The form of the attenuation curve for sulphur dioxide with distance from the Smelter is, therefore, determined by this mechanism of gas dispersion.

Analysis of the recorder data collected since May, 1938, confirms the conclusion of the Tribunal stated in its previous decision to the effect that "the concentration of sulphur dioxide falls off very rapidly from Trail to a point about 16 miles downstream from the Smelter, or 6 miles from the boundary line, measured by the general course of the river; and that at distances beyond this point, the concentration of sulphur-dioxide is lower and falls off more gradually and less rapidly". The position of the knee in this attenuation curve is somewhat affected by wind velocity and direction, and by other factors.

From an examination of the recorded data, it appears that the Columbia Gardens recorder located 6 miles below the Smelter, is above the knee of the attenuation curve. The Waneta recorder, 10 miles below the Smelter, is still in the region of very rapid decrease of sulphur dioxide while the Northport recorder, 19 miles below the Smelter, is well below the knee of the curve. There is very little variation in the average ratio of concentrations between the various recorders. For example, the average ratio for the years 1932 to 1935, between Columbia Gardens and Northport, was 1 to .31, while the average ratio for the experimental period from May, 1938, to November, 1940, was 1 to .39. The individual variations from this ratio are relatively small. The ratio between Columbia Gardens and Waneta for the period 1932 to 1935 was .6 and that for the period May 1938, to November 1940, was .75. The individual variations of the ratio between Columbia Gardens and Waneta are, however, much greater than those between Columbia Gardens and Northport. It is accordingly found that the Columbia Gardens recorder and the Northport recorder give as complete a picture of the attenuation of sulphur dioxide with distance as can be obtained with any reasonable number of recorders.

It may be fairly assumed that the sulphur dioxide concentration at Columbia Gardens will fall off quite rapidly with distance away from the Smelter, and that a concentration very close to that recorded at Northport will be reached several miles above Northport. Concentrations recorded at intermediate points are functions of a number of variables other than distance from the Smelter. It may be generally assumed that the concentration in the neighborhood of the border will be from .6 to .75 of that recorded at Columbia Gardens. Individual variations, however, are likely to be somewhat greater than this, and in unusual instances concentrations near the border may be substantially equal to those at Columbia Gardens.

Although as a result of the investigations carried out by the Technical Consultants, the conclusion might be warranted that the Waneta recorder could be discontinued, it has, nevertheless, been decided to have it main-

tained for a limited period of further investigations, particularly as it was removed from its present location during one winter season of the trial period. As an alternative to Waneta, a location suggested by the United States, Gunderson Farm (on the west bank of the river in Section 12, T. 40, R. 40), was considered. The difficulties inherent in servicing a recorder in that location, particularly in winter time, would not be compensated, it was thought, by any appreciable advantages. It was further considered that Waneta—a location practically identical to that of Boundary which the United States' scientists had selected in the past—jutting out as it does almost into the middle of the Columbia Valley where it swerves to the west, is one of the best sites that could be chosen for a recorder in that vicinity. The Tribunal, having gone into the matter with great care, is convinced that this choice is not adversely affected by the vicinity of the narrow gorge of the Pend-d'Oreille River.

(*b*)

The year is divided into two parts, which correspond approximately with the summer and winter seasons: *viz.*, the growing season which extends from April 1 through the summer to September 30, and the non-growing season which extends from October 1 through the winter to April 1. Atmospheric conditions in the Columbia River Valley during the summer vary widely from those in the winter. During the summer, or growing season, the air is generally in active movement with little tendency toward extended periods of calm, and smoke from the Smelter is rapidly dispersed by the frequent changes in wind direction and velocity and the higher degree of atmospheric turbulence. During the winter, or non-growing season, calm conditions may prevail for several days and smoke from the Smelter may be dispersed only very slowly.

In general, a similar variation in atmospheric stability occurs during the day. The air through the early morning hours until about nine o'clock is not subject to very rapid movement, but from around ten o'clock in the morning until late at night there is usually more wind and turbulence, with the exception of a quiet spell which often occurs during the late afternoon.

During the growing season, there is furthermore a marked diurnal variation of wind changes whose maximum frequency occurs at noon for the general direction from north to south and at seven o'clock in the evening for the general direction from south to north. This diurnal variation of wind changes does not occur so frequently during the non-growing season.

