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COMPENDIUM
of Judicial Decisions on Matters Related to Environment

International Decisions

Volume I

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INTERNATIONAL DECISIONS

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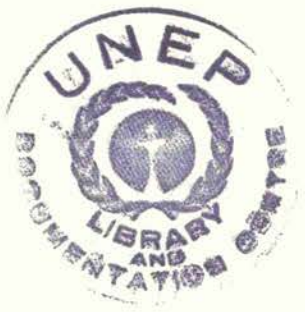

December 1998

INTERNATIONAL DECISIONS

CONTENTS

INTRODUCTION

This publication has been developed in pursuance of the aims of Agenda 21 which recognizes, among other things, the need to facilitate information exchange, including the dissemination of information on environmental law.

The compendium of judicial decisions was devised with two objectives. First, it aims to create awareness and enthusiasm among lawyers and non-lawyers alike on the current trends in the jurisprudence related to environmental matters. Second, it aims to provide resource materials for reflecting on specific pieces of court decisions from the point of view of scope and perspective, grounded as they are in the unique legal traditions and circumstances of different countries and legal jurisdictions.

The promotion of sustainable development through legal means at national and international levels has led to recognition of judicial efforts to develop and consolidate environmental law. The intervention of the judiciary is necessary to the development of environmental law, particularly in implementation and enforcement of laws and regulatory provisions dealing with environmental conservation and management. Thus, an understanding of the development of jurisprudence as an element of the development of laws and regulations at national and international levels is essential fore long term harmonization, development and consolidation of environmental law, as well as its enforcement. Ultimately, this should promote greater respect for the legal order concerning environmental management.

Indeed, when all else fail, the victims of environmental torts turn to the judiciary for redress. But today's environmental problems are challenging to legislators and judges alike by their novelty, urgency and dispersed effect. Over the last two decades, many countries have witnessed a dramatic increase in the volume of judicial decisions on environmental issues as a result of global and local awareness of the link between damage to human health and to the ecosystem and a whole range of human activities. In many countries, the judiciary has responded to this trend by refashioning legal – sometimes age old – tools to meet the demands of the times, with varying degrees of success. But such practices have hardly taken root in Africa where not much judicial intervention has been in evidence.

The complexity of environmental laws and regulations at national and international levels makes it necessary for today's legal practitioners, particularly from Africa, urgently to assimilate and understand the concepts and principles arising from the developing jurisprudence. Only then would they be able to respond appropriately to the growing environmental challenges. In most countries, awareness of the potential of judicial intervention in the environmental field has grown largely because citizens bring proceedings in courts; while in other countries the effectiveness of the judicial mechanisms are still poor because of lack of information and a dearth of human and material resources. This is compounded by the weaknesses of institutions in charge of environmental law enforcement. This Compendium is produced in the belief that this bottleneck can be overcome by the provision of information, such as is contained in the Compendium. The information will be a resource for training and awareness creation.

It is vital today that lawyers in all countries keep abreast of the jurisprudence in other countries, in order to appreciate pertinent changes and trends in their own countries. Comparative study of judicial intervention offers a formidable avenue for the enforcement of environmental law and the vindication of public rights. Courts have to entertain environmental suits and decide on the law in each specific context. As stressed by Raymond Avrilier in *"l'Ecologie à l'épreuve du droit"*, "legal practitioners must understand and tackle questions of current policies, scope of administrative competence and conflicting expert evidence in environmental cases".

Given the novelty of environmental law, this Compendium is a unique opportunity for practitioners, particularly those from Africa, where case law is still scarce, to raise their level of awareness and sensitivity to ecological concerns and to share their experiences on possible approaches to resolving environmental disputes.

The Compendium is divided into national decisions and international decisions, each numbered Volume 1. It is anticipated that after one year subsequent volumes will be published of either national decisions or international decisions, as the availability of materials and resources permit, and if the response to this Volume indicates that demand for such material exists. The volume on national decisions is itself divided into parts reflecting emerging themes in environmental litigation. However these themes provide only a loose grouping, and the reader would be well advised to read the cases without undue attention to the grouping adopted here, as in many instances, the themes

recur in several cases. Secondly, the first part of the volume contains cases in the English language which are drawn from the common law jurisdictions while the second part contains cases in the French language which are drawn from the civil law system. In both cases the reproduction of the cases is preceded by an overview and analysis of the cases. This is in the English language for both the English language and French language decisions. The decisions at international level contains judgements from the International Court of Justice as well as of arbitral tribunals. No particular thematic division has been attempted for these. The cases are reproduced simply in chronological order.

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II. BACKGROUND TO THE INTERNATIONAL JUDICIAL SYSTEM

The International Court of Justice

A fundamental principle of the Charter of the United Nations is the pacific settlement of disputes between member states. This is dealt with in Chapter VI of the Charter. Article 33(1) provides as follows:

"The parties to any dispute the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies, or other peaceful means of their own choice".

Article 36(3) states that legal disputes should, as a general rule, be referred by the parties to the International Court of Justice (ICJ) in accordance with the provisions of the Statute of the Court. However Article 95 states that this shall not prevent members of the UN from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Chapter XIV deals with the International Court of Justice. Article 92 stipulates that the ICJ shall be the principal judicial organ of the United Nations. Article 93 provides that all members of the United Nations are *ipso facto* parties to the Statute of the ICJ. Article 94(2) deals with the enforcement of decisions of the ICJ. It provides that if any party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgement.

The Statute of the International Court of Justice is based upon the Statute of its predecessor, the Permanent Court of International Justice. Article 36 of the Statute deals with the jurisdiction of the Court. It gives to the Court compulsory jurisdiction in only those cases in which parties have declared that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court. The kinds of legal disputes with which the Court may deal are set out in Article 36(2) as follows:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.

Arbitration

Promoting peaceful settlement of disputes remains one of the most important and most difficult objectives of the international legal order. Though it is complex in nature, Article 33 of the Charter of the United Nations lists arbitration among the methods of peaceful settlement. A number of interpretations of this method in literature is discernible since some decades. Arbitration is seen as an *"equitable means of settlement of legal disputes by the application of legal rules, principles and techniques"*.

Arbitration as a means of settlement of disputes offers considerable flexibility as to the legal status of the Parties and the legal techniques used.

The development of the inter-State arbitration is often taken as one gauge of the efficacy of the rule of law in the international legal system. Where notification confirms the existence of a conflict of interests, or where affected states request it, consultation and negotiation are required.

Sources of International Law

Article 38, which is considered as an authoritative statement on the sources of international law, deals with the sources of law which the ICJ is to apply in determining disputes referred to it.

These are:

(a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting parties;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognised by civilised nations;

(d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

Article 38(2) states that the Court has the power to decide a case *ex aequo et bono*, if the parties agree thereto.

Like the rest of the Statute of the ICJ Article 38 originates from the statute that governed the ICJ's predecessor, the Permanent Court of International Justice. The sources of international law which it sets out are drawn from the traditional sources. It does not ascribe any role to recently emergent "soft law" sources, such as the resolutions and declarations of the United Nations and other international institutions which have come to occupy a position of such prominence in the development of international environmental law.

International conventions, or treaties, are agreements whereby two or more states establish a relationship between themselves governed by international law. In the hierarchy of sources, treaties come first. If there is a treaty between the disputing parties that is relevant to the dispute reference will be made to it before resorting to the other sources.

Treaties have recently overtaken international custom as a source. But prior to the Second World War, international law consisted primarily of doctrines, principles and rules developed through the customary practice of States. Customary international law addresses issues unregulated by treaties and other sources of law, facilitates the interpretation of treaties and paves the way for the codification of doctrines, principles and rules through treaties. International custom is constituted by two elements: state practice and the belief that the practice is obligatory as a matter of law *(opinion juris)*.

The phrase "general principles of law recognised by civilised nations" was included in the Statute of the Permanent Court of International Justice to assist in the resolution of cases where neither treaty law nor customary law provides the solution to a dispute. General principles of law therefore provide a residuary source of law, ensuring that there is no gap in the law. The phrase refers not to the rules of law themselves but to the general propositions underlying the various rules of law, such as the principle that no one shall be judge in his own cause.

Judicial decisions, which includes also arbitral awards and decisions on international law in national courts, have only subsidiary value as sources of law. Indeed, Article 59 of the Statute of the ICJ stipulates that decisions of the ICJ in contentious cases have no binding force except as between the parties and in respect of the case under consideration. Nevertheless the ICJ and other tribunals attempt to follow their own previous rulings to ensure a measure of predictability in the development of international law.

Article 38(2) gives the Court power to decide a case *et aequo et bono,* that is, according to what is fair and appropriate, if the parties to the case agree. This provision gives power to reach a just decision given the facts of the case, regardless of whether the decision conforms to the law. For the Court to do this the parties must agree, and this rarely happens.

The Concept of "Soft Law"

In recent years, declarations and resolutions of the United Nations and other intergovernmental agencies have increasingly been cited as evidence of international law. This has been the case particularly in relation to newly emerging concerns such as human rights and environmental conservation.

Whereas the ICJ is a judicial organ, the other UN bodies, such as the General Assembly and the Security Council are political organs. The extent to which their pronouncements can be seen as contributing to the development of

international law is therefore controversial.

The General Assembly does not have law making powers. Its resolutions and declarations are not legally binding. However, they carry considerable moral and political authority which can be characterised as a "soft law" effect. They can also influence the creation of new international law. For instance they may enunciate principles or rules which subsequent state practice adopts as customary law, or which are subsequently incorporated into treaties. They may constitute evidence of state practice to which reference can be made in judicial pronouncements. It has also been argued that, in exceptional cases, such as of unanimity, they may have the effect of creating law. That positions articulated by States in the General Assembly can lead to binding legal obligations has been put beyond doubt by the **Nuclear Tests Cases**. Whether this can be extended to cover positions adopted by states in voting in the General Assembly is still disputed.

The conceptual dispute notwithstanding it is impossible to ignore the "soft law" effect of resolutions and declarations of international fora, particularly in the environmental conservation and human rights fields. Examples of declarations with this "soft law" effect include the 1972 Stockholm Declaration on the Human Environment and the 1992 Rio Declaration on Environment and Development, whose principles of sustainable development (relied on by Judge Weeramantry in his dissent in the **Gabcikovo-Nagymaros Case**), impact assessment, participation, precaution, and polluter pays have become reference points.

SELECTED DECISIONS

In this Compendium, the following decisions have been selected as illustrating principles of international environmental law:

1. **Trail Smelter Case**, United States of America versus Canada (1938 and 1941)

2. **Affaire du Lac Lanoux**, Espagne versus France, (1957) [in French].

3. **Nuclear Test Cases**, Australia versus France and New Zealand versus France, (1974)

4. **Fisheries Jurisdiction Cases,** United kingdom of Great Britain and Northern Ireland versus Iceland and Federal Republic of Germany versus Iceland (1974)

5. **Case Concerning the Gabcikovo-Nagymaros Project,** Hungary versus Slovakia (1997)

6. **Stichting Greenpeace Council v Commission of European Communities (1998)**

III. OVERVIEW AND ANALYSIS OF SELECTED INTERNATIONAL DECISIONS

1. Trail Smelter Case

(i) Background

The case commenced with a special agreement referred to as the Convention for settlement of difficulties arising from operation of smelter at Trail, B.C., signed between the US and Canada on 15 April 1935. In Articles II and III of the Convention the parties agree to constitute a tribunal to decide:

(a) whether damage caused by the Trail Smelter has occurred since 1 January 1932, and if so, what indemnity should be paid therefore?

(b) if so, whether the Trail Smelter should be required to refrain from causing damage in the future and, if so, to what extent?

(c) if so, what measures or regime should be adopted or maintained by the Trail Smelter?

(d) what indemnity or compensation should be paid on account of any decisions rendered by the Tribunal?

Article IV provided that the Tribunal was to apply the law and practice followed in the USA as well as international law and practice.

The dispute arose as a result of damage occurring in the territory of the US due to activity of a smelter situated in Canada. The damage arose from sulphur dioxide fumes which were emitted from the smelter. It was claimed that the height of stacks increased the area of damage in the US. In 1927 the US proposed that the matter be referred to the International Joint Commission for investigation. Its report was presented in 1931. It determined that up to 1 January 1932 the damages incurred by the US should be compensated in the sum of US $350,000. Two years after this Report the US indicated to Canada that damage was still occurring and negotiations were renewed leading to the signing of the Convention.

(ii) The Award

On 16 April 1938 the Tribunal gave its decision in the first and fourth questions. It found that damage had been caused in US territory by the Trail Smelter since 1 January 1932 up to 1 October 1937 and that the indemnity to be paid for the damage was US $78,000 as the complete and final indemnity and compensation for all damage which occurred between such dates. The Tribunal postponed a final decision on the remaining questions, and on the existence of damage, if any, and the indemnity to be paid occurring after 1 October 1937 to a later date to enable further studies to be conducted to determine an appropriate regime to be set up.

On 11 March 1941 the Tribunal gave its final decision on the remaining questions. The Tribunal needed to determine whether the Trail Smelter should be required to refrain from causing damage in the US in the future. It observed that no case of air or water pollution dealt with by an international tribunal had been brought to its attention. It therefore would rely on decisions of the Supreme Court of the United States which could be taken as a guide in the field of international law in so far as they had dealt with controversies between the various federal states of the US. The Tribunal held that these decisions provided an adequate basis for holding that under the principles of international law, as well as 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 Tribunal found therefore that Canada was responsible in international law for the conduct of the Trail Smelter. It had a duty to see to it that conduct was in conformity with Canada's obligations under international law. Accordingly the Trail smelter would be required to refrain from causing any damage through fumes in the US. The Tribunal decided, finally, that, to prevent future damage, a regime of control, which it stipulated, would be applied to the operations of the Smelter.

2. Lac Lanoux Case

The *Lac Lanoux* arbitration case involving France and Spain shows how the process of prior consultation and negotiation has been interpreted by an international arbitral tribunal, not only as a treaty stipulation, (specifically the Bayonne Treaty of 1866 between France and Spain), but more generally as a principle of customary law.

Background

The Lac Lanoux negotiations began in 1917. The case was put to arbitration in 1956.