During the growing season, the descent of sulphur dioxide to the earth's surface is more likely to occur at some hours than at others. At about nine to ten o'clock in the morning, there is usually a very pronounced maximum of fumigations, and this morning fumigation occurs with such regularity that it has been the practice of the Smoke Control Office at the Smelter for some time to cut down the emission of sulphur to the atmosphere during the early morning hours and to keep it down until from eight to eleven o'clock in the morning. The amount and duration of the cut are determined after an analysis of the wind velocity and direction, and of the conditions of turbulence or diffusion of the smoke. This is a fundamental feature of the program of smoke control, and the main reason for its success is that it prevents accumulations of sulphur dioxide which tend to descend from higher elevations when the early morning sun disturbs the thermal balance by heating the earth's surface. This early morning diurnal fumigation reaches

all recorders in the valley almost simultaneously, the intensity being usually highest near the Smelter. The concentration of sulphur dioxide during this type of fumigation rises as a rule very rapidly to a maximum in a few minutes and then drops off exponentially, only traces often remaining after two or three hours. A similar diurnal fumigation, usually of shorter duration, is occasionally observed in the early evening due to a disturbance of the thermal balance as the sun sets.

Sulphur dioxide sampling by airplane has indicated that in calm weather and especially in the early morning hours, the effluent gases hold to a fairly well-defined pattern in the early stages of their dispersion. The gases rise about 400 feet above the top of the two high stacks, then level out and spread horizontally along the main axis of the prevailing wind movement. During the relatively quiet conditions frequently found in the early morning, an atmospheric stratum carrying fairly high concentrations of sulphur dioxide and spreading over a large area may be formed.

With the rising of the sun, the radiational heating of the atmosphere near the surface may disturb the thermal balance, resulting in the descent of the sulphur dioxide which had accumulated in the upper layers at approximately 2,400 feet elevation above mean sea level, and extending either upstream or down-stream from the Smelter, depending on wind direction. This readily explains the simultaneous appearance of sulphur dioxide at various distances from the Smelter.

During the non-growing season, the non-diurnal type of fumigation predominates. In this type, the sulphur dioxide leaving the stacks is carried along the valley in a general drift of air, diffusing more or less uniformly as it advances. From two to eight hours are usually required for the smoke to get from Trail to Northport when the drift is down river. Such fumigations are not recorded simultaneously on the various recorders but the gas is first noted nearest the Smelter and then in succession at the other recorders. The concentration at a given recorder often shows very little variation as long as it lasts, which might be for several days depending entirely upon wind velocity and direction.

It is an interesting fact that the agricultural growing season and the non-growing season coincide almost exactly with the periods in which diurnal and non-diurnal fumigations respectively, are dominant. The transition from diurnal to non-diurnal fumigations and *vice versa* occurs in September and April. Diurnal fumigations sometimes occur during the non-growing season but with much less frequency and regularity than during the growing season, and at a later hour because of the later sunrise in winter. Similarly, the non-diurnal type sometimes occurs during the growing season. Its manifestations are then the same as during the winter, the chief difference being that it rarely lasts as long.

Sulphur dioxide recorders can be used to assist in smoke control during both the growing and non-growing season. They are more useful in the latter season, however, because in a non-diurnal fumigation, the gas usually appears at Columbia Gardens some time before it reaches Northport, and high concentrations recorded at the former location serve as warnings that more sulphur dioxide is being emitted than can adequately be dispersed under the prevailing atmospheric conditions. This information may lead to a decrease in the amount of sulphur dioxide emitted from the Smelter in time to avoid serious consequences. With the diurnal type of fumigations, on the other hand, high concentrations of sulphur dioxide may descend from the upper atmosphere to the surface with little or no warning, and the

only adequate protection against this type of fumigation is to prevent accumulations of large amounts of sulphur dioxide, either up or down stream, at or just before the periods when diurnal fumigations may be expected.

(*c*)

Observations over a period of years have indicated that there is little likelihood of gas being carried across the international boundary if the wind in the gas-carrying levels, approximately 2,400 feet above mean seal level, is in a direction not included in the 135° angle opening to the westward starting with north, and has a velocity sufficient to insure that no serious accumulation of smoke occurs. A recording cup anemometer and an anemovane suspended 300 feet above the surface, 1,900 feet above mean sea level, from a cable between the tops of the zinc stack and a neighboring lower stack, indicate the velocity and direction of the wind reliably except when the velocity or direction of the wind at this level differs from that in the gas-carrying level 500 feet or more higher. An attempt has been made to use the geostrophic wind forecasts made by the Weather Bureau at Vancouver for predicting the velocity and direction of the wind at these higher levels, but the results, although promising, have not yet been sufficiently certain to warrant the use of geostrophic winds as a factor in smoke control. (For further details, see Report of the Technical Consultants.)