Lake Lanoux is located on the French side of the Pyrenees mountain chain. It is fed by many streams rising in France and running only in the French territory. However, its waters also run into the headwaters of the river Carol which, some 25 kilometres from the lake, do cross the Spanish frontier at Puigcerda, having previously fed the Canal of Puigcerda, which is the private property of that town. After some 6 kilometres in Spanish territory, the Carol joins the Segre, which ultimately flows into the Ebro. The frontier between France and Spain was fixed by the Treaty of Bayonne, 1866 and an additional Act thereto, whereby regulations were made for the joint use of the water resources.

Spain alleged that certain plans proposed by France would adversely affect Spanish rights and interests contrary to the Treaty, and could only be undertaken with prior consent of both Parties.

Award

In the light of the agreement between the two countries (treaty of Bayonne, 1866, and Additional Act), the tribunal found that the conflicting interests aroused by the industrial use of international rivers must be reconciled by mutual concessions embodied in the agreements which needed to be interpreted. In the present case, the Tribunal was of the opinion that "the French scheme complied with the obligations of Article 11....In carrying out without prior agreement between the two Governments, works for the utilization of the waters of Lake Lanoux...and brought to the notice of the representatives of Spain...., the French Government was not committing a breach of the provisions of the Treaty of Bayonne...or of the Additional Act".

The Tribunal said that, because the question before it related uniquely to a treaty of 1866, the tribunal would apply the treaty if it was clear. But if interpretation was necessary, the tribunal would turn to international law, allowing it in this case to take account of the "spirit" of the *Pyrennées treaties* and *"des règles du droit international commun"*, and also consider certain rules of customary international law in order to proceed to the interpretation of the Treaty and the Act.

Commentary

The tribunal discussed the applicable law because the Parties (France and Spain) disagreed on this issue of international rights and obligations of States sharing common natural resources such as water. Consultations and negotiation in good faith are necessary not only as a mere formality, but as an attempt to conclude an agreement for the prevention of conflicts.

3. Nuclear Tests Cases

Like the **Fisheries Jurisdiction Cases the Nuclear Tests Cases** were two, with the facts being the same in all material respects. The fist case was between Australia and France while the second was between New Zealand and France.

(i) Background

Between 1966 and 1972 France had conducted atmospheric tests of nuclear weapons in the territory of French Polynesia in the South Pacific Ocean. This had released into the atmosphere radioactive matter. France created "prohibited zones" for aircraft and "dangerous zones" for aircraft and shipping, in order to exclude aircraft and shipping from the area. These zones had been put into effect during the period of testing in each year in which the tests had been carried out.

The tests released into the atmosphere radioactive matter. The main firing site was Mururoa atoll, 6000 kilometres east of Australia. Australia asserted that the tests caused some fallout of radioactive matter to be deposited on its territory. France maintained that the radioative matter produced by the tests were so infinitesimal that it was negligible, and that it did not constitute a danger to the health of Australian population.

In May 1993 Australia instituted proceedings against in the ICJ. It asked for a declaration that the carrying out of further atmospheric nuclear weapon tests was not consistent with the applicable rules of international law, and an order that France not carry out further tests. Australia asked for, and obtained, interim orders that France should avoid further tests. France declined to accept the Court's jurisdiction and did not participate in the proceedings. The Court ruled however that it had jurisdiction to hear the case.

Australia claimed that France had violated the following rights:

(a) a right possessed by every state to be free from atmospheric nuclear tests conducted by any state arising from what is now a generally accepted rule of customary international law prohibiting all such tests;

(b) a right inherent in Australia's own territorial sovereignity to be free from the deposit on her territory and dispersion in her air space, without her consent, of radioactive fall-out from the nuclear tests. The mere fact of the trespass from the fall-out, the harmful effects which flow from such fall-out and the impairment of her independent right to determine what acts shall take place within her territory are all violations of this right; (c) a right derived from the character of the high seas as *res communis*, and possessed by Australia in common with all other maritime states to have freedom of the high seas respected by France and, in particular, to require her to refrain from (1) interference with the ships and air craft of other states on the high seas and superadjacent air space and (2) pollution of the high seas by radioactive fall-out.

(ii) The legality of atmospheric nuclear weapons tests

The Court held that before deciding on the legality of the tests it needed to examine, as a preliminary matter, whether or not there was a dispute between the parties. The Court therefore had to consider whether Australia requested a judgement which would only state the legal relationship between it and France with regard to the matters in issue or a judgement which required one or both of the parties to take, or to refrain from taking, some action. In other words, the Court had to decide the true object and purpose of the claim.

The Court observed that Australia's objective was to bring about the termination of the French atmospheric nuclear tests. It had repeatedly sought to obtain from France a permanent undertaking to refrain from further atmospheric tests but France had refused to give one. The Court held that it was clear that if France had given a firm, explicit and binding undertaking to refrain from further atmospheric tests, Australia would have regarded its objective as having been achieved. Therefore, Australia's claim could not be regarded as a claim for a declaratory judgement since such a declaration would only be a means to an end, which was the cessation of the French nuclear tests.

The Court observed that, in the months following the commencement of the proceedings, France had made public its intention to cease the conduct of atmospheric nuclear tests at the end of the 1974 series of tests, and move on to underground tests. This was stated by, among others, France's President at a press conference, its Minister for Defence on television and its Minister for Foreign Affairs in the UN General Assembly.

The Court held that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Further, that when it was the intention of the State making the declaration that it should become bound according to its terms, that intention conferred on the declaration the character of a legal undertaking, the state being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with the intention to be bound, was binding without the need for any acceptance or reply from other States. And that whether the statement was written or oral made no difference.

The Court held therefore that, in announcing that the 1974 series of tests would be the last, the French Government conveyed to the world at large its intention to terminate the tests. In light of this development Australia's objective had in effect been accomplished in as much as France had undertaken to hold no further atmospheric tests. These declarations had caused the dispute between the parties to disappear. Therefore, no further judicial action was required as there was nothing on which to give judgement.

(iii) Minority opinions

A number of minority opinions remarked on the fact that the Court had not ruled on the lawfulness or otherwise of France's atmospheric nuclear tests which, in their view, was the gist of the dispute.

Several judges pointed out that in order to succeed Australia would have had to show that its claim for prohibition of further tests was based on conduct by the French government which was contrary to the rules of international law. In other words, what Australia would have had to show was that there existed a rule of customary international law whereby states were prohibited from causing, through atmospheric nuclear tests, the deposit of radioactive fall-out on the territory of other states. In order to be bale to determine the dispute it would have been necessary for the Court to consider, at the outset, whether such a rule of customary law existed.

To ascertain whether such a rule did exist the attitude of states towards these tests had to be examined. There was no evidence that a sufficient number of states, economically and technically capable of manufacturing nuclear weapons, refrained from carrying out atmospheric nuclear tests because they considered that customary international law forbade it. Further, states on whose territory radioactive fall-out from atmospheric tests had been deposited had not protested on the basis that this was a breach of customary international law. Australia itself had given support to the United Kingdom and the United States whenever these countries conducted atmospheric nuclear tests. This was an admission by Australia that such tests were not contrary to international law since, according to Judge Gros, "what is laudable on the part of some states [cannot be considered] execrable on the part of others." Thus, it could not be said that a rule of customary international law forbidding such tests existed.