(*d*)

A very significant factor in determining how much sulphur dioxide can safely be emitted by the Smelter is the rate of eddy current diffusion. When the rate of diffusion is low, smoke may accumulate in parts of the valley. Such accumulations frequently occur up-stream from the Smelter when there is a light up-river breeze.

The main factors governing the rate of diffusion of sulphur dioxide are the turbulence and lapse rate of the air. Turbulence is used instead of the more homely term gustiness to express the action of eddy currents in the air stream. Turbulence, therefore, is expressed in terms of changes in wind velocity over definite intervals of time, and may be measured by observations on standard anemometers, as has been done during the early stages of these meteorological studies. It has been found, however, that different observers using this method of measurement were not in agreement when the changes in velocity occurred rapidly and were of great intensity. It was furthermore found that the sensitivity of standard anemometers was not sufficient to give the desired precision. A number of modifications have been made which have led finally to the design and construction of an instrument called the Bridled Cup Indicator, which is more sensitive than any of the other instruments used, and is also free from personal error in the reading of the instrumental record.

(*e*)

There are several limitations to the application of the turbulence criterion. On a number of occasions, marked fumigations have occurred when the instrument showed that the turbulence was good or excellent. On every occasion of that sort which has been studied, pilot balloon observations revealed that there was a strong down-river wind from the surface of the

valley floor to about 2,500 feet above mean sea level. At about 4,000 feet, however, the height to which the valley sides reached, conditions were calm or very nearly so. Ordinarily, with good turbulence, the sulphur dioxide would be rapidly diffused upward and rise above the sides of the valley without difficulty. The non-turbulent condition at 4,000 feet associated with the calm layer acts effectively as a blanket, preventing the escape of the gas through the top of the valley. The turbulence in the lower layers serves then only to distribute the sulphur dioxide more or less uniformly in the valley. There is no exit through the top, and the gas moves down the valley with no lateral diffusion, in much the same way as if it were flowing along in a giant pipe. This type does not occur very frequently, but when it does, the sulphur dioxide recorder at Columbia Gardens must be used to prevent the building up of high concentrations in the valley. That is the type of fumigation which can be controlled most readily by means of such a recorder.

(*f*)

Another difficulty with the turbulence condition is that, especially during the daytime in summer, the turbulence recorder may indicate very little turbulence, but the diffusion may nevertheless be quite satisfactory. That is because turbulence does not cover all aspects of diffusion and some other factors, such as the lapse rate, must be taken into account.

Lapse rate, which is the technical term for the change of temperature in any given unit interval of height, is inter-related with wind velocity and turbulence, but each may contribute separately in the slow carrying upward of smoke by means of convection currents. Unfortunately, the measurement of lapse rate and its application in smoke control have not yet been fully developed. (For further details, see Final Report of the Technical Consultants.)

(*g*)

The behavior of the air in the valley is influenced also by other general meteorological conditions. For example, experience has shown that when the relative humidity of the air is high, particularly during periods of rain or snow, caution must be used in emitting sulphur dioxide to the atmosphere. Again, when the barometer is steady, weather conditions such as wind direction and velocity, diffusion conditions, etc., are not liable to change. Similarly, unfavorable conditions are likely to persist until the barometer changes noticeably. This suggests a generalization which will be found to hold not only for barometric changes but also for most of the other factors that have been found to influence sulphur dioxide distribution; that fumigations occur chiefly during the period of disturbance that accompanies transitional stages in meteorological conditions.

(*h*)

It has been found by the Technical Consultants that meteorological conditions at the Smelter sometimes prevail under which the instrumental readings at the level where the instruments now are or may be located do not fully reflect the degree of turbulence in the atmosphere at the higher gas-carrying levels. Under those conditions, it is possible that visual observations by trained observers may sometimes determine the turbulence more accurately. Where by such visual observations the conclusion shall be

reached that the turbulence at higher levels is definitely better than at the level of the instruments, the load can sometimes be safely increased from the maximum allowable as determined by the instruments under the régime herein prescribed. Conversely, where by such visual observations the conclusion shall be reached that the turbulence at higher levels is definitely worse than at the level of the instruments, it will be the duty of the Smelter (and to its advantage in lessening risk of injurious fumigation) to reduce the load from the maximum allowable as determined by the instruments under the régime herein prescribed.

The Tribunal in the régime has taken into consideration this factor of visual observations, to a limited extent and in the non-growing season only. If further experience shall show in the future that more use can be made of this factor, the clause of the régime providing for a method of its alteration may be utilized for a future development of this factor provided it shall appear that it can be done without risk of injury to territory south of the boundary.

(*i*)

The Tribunal is of opinion that the régime should be given an uninterrupted test through at least two growing periods and one non-growing period. It is equally of opinion that thereafter opportunity should be given for amendment or suspension of the régime, if conditions should warrant or require. Should it appear at any time that the expectations of the Tribunal are not fulfilled, the régime prescribed in Section 3 (*infra*) can be amended according to Paragraph VI thereof. This same paragraph may become operative if scientific advance in the control of fumes should make it possible and desirable to improve upon the methods of control hereinafter prescribed; and should further progress in the reduction of the sulphur content of the fumes make the régime, as now prescribed, appear as unduly burdensome in view of the end defined in the answer to Question No. 2, this same paragraph can be invoked in order to amend the régime accordingly. Further, under this paragraph, the régime may be suspended if the elimination of sulphur dioxide from the fumes should reach a stage where such a step could clearly be taken without undue risks to the United States' interests.

Since the Tribunal has the power to establish a régime, it must equally possess the power to provide for alteration, modification or suspension of such régime. It would clearly not be a "solution just to all parties concerned" if its action in prescribing a régime should be unchangeable and incapable of being made responsive to future conditions.

(*j*)

The foregoing paragraphs are the result of an extended investigation of meteorological and other conditions which have been found to be of significance in smoke behavior and control in the Trail area. The attempt made to solve the sulphur dioxide problem presented to the Tribunal has finally found expression in a régime which is now prescribed as a measure of control.

The investigations made during the past three years on the application of meteorological observations to the solution of this problem at Trail have built up a fund of significant and important facts. This is probably the most thorough study ever made of any area subject to atmospheric pollution by industrial smoke. Some factors, such as atmospheric turbulence and

the movement of the upper air currents have been applied for the first time to the question of smoke control. All factors of possible significance, including wind directions and velocity, atmospheric temperatures, lapse rates, turbulence, geostrophic winds, barometric pressures, sunlight and humidity, along with atmospheric sulphur dioxide concentrations, have been studied. As said above, many observations have been made on the movements and sulphur dioxide concentrations of the air at higher levels by means of pilot and captive balloons and by airplane, by night and by day. Progress has been made in breaking up the long winter fumigations and in reducing their intensity. In carrying finally over to the non-growing season with a few minor modifications a régime of demonstrated efficiency for the growing season, there is a sound basis for confidence that the winter fumigations will be kept under control at a level well below the threshold of possible injury to vegetation. Likewise, for the growing season a régime has been formulated which should throttle at the source the expected diurnal fumigations to a point where they will not yield concentrations below the international boundary sufficient to cause injury to plant life. This is the goal which this Tribunal has set out to accomplish.

The Tribunal has carefully considered the suggestions made by the United States for a régime by which a prefixed sum would be due whenever the concentrations recorded would exceed a certain intensity for a certain period of time or a certain greater intensity for any twenty minute period.

It has been unable to adopt this suggestion. In its opinion, and in that of its scientific advisers, such a régime would unduly and unnecessarily hamper the operations of the Trail Smelter and would not constitute a "solution fair to all parties concerned".

SECTION 3.

In order to prevent the occurrence of sulphur dioxide in the atmosphere in amounts, both as to concentration, duration and frequency, capable of causing damage in the State of Washington, the operation of the Smelter and the maximum emission of sulphur dioxide from its stacks shall be regulated as provided in the following régime.

I. Instruments.

A. The instruments for recording meteorological conditions shall be as follows:

(*a*) Wind Direction and Wind Velocity shall be indicated by any of the standard instruments used for such purposes to provide a continuous record and shall be observed and transcribed for use of the Smoke Control Office at least once every hour.

(*b*) Wind Turbulence shall be measured by the Bridled Cup Turbulence Indicator. This instrument consists of a light horizontal wheel around whose periphery are twenty-two equally-spaced curved surfaces cut from one-eighth inch aluminium sheet and shaped to the same-sized blades or cups. This wind-sensitive wheel is attached to an aluminium sleeve rigidly screwed to one end of a three-eighth inch vertical steel shaft supported by almost frictionless bearings at the top and bottom of the instrument frame. The shaft of the wheel is bridled to prevent continuous rotation and is so

constrained that its angle of rotation is directly proportional to the square of the wind velocity. One complete revolution of the anemometer shaft corresponds to a wind velocity of 36 miles per hour and, with eighteen equally spaced contact points on the commutator, one make and one break in the circuit is equivalent to a change in wind velocity of two miles per hour, recorded on a standard anemograph. (For further detail, see the Final Report of the Technical Consultants, p 209.)