A second weakness in Australia's case related to whether Australia possessed the standing to institute the proceedings. Any nuclear explosion in the atmosphere gives rise to radioactive fallout over the whole of the hemisphere where it takes place. Australia was only one of the many territories on whose territory France's tests had given rise to the deposit of radioactive fall-out. This raised the question whether, in the case of a right possessed by the international community as a whole, an individual state, independent of material damage to itself, was entitled to seek the respect of that right by another state. This question would also have needed to be determined at the outset.

(iv) Commentary

It is clear that the Court side stepped the real dispute between the parties, perhaps because of an acute consciousness of the fact that, France having declined to participate in the proceedings would not comply with an adverse ruling. Therefore, whereas the case raised important questions of international environmental law, these were not substantively dealt with.

4. Fisheries Jurisdiction Cases

There are two cases concerning fisheries jurisdiction, one between the UK and Iceland, and the other between Germany and Iceland. The cases were determined separately but are on all fours in all material repects.

(i) Background

In 1948 Iceland passed a law called "Law concerning the scientific conservation of the Continental Shelf Fisheries." This gave the Ministry of Fisheries power to establish conservation zones within Iceland's continental shelf and to issue regulations for the protection of fishing grounds within those zones. This move was prompted by the "progressive impoverishment" of the fishing grounds arising out of the increased efficiency of fishing gear used. Iceland therefore sought to establish an exclusive fishing zone around its coastline, reserved for its nationals only, as a way of conserving the fisheries.

In 1952 Iceland established a fishery zone extending to 4 miles from its coastline. The UK, who traditionally fished in the area, protested the establishment of the zones. In 1958 Iceland extended the fishery limits to 12 miles and prohibited all fishing activities by foreign vessels within the 12 mile zone. The UK refused to accept the 12 mile limit and its vessels continued to fish within the zone. The UK and Iceland commenced negotiations in order to resolve

their differences. In 1961 they reached an agreement which provided that (a) the UK would no longer object to the 12 mile zone; (b) UK vessels would continue to fish within the zone for three years; and (c) Iceland would continue to work for the extension of its fisheries jurisdiction but would give the UK six months notice of such extension, and in case of dispute, the matter would be referred to the ICJ.

In 1971 Iceland decided to extend its fisheries jurisdiction to 50 miles with effect from 1st September 1972. The UK protested. In the talks that followed the UK proposed that Iceland's objectives of conserving the fisheries in issue could be achieved by a catch limitation agreement. The UK expressed readiness to recognise Iceland's preferential requirements on account of its dependence on the fisheries. Iceland rejected the catch limitation approach.

The UK referred the dispute to the ICJ in accordance with the 1961 Agreement. Iceland declined to recognise the Court's jurisdiction but the Court held that it had jurisdiction under the 1961 Agreement and proceeded to determine the case. The UK asked the Court to declare that the claim by Iceland to a zone of exclusive fisheries jurisdiction extending to 50 miles is without foundation in international law, and that as against the UK, Iceland was not entitled unilaterally to assert exclusive fisheries jurisdiction beyond the limits agreed to in 1961.

(ii) The law on fisheries conservation

The Court observed that two concepts had crystallised as customary law in recent years. The first was the concept of the fishery zone, the area in which a state may claim exclusive fishery jurisdiction independently of its territorial sea, which had now been extended by general consensus to 12 miles. The second was 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. The concept was particularly applicable in situations where, 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. In such a case, where intensification in the exploitation of fisheries resources makes it imperative to introduce some system of catch limitation and sharing of the resources, special consideration is to be given to the coastal state whose population is overwhelmingly dependent on the fishing resources in its adjacent waters.

The Court observed further that the concept of a 12 mile fishery zone had been accepted by the parties in the 1961 Agreement, as had the concept of preferential rights. At the same time the UK's historic fishing rights in these same waters had been acknowledged. The Icelandic regulations, on their part, were issued as a claim to exclusive rights, going beyond the concept of preferential rights and seeking to establish an exclusive fishery zone in which all foreign fishing vessels would be prohibited.

The Court held that the concept of preferential rights was not compatible with the exclusion of all fishing activities of other states. The concept implied a certain priority, but not the extinction of the concurrent rights of other states, and particularly of a State which, like the UK, had for many years fished in the waters in question. Therefore the fact that Iceland was entitled to claim preferential rights did not justify its claim unilaterally to exclude the UK's fishing vessels in the waters beyond the 12 mile limit. Indeed, given the UK's own dependence on the fishing in these waters, the conservation and efficient exploitation of the fish stocks in issue were of importance to both the parties. Consequently, the Icelandic regulations establishing a zone of exclusive fisheries jurisdiction extending to 50 miles could not be applied to UK fishing in the area.

An equitable solution required that Iceland's preferential fishing rights be reconciled with the UK's traditional rights. This could not be achieved through the extinction of the UK's fishing rights. The parties should therefore negotiate in order to define the extent of each other's rights.

(iii) Minority opinions

A number of members of the Court observed that the Court's decision had focused on specifying the conditions for the exercise of preferential rights, for conservation of fish species, and historic rights, rather than on answering the question whether Iceland's claims were in accordance with the rules of international law. The judgement was based on the circumstances and special characteristics of the case in dispute. It did not rule on the UK's main contention, i.e that there was a customary rule of international law prohibiting extensions by states of their exclusive fisheries jurisdiction beyond 12 miles. In the view of these members of the Court, such a rule did not exist.

5. Gabcikovo-Nagymaros Case

(i) The Background

This is the most recent of the international environmental law decisions to be handed down by the International Court of Justice. It is also the case which most directly raises issues relating to sustainable development and the equitable sharing of natural resources.

The case arose out of a treaty signed in 1977 between Hungary and Czechoslovakia. Following the partition of Czechoslovakia in 1993 Slovakia took the place of Czechoslovakia under the Treaty.

The Treaty provided for the construction and operation of a barrage system on the section of the Danube River within the two countries. This was to be a joint investment to produce hydroelectricity, improve navigation on the relevant section of the Danube and protect areas along the banks against flooding. The Parties undertook to ensure that the Project did not impair the quality of the water in the Danube, and that nature would be protected in the course of the construction and operation of the system.

The Treaty provided for the building of two series of locks, one at Gabcikovo (in Slovak territory) and the other at Nagymaros (in Hungarian territory). The two locks were to constitute "a single and indivisible operational system of works." The cost of the joint investment was to be borne by the two parties in equal measure and parties were to participate in equal measure in the use of the system.

Work on the project started in 1978. Due to domestic criticism focusing on the economic and environmental implications of the project, Hungary suspended the works at Nagymaros in May 1989 pending the completion of various studies. Later, in October 1989 it abandoned the works altogether. By this time work on the Gabcikovo sector was well advanced, with the most advanced sections being 95% complete while the least advanced were up to 60% complete. On the Nagymaros sector, on the other hand, very little work had been done.

Czechoslovakia protested Hungary's suspension, and subsequent abandonment, of the works. Prior to Hungary's abandonment of the works negotiations to find a solution commenced. These eventually proved fruitless and, in May 1992, Hungary terminated the Treaty.

While negotiations were ongoing, Czechoslovakia started investigating alternative solutions. One of them, "Variant C", entailed a diversion of the Danube by Czechoslovakia on its territory and the construction, also on its territory, of a reservoir with a storage capacity about 30% less than that of the one initially contemplated. Work on Variant C began in November 1991 and, in October 1992, Czechoslovakia put it into operation without the involvement of Hungary.