The instruments noted in (*a*) and (*b*) above, shall be located at the present site near the zinc stack of the Smelter or at some other location not less favorable for such observations.

(*c*) Atmospheric temperature and barometric pressure shall be determined by the standard instruments in use for such meteorological observations.

B. Sulphur dioxide concentrations shall be determined by the standard recorders, which provide automatically an accurate and continuous record of such concentrations.

One recorder shall be located at Columbia Gardens, as at present installed with arrangements for the automatic transcription of its record to the Smoke Control Office at the Smelter. A second recorder shall be maintained at the present site near Northport. A third recorder shall be maintained at the present site near Waneta, which recorder may be discontinued after December 31, 1942.

II. Documents.

The sulphur dioxide concentrations indicated by the prescribed recorders shall be reduced to tabular form and kept on file at the Smelter. The original instrumental recordings of all meteorological data herein required to be made shall be preserved by the Smelter.

A summary of Smelter operation covering the daily sulphur balances shall be compiled monthly and copies sent to the Governments of the United States and of the Dominion of Canada.

III. Stacks.

Sulphur dioxide shall be discharged into the atmosphere from smelting operations of the zinc and lead plants at a height no lower than that of the present stacks.

In case of the cooling of the stacks by a lengthy shut down, gases containing sulphur dioxide shall not be emitted until the stacks have been heated to normal operating temperatures by hot gases free of sulphur dioxide.

IV. Maximum Permissible Sulphur Emission.

The following two tables and general restrictions give the maximum hourly permissible emission of sulphur dioxide expressed as tons per hour of contained sulphur.

GROWING SEASON

	Turbulence Bad		Turbulence Fair		Turbulence Good		Turbulence Excellent
	(1) Wind not favorable	(2) Wind favorable	(3) Wind not favorable	(4) Wind favorable	(5) Wind not favorable	(6) Wind favorable	(7) Wind not favorable and favorable
Midnight to 3 a.m. . .	2	6	6	9	9	11	11
3 a.m. to 3 hrs. after sunrise	0	2	4	4	4	6	6
3 hrs. after sunrise to 3 hrs. before sunset	2	6	6	9	9	11	11
3 hrs. before sunset to sunset	2	5	5	7	7	9	9
Sunset to midnight . .	3	7	6	9	9	11	11

NON-GROWING SEASON

	Turbulence Bad		Turbulence Fair		Turbulence Good		Turbulence Excellent
	(1) Wind not favorable	(2) Wind favorable	(3) Wind not favorable	(4) Wind favorable	(5) Wind not favorable	(6) Wind favorable	(7) Wind not favorable and favorable
Midnight to 3 a.m. . .	2	8	6	11	9	11	11
3 a.m. to 3 hrs. after sunrise	0	4	4	6	4	6	6
3 hrs. after sunrise to 3 hrs. before sunset	2	8	6	11	9	11	11
3 hrs. before sunset to sunset	2	7	5	9	7	9	9
Sunset to midnight . .	3	9	6	11	9	11	11

General Restrictions and Provisions.

(*a*) If the Columbia Gardens recorder indicates 0.3 part per million or more of sulphur dioxide for two consecutive twenty minute periods during the growing season, and the wind direction is not favorable, emission shall be reduced by four tons of sulphur per hour or shut down completely when the turbulence is bad, until the recorder shows 0.2 part per million or less of sulphur dioxide for three consecutive twenty minute periods.

If the Columbia Gardens recorder indicates 0.5 part per million or more of sulphur dioxide for three consecutive twenty minute periods during the non-growing season and the wind direction is not favorable, emission shall be reduced by four tons of sulphur per hour or shut down completely when the turbulence is bad, until the recorder shows 0.2 part per million or less of sulphur dioxide for three consecutive twenty minute periods.

(*b*) In case of rain or snow, the emission of sulphur shall be reduced by two (2) tons per hour. This regulation shall be put into effect immediately when precipitation can be observed from the Smelter and shall be continued in effect for twenty (20) minutes after such precipitation has ceased.

(*c*) If the slag retreatment furnace is not in operation the emission of sulphur shall be reduced by two (2) tons per hour.

(*d*) If the instrumental reading shows turbulence excellent, good or fair, but visual observations made by trained observers clearly indicate that there is poor diffusion, the emission of sulphur shall be reduced to the figures given in column (1) if wind is not favorable, or column (2) if wind is favorable.

(*e*) When more than one of the restricting conditions provided for in (*a*), (*b*), (*c*), and (*d*) occur simultaneously, the highest reduction shall apply.

(*f*) If, during the non-growing season, the instrumental reading shows turbulence fair and wind not favorable but visual observations by trained observers clearly indicate that there is excellent diffusion, the maximum permissible emission of sulphur may be increased to the figures in column (5). The general restrictions under (*a*), (*b*), (*c*) and (*e*), however, shall be applicable.

Whenever the Smelter shall avail itself of the foregoing provisions, the circumstances shall be fully recorded and copy of such record shall be sent to the two Governments within one month.

(*g*) Nothing shall relieve the Smelter from the duty of reducing the maximum sulphur emission below the amount permissible according to the tables and the preceding general restrictions and provisions, as the circumstances may require for the prudent operation of the plant.

V. Definition of Terms and Conditions

(a) Wind Direction and Velocity—The following directions of wind shall be considered favorable provided they show a velocity of five miles per hour or more and have persisted for thirty minutes at the point of observation, namely north, east, south, southwest, and intermediate directions, that is any direction not included in the one hundred and thirty-five (135) degree angle opening to the westward starting with north.

All winds not included in the above definition shall be considered not favorable.

(b) Turbulence—The following definitions are made of bad, fair, good, and excellent turbulence. The figures given are in terms of the Bridled Cup Turbulence Indicator for a period of one half hour:

Bad Turbulence	0-74
Fair Turbulence	75-149
Good Turbulence	150-349
Excellent Turbulence	350 and above

If at any time another instrument should be found to be better adapted to the measurement of turbulence, and should be accepted for such measure-

ment by agreement of the two Governments, the scale of this instrument shall be calibrated by comparison with the Bridled Cup Turbulence Indicator.

VI. Amendment or Suspension of the Régime.

If at any time after December 31, 1942, either Government shall request an amendment or suspension of the régime herein prescribed and the other Government shall decline to agree to such request, there shall be appointed by each Government, within one month after the making or receipt respectively of such request, a scientist of repute; and the two scientists so appointed shall constitute a Commission for the purpose of considering and acting upon such request. If the Commission within three months after appointment fail to agree upon a decision, they shall appoint jointly a third scientist who shall be Chairman of the Commission; and thereupon the opinion of the majority, or in the absence of any majority opinion, the opinion of the Chairman shall be decisive; the opinion shall be rendered within one month after the choice of the Chairman. If the two scientists shall fail to agree upon a third scientist within the prescribed time, upon the request of either, he shall be appointed within one month from such failure by the President of the American Chemical Society, a scientific body having a membership both in the United States, Canada, Great Britain and other countries.

Any of the periods of time herein prescribed may be extended by agreement between the two Governments.

The Commission of two, or three scientists as the case may be, may take such action in compliance with or in denial of the request above referred to, either in whole or in part, as it deems appropriate for the avoidance or prevention of damage occurring in the State of Washington. The decision of the Commission shall be final, and the Governments shall take such action as may be necessary to ensure due conformity with the decision, in accordance with the provisions of Article XII of the Convention.

The compensation of the scientists appointed and their reasonable expenditures shall be paid by the Government which shall have requested a decision; if both Governments shall have made a request for decision, such expenses shall be shared equally by both Governments; provided, however, that if the Commission in response to the request of the United States shall find that notwithstanding compliance with the régime in force damage has occurred through fumes in the State of Washington, then the above expenses shall be paid by the Dominion of Canada.

SECTION 4.

While the Tribunal refrains from making the following suggestion a part of the régime prescribed, it is strongly of the opinion that it would be to the clear advantage of the Dominion of Canada, if during the interval between the date of filing of this Final Report and December 31, 1942, the Dominion of Canada would continue, at its own expense, the maintenance of experimental and observational work by two scientists similar to that which was established by the Tribunal under its previous decision, and has been in operation during the trial period since 1938. It seems probable that a continuance of investigations until at least December 31, 1942, would provide additional valuable data both for the purpose of testing the effective operation of the régime now prescribed and for the purpose of obtaining information as to the possibility or necessity of improvements in it.