In April 1993 the parties agreed to submit the dispute to the ICJ. They requested the Court to decide, first, "whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcokovo Project for which the Treaty attributed responsibility to the Republic of Hungary." Secondly, the parties asked the court to decide whether "the Czech and Slovak Republic was entitled to proceed, in November 1989, to the provisional solution, and put it into operation in October 1992." The Court was also asked to determine the legal consequences of its judgement on these questions.

(ii) Hungary's termination of the treaty

Hungary relied on a "state of ecological necessity" as justifying its termination of the treaty in 1989. It saw several ecological dangers from the works: the quality of the water would be impaired due to erosion and silting, there were risks of eutrophication and the fluvial fauna and flora would become extinct. Slovakia, on the other hand, denied the existence of a "state of ecological necessity." It argued that whatever ecological problems might have arisen could have been remedied.

The "state of necessity" is "the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another state."

The Court stated that the state of necessity is a ground recognised by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. For it to be successfully invoked the following conditions must be satisfied;

(a) it must have been occasioned by an essential interest of the State which has committed the act conflicting with one of its international obligations;

(b) that interest must have been threatened by a grave and imminent peril;

(c) the act being challenged must have been the only means of safeguarding that interest;

(d) that act must not have seriously impaired an essential interest of the State towards which the obligation existed; and

(e) the state which has committed the act must not have contributed to the occurrence of the state of necessity.

The Court accepted that Hungary's concerns about the effects of the project on its natural environment related to its essential interest: safeguarding the ecological balance has come, in the last two decades, to be considered an essential interest of all states. It held, however, that Hungary's uncertainties as to the ecological impact of the project could not, alone, establish the objective existence of a peril that could justify invoking state of necessity. The existence of a peril must be established at the relevant point in time, and the mere apprehension of a possible peril will not suffice since such peril must be grave and imminent. The environmental dangers highlighted by Hungary were mostly of a long term nature, and remained uncertain. Even if it could have been established that the project would ultimately have constituted a grave peril for the environment in the area, the peril was not imminent in 1989, the time when Hungary suspended and then abandoned the works. In any case, Hungary had means other than abandonment of the works, of responding to any such peril, for instance the adoption of mitigatory measures.

Therefore, on the first question, the Court held that Hungary was not entitled to suspend and subsequently abandon the project, and that it's notification of termination of the Treaty did not have the legal effect of terminating it.

(iii) Czechoslovakia's implementation of an alternative solution

Hungary considered that Variant C was a contravention of the 1977 Treaty, the convention ratified in 1976 regarding the water management of boundary waters, the principles of sovereignity, territorial integrity, the inviolability of state borders, as well as the general customary norms on international rivers and the spirit of the 1948 Belgrade Danube Convention. For its part, Czechoslovakia considered that recourse to Variant C had been rendered inevitable for economic, ecological and navigational reasons because of the unlawful suspension and abandonment of the works by Hungary.

Slovakia maintained that implementing Variant C did not constitute an internationally wrongful act. It argued that it had a right, in the face of Hungary's abandonment of the project, to implement a solution as close as possible to the original project, ie, the "principle of approximate application." Also, that it had a duty to mitigate the damage to itself resulting from Hungary's unlawful actions. Given the advanced state of the works on the Slovak side at the time of Hungary's termination of the Treaty, the economic loss and environmental prejudice arising out of a failure to put the system into operation would have been immense.

The Court, while acknowledging the serious problems facing Czechoslovakia on account of Hungary's actions, held that Variant C failed to meet the cardinal condition of the 1977 Treaty, that the project was to be a "joint investment constituting a single and indivisible operational system of works." This could not be carried out by unilateral action, such as Slovakia's. Moreover, the operation of Variant C led Slovakia to appropriate for its own use and benefit between 80 and 90% of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river. The Court held that the implementation of Variant C by Slovakia was an internationally wrongful act.

The Court considered whether the wrongfulness could be precluded on the ground that the measure was in response to Hungary's prior failure to comply with its obligations. It observed that for wrongfulness to be so precluded the countermeasure adopted must be commensurate with the injury suffered. The Court held that Czechoslovakia, by

unilaterally assuming control of a shared resource, thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube failed to respect the proportionality which is required by international law. Czechoslovakai'a diversion of the river was therefore not a justified countermeasure.

Therefore the Court held, on the second question, that whereas Czechoslovakia was entitled to proceed with the preparatory works for variant C it was not entitled to implement it.

(iv) Consequences of the Court's judgement

On the issue of the consequences of the Court's findings the Court held that, as the 1977 Treaty was still in force it would continue to govern the relationship between the Parties. Therefore, the Parties should to negotiate on how the Treaty's multiple objectives could still be fulfilled. The Court observed that the Project's impact upon, and implications for, the environment were a key issue and the that parties should look afresh at the effects on the environment of the operation of the power plant. Whatever solution is found by the parties must take account of the objectives of the Treaty, the norms of international environmental law and the principles of the law of international watercourses.

The Court suggested that one way in which the Parties could achieve these multiple objectives would be for them to re-establish the joint regime by making Variant C conform to the Treaty through the joint operation of the current works, and its modification to satisfy Hungary's environmental concerns. The Court stated further that the re-establishment of the joint regime would reflect the concept of common utilization of shared water resources in accordance with the Convention on the Law of the Non-Navigable Uses of International Watercourses, and would constitute the best solution in this instance.

(v) Minority Opinions

The Court's decision was not unanimous: there were both seperate, but concurring, opinions and dissenting opinions.

Judge Weeramantry gave a separate opinion focusing on the role played by the principle of sustainable development in balancing the competing demands of development and environmental protection, the principle of continuing environmental impact assessment and the use of principles such as estoppel for the resolution of *erga omnes* problems such as environmental damage.

Judge Weeramantry observed that had the possibility of environmental harm been the only consideration to be taken into account Hungary's contentions would have proved conclusive. But there were other factors to be taken into account, not least the developmental aspect. The Project was important to Slovakia from the point of view of development. Therefore the Court had to balance between the environmental and developmental considerations, which it could only do through the principle of sustainable development, which Judge Weeramantry considered to be an integral part of modern international law. This case marked the first occasion on which it had received attention in the jurisprudence of the Court.

On the principle of continuing environmental impact assessment Judge Weeramantry observed that this referred not merely to an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project was in operation. In this instance the principle of EIA was incorporated into the Treaty. Environmental law would read into treaties which may be considered to have significant impact on the environment, such as this one, a duty of monitoring the environmental impacts of the project during its operation since there has been growing international recognition of the concept of continuous monitoring as part of EIA.

On the issue of estoppel Judge Weeramantry suggested that *inter partes* adversarial procedures might not be suitable in resolving a case involving imminent serious or catastrophic environmental danger. He observed that international environmental law would need to proceed beyond weighing the rights and obligations of the parties within a closed compartment of individual state self-interest, unrelated to the global concerns of humanity as a whole. This case presented an opportunity for such reconsdieration.

(iv) Commentary

This judgement marks an important milestone in the development of the ICJ's jurisprudence on international environmental law.