The value of this trial period has been acknowledged by each Government. In the memorandum submitted by the Canadian Agent, under date of December 28, 1940, while commenting on the expense involved, it is stated (p. 8):

> The Canadian Government is not disposed to question in the least the value of the trial period of three years or to underestimate the great benefits that have been derived from the investigations carried on by the Tribunal through its Technical Consultants.

The Agent for Canada at the hearing on December 11, 1940 (Transcript, p. 6318) stated:

> We have had the benefit of an admirable piece of research in fumigations conducted by the Technical Consultants, and we have had the advantage of all of their studies of meteorological conditions. . . .

The Counsel for Canada (Mr. Tilley), in a colloquy with the American Member of the Tribunal at the hearing on December 12, 1940 (Transcript, pp. 6493-6494) said:

> JUDGE WARREN: We stated very frankly to the Agents that we were prepared in March (1938) to render a final decision but that we thought it would be highly unsatisfactory to both parties to do so unless we had some experimentation.
>
> Mr. TILLEY: There is no doubt about that—quite properly, if I may say so, with deference.
>
> JUDGE WARREN: We were trying to do this for the benefit of both parties. We were prepared to answer the questions.
>
> Mr. TILLEY: Nothing could have been more in the interests of the parties concerned than what you did.

In the memorandum submitted by the United States Agent, under date of January 7, 1949, while explaining the reasons for the inability of the United States to offer concrete suggestions in relation to a proposed régime, other than the régime suggested by the United States, it is stated (p. 11):

> It should be understood that the drafting of this Memorandum has not been undertaken in an attempt to minimize the importance of the excellent work performed by meteorologists of the Government of Canada under the direction of the Technical Consultants and their undoubtedly meritorious contribution. . . .

The Counsel for the United States (Mr. Raftis) at the hearing on December 9, stated (Transcript of Record, p. 6080, p. 6089):

> I will say at the outset that I believe the meteorological studies which we (were?) conducted have been very helpful. They have been undoubtedly gone into at considerable length with a definite effort to put the finger on the problem which has been confronting us now for some fifteen years. . . . As I say, I think these studies have been most helpful, because up to that time we had more or less only to leave to conjecture what happened when these gases left the stacks; we did not know through any definite experiments what became of this gas problem.

The scientist employed by the United States, Mr. S. W. Griffin, in his report submitted November 30, 1940, relating to the Final Report of the Technical Consultants, stated (p. 3):

> Regarding the investigations of the Canadian meteorologists in working out the complicated air movements which take place over this irregular terrain, there can be no doubt of the value of their contribution in adding much to the knowledge, both of a fundamental and detailed character, to that which previously existed.
>
> (p. 5) It remains to be determined whether or not the three year period of experimentation may eventually bring about a permanent abeyance of harmful sulphur dioxide fumigations, south of the international boundary. However this may be, there can be little doubt that the knowledge gained in some of the researches described in the report is sufficiently fundamental in character and broad in application that, if published, the work should be of interest and value to any smelter management engaged in processes which pollute the air with sulphur dioxide.

PART FIVE.

The fourth question under Article III of the Convention is as follows:

> What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?

The Tribunal is of opinion that the prescribed régime will probably remove the causes of the present controversy and, as said before, will probably result in preventing any damage of a material nature occurring in the State of Washington in the future.

But since the desirable and expected result of the régime or measure of control hereby required to be adopted and maintained by the Smelter may not occur, and since in its answer to Question No. 2, the Tribunal has required the Smelter to refrain from causing damage in the State of Washington in the future, as set forth therein, the Tribunal answers Question No. 4 and decides that on account of decisions rendered by the Tribunal in its answers to Question No. 2 and Question No. 3 there shall be paid as follows: (*a*) if any damage as defined under Question No. 2 shall have occurred since October 1, 1940, or shall occur in the future, whether through failure on the part of the Smelter to comply with the regulations herein prescribed or notwithstanding the maintenance of the régime, an indemnity shall be paid for such damage but only when and if the two Governments shall make arrangements for the disposition of claims for indemnity under the provisions of Article XI of the Convention; (*b*) if as a consequence of the decision of the Tribunal in its answers to Question No. 2 and Question No. 3, the United States shall find it necessary to maintain in the future an agent or agents in the area in order to ascertain whether damage shall have occurred in spite of the régime prescribed herein, the reasonable cost of such investigations not in excess of $7,500 in any one year shall be paid to the United States as a compensation, but only if and when the two Governments determine under Article XI of the Convention that damage has occurred in the year in question, due to the operation of the Smelter, and "disposition of claims for indemnity for damage" has been made by the two Governments; but in no case shall the aforesaid compensation be payable in excess of the indemnity

for damage; and further it is understood that such payment is hereby directed by the Tribunal only as a compensation to be paid on account of the answers of the Tribunal to Question No. 2 and Question No. 3 (as provided for in Question No. 4) and *not* as any part of indemnity for the damage to be ascertained and to be determined upon by the two Governments under Article XI of the Convention.