In the **Gabcikovo-Nagymaros Case** the Court held that Slovakia had committed an internationally wrongful act by implementing Variant C, though not in carrying out the preparatory works. The Court equated Slovakia's act with Hungary's act in terminating the Treaty. This set the stage for the it's direction to the parties to negotiate a settlement on an equal footing, both having been found at fault. However the ruling has justifiably been criticised as not supportable on the facts. Clearly, there would not have been any point in Slovakia carrying out works which it could not put into operation. In his seperate opinion, Judge Koroma expressed disatisfaction with this aspect of the Court's judgement and observed that "justice would have been enhanced had the Court taken account of the special circumstances [justifying Slovakia's actions]." Other members of the Court also dissented from this aspect of the judgement.

6. Stichting Greenpeace Council v. Commission of the European Communities

By this case Greenpeace challenged the Commission's decision to disburse funds to Spain to construct two power stations in the Canary islands. The basis of the challenge was the alleged failure to carry out an environmental impact assessment study in accordance with European Community requirements. Greenpeace relied on the provisions governing the disbursment of structural funds which provides that "Measures financed by the Funds or receiving assistance from the European Investment Bank or from other existing financial instruments shall be in keeping with the provisions of the Treaties, with instruments adopted thereto and without Community policies, including those concerning ... environmental protection."

The Commission objected to the challenge on the basis of, inter alia, the *locus standi* of Greenpeace to bring the action. The Court upheld the challenge, pointing out that under Community law required that a party coming to Court must be affected by an act in manner which differentiated him from all other persons.

TRAIL SMELTER CASE

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 regime 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 regime to prevent future damages.-Indemnity or compensation on account of decision or decisions rendered.

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.

[1] U.S. Treaty Series No. 893

Article II

The Government 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 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 regime, 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 completed, 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 documen-

tary, as may be presented by the Government 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 re-

pute", 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 regime, 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 Country 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 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 authorising 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 regime 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 Judgement 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 North-port is located on the east bank of the river, about nineteen 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 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 form 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 1^0 (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 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 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. (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 form 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 sulphuric acid units for the purpose of reducing the amount of sulphur discharged

form 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 form the lead smelter, but that there is still a certain amount of sulphur content in the fumes form he 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 6,8000 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 fumigation 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 causing 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 int he 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 judgement 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 bet judgement 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 ap-

> pearance 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 appoint 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 favourable 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 precincts 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 form 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 fumigation.

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 maybe 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 0 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 and 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 land sin 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 neighbourhood of the boundary.

It has been contended that the death of trees and shrubs due too fumigation has had an injurious affection 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 fora 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 form the decisions in suits in the courts of the State of Washington on claims for damages from fumigations in this area[2]. 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.

> "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 int his 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

[2] 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. Part 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.

(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 i 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 send 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 tyres 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, as 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 not 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 Duglas fir and yellow pine rarely germinate more than one year after they are shed[3], 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

[3] 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).

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[4]. 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 form 1923 to 1936, averaged slightly below seventeen inches. With all these considerations in mind, the 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 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 damage of this nature

[4] Applied Silviculture in the United States, by R.H. Westveld (1935).

"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 1, 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 regime, 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 regime, 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 regime 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 regime based on the more adequate and intensive study and knowledge above referred to, the Tribunal establishes the following temporary regime.

(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, un-

der 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 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 regime 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 east 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 form 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 regime 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 paragraph 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 Judgement 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 regime, 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 northen part of Stevens Country 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; 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 regime 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. I 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 regime (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 regime 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 regime.

In order to supervise the conduct of the temporary regime 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 has 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 regime, 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, to 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 26o 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[5]. 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[6].

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.

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 favourable 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

[5] 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".

[6] For the Precint 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.

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, 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 large at 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 SO2 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 SO2 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 determine 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 Unites States Government, on February 17, 1933, made repre-

sentations 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 shut-down 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 and 127 tons of sulphur per day for those two years, respectively, were emitted as sulphur dioxide to the atmosphere.

NORTHPORT

(FUMIGATION 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	2 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 4i 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	September
.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
.11-.25	5 20	18 20	27 20	28 0
.25-.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

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 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 it 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 regime. 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 regime 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 favour 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 regime 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 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. Falston'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 tribu-

nal 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: 2... 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, Judgement 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 judgement (Judgement No. 11, Series A, No. 13, pp. 18, 20 - Chorzow 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 (Judgement 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 (Judgement II, 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 judgement in which the preliminary question has been decided?" It is true that, when the case came up again on the question of indemnity (Judgement 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 Chorzow factory should be looked upon differently for the purposes of that judgement (the previous Judgement 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 of reparation based on the same judgement", 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 investiga-

tion 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 compromise 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, La Abra, 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 issued be decided by he 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 Trial 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 judgement 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 judgement 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 Screck, 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 judgement" (*de Neuflize v. Disconto Gesellschaft, Recueil des Décisins des Tribunaux Arbitraux Mixtes,* l. VII, 1928, 629)[7]

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 critized 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 or 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 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-

[7] 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.

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 one and a half 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 one and a quarter miles at the border to a quarter 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, R41; it extends along Cedar Crrek 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 purpose. 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 factor 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 drought, 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 form 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 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. What-

ever 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 mention 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 the 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 judgement 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.[8]

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 October, 1937, 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 SO2 fumes being carried across the international boundary in air pockets or by reason of unusual

[8] 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).

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 states 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 Washington 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 laws 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 odours 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 he 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 regime 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, therefor, 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 regime, 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 regime 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 regime 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 stack 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 regime.

The previous decision finally prescribed that the Dominion of Canada should undertake to provide for the payment of the expenses resulting form this temporary regime.

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 form 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 regimes 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 regime, 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 know 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 attenuating 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 neighbourhood 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 arranged that the Waneta recorder could be discontinued, it has, nevertheless, been decided to have it maintained 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 form 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 states 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, 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 form the upper atmosphere to the surface with little or no warning, and the only adequate protection against this type of fumigation is to prevent accumulation 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 dif-

fusion 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 interrelated 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 bee 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 regime 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 regime herein prescribed.

The Tribunal in the regime 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 regime 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 regime 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 regime, if conditions should warrant or require. Should it appear at any time that the expectations of the Tribunal are not fulfilled, the regime 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 regime, 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 regime accordingly. Further, under this paragraph, the regime 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 regime, it must equally possess the power to provide for alteration, modification or suspension of such regime. It would clearly not be a "solution just to all parties concerned" if its action in prescribing a regime 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 regime 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 regime 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 regime 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 regime 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 regime 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 regime.

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 details 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 3a.m.	2	6	6	9	9	11	11
3a.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 3a.m.	2	8	6	11	9	11	11
3a.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 retreatement 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 measurement 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 Regime.

If at any time after December 31, 1942, either Government shall request an amendment or suspension of the regime 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 regime 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 regime 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 ad 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 regime 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 regime, other than the regime 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 ....

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 regime 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 regime 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 regime, 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 answer 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 regime 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 an 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 at all reasonable times to inspect any of the properties in the State of Washington which may be claimed to be affected by fumes. This provisions shall also apply to any localities where instruments are operated under the present regime or under any amended regime. Wherever under the present regime or any amended regime, 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.

CHARLIE 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 Buildings

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 regimes which we have laid down, simply because they are insignificant in amount. In the orderly administration of this final regime, all who have been connected with the previous regimes 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 regime. Tail gases have been recognised 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 regime 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 regime as it is now worded.

Yours sincerely,

ROBERT E. SWAIN,

R.S. DEAN,

Technical Consultants.

AFFAIRE DU LAC LANOUX

PARTIES: **Espagne, France.**

COMPROMIS: **Compromis d'arbitrage du 19 Novembre 1956[1].**

ARBITRES: **Tribunal arbitral: Sture Petrén; Plimio Bolla, Paul Reuter; Fernand de Visscher, Antonio de Luna.**

SENTENCE: **16 Novembre 1957**

Utilisation des cours d'eaux internationaux — Projet français d'aménagement des eaux du lac Lanoux — Dérivation des eaux vers l'Ariège — Question de la nécessité de l'accord préalable de l'Espagne — Nécessité du recours à des négociations préalables — Souveraineté territorale de l'Etat — Limitations à la souveraineté — Interprétation des traités — Méthodes d'interprétation — Absence d'un système absolu et rigide d'interprétation — Appel à l'esprit des traités et aux règles du droit international commun — Relations de voisinage — Notion de "frontière zone" — Bonne foi — Compétence de la Commission internationale des Pyrénées — Absence en droit international commun d'une règle interdisant à un Etat, agissant pour la sauvegarde de ses intérêts légitimes, de se mettre dans une situtión qui lui permette, en fait, en violation de ses engagements internationaux, de préjudicier même gravement à un Etat riverain.

Utilization of international rivers — French development scheme for lake Lanoux. — Diversion of waters towards the river Ariège — Whether prior agreement with Spain is necessary — Necessity fo prior negotiations — Territorial sovereignty of a State — Limitations on — Treaty interpretation — Methods of interpretation — Absence of absolute and rigid methods of interpretation — Relevance of the spirit of treaty and of the rules of international common law — "Neighbourly relations" — Notion of the "boundary zone" — Good faith — Competence of the International Commission for the Pyrenees — Absence in international common law of any rule that forbids one State, acting to safeguard its legitimate interests, to put itself in a situation which would in fact permit it, in violation of its international pledges, seriously to injure a neighbouring State.

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SENTENCE DU TRIBUNAL ARBITRAL CONSTITUTE EN VERTU DU COMPROMIS D'ARBITRAGE ENTRE LES GOUVERNEMENTS FRANÇAIS ET ESPAGNOL SUR L'INTERPRÉTATION DU TRAITÉ DE BAYONNE EN DATE DU 26 MAI 1866 ET DE L'ACTE ADDITIONNEL DE LA MEME DATE CONCERNANT L'UTILISATION DES EAUX DU LAC LANOUX, 16 NOVEMBRE 1957[2]

Par un compromis signé à Madrid le 19 Novembre 1956,

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[1] Le texte du compromis se trouve incorporé dans la sentence.

[2] *Revue générale de droit international public,* t. LXII, 1958, p.79.

les Gouvernements français et espagnol ont convenu de soumettre à un tribunal arbitral d'interprétation du Traité de Bayonne du 26 Mai 1866 et de son Acte additionnel de la même date en ce qui concerne l'utilisation des eaux du Lac Lanous.

Le compromis d'arbitrage est redigé comme suit:

COMPROMIS D'ARBITRAGE SUR L'INTERPRÉTATION DU TRAITÉ DE BAYONNE DU 26 MAI 1866 ET DE SON ACTE ADDITIONNEL DE LA MEME DATE, CONCERNANT L'UTILISATION DES EAUX DU LAC LANOUX LE GOUVERNEMENT FRANÇAIS ET LE GOUVERNMENT ESPAGNOL

CONSIDÉRANT, d'une part, le projet d'utilisation des eaux du lac Lanoux notifié au Gouverneur de la province de Gérone le 21 Janvier 1954 et porté à la connaissance des repésentatants de l'Espangne à la Commission des Pyrénées lors de sa session tenue du 3 au 14 Novembre 1955, et les propositions présentées par la Délégation française à la Commission Mixte Spéciale le 13 décembre 1955; d'autre part, le projet et les propositions espagnols présentés lors de la séance du 2 mars 1956 de la même Commission et concernant l'aménagement des eaux du lac Lanoux,

CONSIDÉRANT que, de l'avis du Gouvernement français, la réalisation de son projet, en raison des modalitiés et garanties dont il est assorti, ne léserait aucun des droits ou intérêts visés au Traité de Bayonne du 26 Mai 1866 et à l'Acte additionnel de la même date;

CONSIDÉRANT que, de l'avis du Gouvernement espagnol la réalisation de ce projet léserait les intérêts et les droits espagnols, étant donné que, d'une part, il modifie les conditions naturelles du bassin hydrographique du lac Lanoux en détournant ses eaux vers l'Ariège et en faisant ainsi dépendre physiquement la restitution des eaux au Carol de la volonté humaine, ce qui entrainerait la prépondérance de fait d'une Partie au lieu de l'égalité

des deux Parties prévue par le Traité de Bayonne du 26 Mai 1866 et par l'Acte aditionnel de la même date; et que, d'autre part, ledit projet a, par sa nature, la portée d'une affaire de convenance générale *(asunto de conveniencia general),* relève comme tel de l'Article 16 de l'Acte additionnel et requiert en conséquence, pour son exécution, l'accord préalable des deux Gouvernements à défaut duquel le pays qui le propose ne peut avoir liberté d'action pour entreprendre les travaux,

N'AYANT PU ABOUTIR à un accord par voie de négociation,

SONT CONVENUS, par application de la Convention du 10 Juillet 1929, de constituer un tribunal arbitral appelé à trancher le différend et ont défini ainsi qu'il suit sa mission, sa composition et sa procédure:

ART. 1. - Le Tribunal sera prié de répondre à la question suivante:

Le Gouvernement français est-il fondé à soutenir qu'en exécutant, sans un accord préalable entre les deux Gouvernements, des travaux d'utilisation des eaux du lac Lanoux dans les conditions prévues au projet et aux propositions français visés au préambule du présent compromis, il ne commettrait pas une infraction aux dispositions du Traité de Bayonne du 26 Mai 1866 et de l'Acte additionnel de la même date?

ART. 2. - Le Tribunal sera composé d'un Président et de quatre membres.

Le Président sera nommé du commun accord des deux Parties. Chacune de celles-ci nommera deux membres, dont l'un seulement pourra être son national.

Le Tribunal sera constitué dans un délai de six semaines à compter de la signature du présent compromis. Si les Parties ne sont pas tombées d'accord dans ce délai sur le choix du Président, Sa Majesté le Roi de Suède sera priée de le désigner. En ce cas, le Tribunal sera constitué à la date de la nomination du Président.

ART. 3. - Les Parties déposeront chacune un mémoire dans un délai de trois mois à compter du jour de la constitution du Tribunal. Elles disposeront d'un délai de deux mois à compter de la communication des mémoires respectifs à chacune des Parties, dans les conditions prévues à l'article 5, pour déposer un contre-mémoire. La procédure orale s'ouvrira dans un délai d'un mois à compter de la communication des contre-mémoires. Sur demande formulée par l'une ou l'autre des Parties dix jours au moins avant l'expiration de ce délai, celui-ci pourra être prolongé d'un mois au maximum.

ART.4. - Le Tribunal siégera à Genève.

Les langues de travail seront le français et l'espagnol.

ART. 5. - Les communications prévues à l'article 3 seront faites au Président du Tribunal et aux Consulats généraux respectifs des Parties à Genève.