PART SIX.

Since further investigations in the future may be possible under the provisions of Part Four and of Part Five of this decision, the Tribunal finds it necessary to include in its report, the following provision:

Investigators appointed by or on behalf of either Government, whether jointly or severally, and the members of the Commission provided for in Paragraph VI of Section 3 of Part Four of this decision, shall be permitted at all reasonable times to inspect the operations of the Smelter and to enter upon and inspect any of the properties in the State of Washington which may be claimed to be affected by fumes. This provision shall also apply to any localities where instruments are operated under the present régime or under any amended régime. Wherever under the present régime or any amended régime, instruments have to be maintained and operated by the Smelter on the territory of the United States, the Government of the United States shall undertake to secure for the Government of the Dominion of Canada the facilities reasonably required to that effect.

The Tribunal expresses the strong hope that any investigations which the Governments may undertake in the future, in connection with the matters dealt with in this decision, shall be conducted jointly.

(*Signed*) JAN HOSTIE.
(*Signed*) CHARLES WARREN.
(*Signed*) R. A. E. GREENSHIELDS.

ANNEX.

I. *Letter from the Members of the Tribunal to the Secretary of State of the United States and Secretary of State for External Affairs of Canada, May* 6, 1941.

TRAIL SMELTER ARBITRAL TRIBUNAL.
UNITED STATES AND CANADA.

710 MILLS BUILDING,
WASHINGTON, D.C.
May 6, 1941.

SIR:

The Trail Smelter Arbitral Tribunal has received from its scientific advisers in that case, a letter dated April 28, 1941, copy of which is herewith enclosed. The members of the Tribunal think that it is their duty in transmitting this letter to both Governments, to declare that the statement contained therein is the correct interpretation of Clause IV, Section 3 of Part Four of the Decision reported on March 11, 1941.

Respectfully yours,

JAN HOSTIE.
CHARLES WARREN.
R. A. E. GREENSHIELDS.

II. *Letter from the Technical Consultants to the Chairman of the Trail Smelter Arbitral Tribunal, April* 26, 1941.

REGINALD S. DEAN.

1529 ARLINGTON DRIVE,
SALT LAKE CITY, UTAH.
April 28, 1941.

DR. JAN F. HOSTIE,
Trail Smelter Arbitral Tribunal,
710 Mills Building,
Washington, D.C.

DEAR DOCTOR HOSTIE:

A critical reading of the text of Part IV, Section 3 (IV) of the decision of the Tribunal reported on March 11, 1941, reveals a situation which, after careful consideration, we feel should be brought to your attention. Under the heading "Maximum Permissible Sulphur Emission" it is stated that the two tables and the general restrictions which follow give the maximum hourly permissible emission of sulphur dioxide expressed as tons per hour of contained sulphur.

If a strict interpretation were placed on this statement as it stands, it would lead often to a complete shut-down of all operations at the Smelter. For example, if the turbulence is bad and the wind not favorable, no sulphur may be emitted. Of course, it was intended that these stipulations were to govern Dwight and Lloyd roasting operations. Small amounts of sulphur dioxide will necessarily escape from the blast furnace and other operations in the Smelter, but these have never been specifically designated in any of the régimes which we have laid down, simply because they are insignificant in amount. In the orderly administration of this final régime, all who have been connected with the previous régimes would not fall within the above stipulation. If, however, the strictest possible interpretation were insisted upon the results would not only be disastrous to the Smelter, but clearly outside of the intended scope of the régime. Tail gases have been recognized all along as a normal part of the smelting operation.

The situation would be fully clarified if the following changes were made in the statement on page 74, Section 3 (IV): The following two tables and general restrictions give the maximum hourly permissible emission of untreated sulphur dioxide from the roasting plants expressed as tons per hour of contained sulphur.

I regret that such a possible interpretation of the régime was not noted by us when it was being formulated. It is brought to your attention now in order to put on record this possible misinterpretation of the régime as it is now worded.

Yours sincerely,

ROBERT E. SWAIN,
R. S. DEAN,
Technical Consultants.