ART.6. - En ce qui concerne les points qui ne sont pas réglés par le présent compromis, les dispositions des articles 59, 60 al. 3, 62, 63 al. 3, 64 à 85 de la Convention du 18 Octobre 1907 pour le règlement pacifique des conflits internationaux sont applicables.

Les Parties se réservent de recourir à la faculté prévue à l'alinéa premier de l'article 83; elles exerceront, le cas

échéant, cette faculté dans un délai de six mois.

Le présent compromis entre en vigueur dès sa signature.

FAIT à Madrid, le 19 novembre 1956.

[L.S.] [L.S.]

Luis CARRERO-BLANCOGUY DE LA TOURNELLE

Sous-Secrétaire à la Présidence du Counseil
Ambassadeur de France

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Le Traité d'arbitrage entre la France et l'Espagne du 10 Juillet 1929 contient, entre autres, la disposition suivante:

ART. 2 - Tous les litiges entre les Hautes Parties contractantes, de quelque nature qu'ils soient, au sujet desquels les Parties se contesteraient réciproquement un droit et qui n'auraient pu être réglés à l'amiable par les procédés diplomatiques ordinaires, seront soumis pour jugement soit à un tribunal arbitral, soit à la Cour Permanente de Justice Internationale, ainsi qu'il est prévu ci-après. Il est entendu que les contestations ci-dessus visées comprennent celles que mentionne l'article 13 du Pacte de la Société des Nations.

Les contestations pour la solution desquelles une procédure spéciale est prévue par d'autres conventions en vigueur entre les Hautes Parties contractantes seront réglées conformément aux dispositions de ces conventions.

Conformément aux règles de l'article 2 du compromis, le Gouvernement français a nommé comme membres du Tribunal M. Plinio Bolla, ancien Président du Tribunal féderal Suisse, membre de la Cour permanente d'arbitrage, et M. Paul Reuter, professeur à la Faculté de droit de Paris.

Le Gouvernement espagnol a nommé comme membres du Tribunal M. Fernand de Visscher, professeur à l'Université de Louvain, et M. Antonio de Luna, professeur à l'Université de Madrid.

Les deux Parties n'ayant pu fixer, d'un commun accord, leur choix du Président dans les délais prévus dans l'article 2 du compromis elles ont prié Sa Majesté le Roi de Suède de le désigne., Faisant suite à cette demande, Sa Majesté a désigné, en Conseil, le 25 Janvier 1957, M. Sture Petrén, Envoyé extraordinaire et Ministre plénipotentiaire, membre de la Cour permanente d'Arbitrage, pour remplir cette fonction. Le Tribunal a donc été constitué à la date susmentionnée.

Conformément à l'article 3 du compromis, les deux Parties ont déposé chacune le 30 Avril 1957 un mémoire au sujet de l'affaire. Un contre-mémoire préparé par chacune des deux Parties, a été déposé le 31 juillet 1957.

En modifiant les dispositions de l'article 3 du compromis concernant le délai prévu pour l'ouverture de la procédure orale, les Parties ont demandé au Président du Tribunal de ne fixer l'ouverture des débats oraux qu'au 16 Octobre 1957.

Le Conseil fédéral helvétique a autorisé le Tribunal à siéger sur le territoire de la Confédération. Le Conseil d'Etat du Canton de Genève a bien voulu mettre à la disposition du Tribunal des locaux dans le Bâtiment Electoral à Genève. Le Tribunal a été convoqué dans ce lieu pour la date susmentionnée.

Les Parties furent représentées par leurs Agents, à savoir

pour le Gouvenement français: M. Lucien Hubert, Conseiller juridique du Ministrère de Affaires Étrangères, assisté par: M. le Professeur André Gros, Jurisconsulte du Ministère des Affaires Étrangères, MM. Duffaut, Inspecteur général des Ponts et Chaussées, Pierre Henry, Sous-Directeur au Ministère des Affaires Étrangères, Sermet, Professeur à la Faculté des Lettres de Toulouse, et par les experts: MM. Olivier-Martin, Directeur de l'Equipement de l'Électricité de France, Moulinier, Directeur de la région d'équipement hydraulique Garonne de l'Électricité de France, M^lle^ Françoise Duléry, Attachée au Service juridique du Ministère de Affaires Étrangères et pour le Gouvernement espagnol: M. Pedro Cortina Mauri, Ministre plénipotentiaire, membre de la Cour permanente d'arbitrage, assisté par: M. Juan M. Castro-Rial, Sous-directeur au Ministère des Affaires Étrangères, professeur de droit international.

Les débats oraux ont commencé le 17 Octobre 1957 et se sont terminés le 23 Octobre 1957. Aux questions posées par le Tribunal, après les débats oraux, les Agents de deux Gouvernements litigants ont répondu par écrit.

Le Tribunal a délibéré sa sentence au Bâtiment Electoral à Genève, et celle-ci fut lue en séance publique le 16 Novembre 1957 comme suit.

Le lac Lanoux est situé sur le versant Sud des Pyrénées et sur le territoire de la République Française, dans le département des Pyrénnées-Orientales. Il est alimenté par des ruisseaux qui tous prennent naissance sur le terriotire français et ne traversent que celui-ci. Ses eaux ne s'écoulent que par le ruisscau de Font-Vive, qui constitue une des origines de la rivière du Carol. Cette rivière, après avoir coulé sur environ 25 kilomètres comptés du lac Lanoux sur le territoire français, traverse à Puigcerda la frontière espagnole et continue à couler en Espagne sur environ 6 kilomètres avant de se joindre à la rivière du Sègre, laquelle finit par se jeter dans l'Ebre.

Avant d'entrer en Espagne, les eaux du Carol alimentent le canal de Puigcerda, lequel appartient à cette ville espagnole à titre de proprieté privée.

La frontière franco-espagnole a été fixée par trois traités successifs signés à Bayonne en date du 1er Décembre 1856, du 14 Avril 1862 et du 26 Mai 1866. Le dernier de ces traités fixe la frontière depuis le Val d'Andorre jusqu à la Méditerrannée.

Le Traité de Bayonne du 26 Mai 1866 contient, entre autres, les dispositions suivantes:

S.M. l'Empereur des Français et S.M. la Reine des Espagnes, désirant fixer d'une manière définitive la frontière commune de leurs Etats, ainsi que les droits, usages et privilèges appartenent aux populations limitrophes des deux Pays, entre le Département des Pyrénées-Orientales et la Province de Girone, depuis le Val d'Andorre jusqu à la Méditerranée, afin de compléter d'une mer à l'autre l'oeuvre si heureusement commencée et poursuivie dans les traités de Bayonne des 2 décembre 1856 et 14 avril 1862, et pour consolider en même temps et à toujours l'ordre et les bonnes relations entre Français et Espagnols dans cette partie orientale des Pyrénées, de la même manière que sur le reste de la frontière , depuis l'embouchure de la Bidassoa jusqu'au Val d'Andorre, ont jugé nécessaire d'insérer dans un troisième et dernier traité spécial, faisant suite aux deux premiers précités, les stipulations qui leur ont paru les plus propres à atteindre ce but, et ont nommé à cet effet pour leurs Plénipotentiaires, savoir...

ART. 20. - Le canal conduisant les eaux de l'Aravo à Puycerda et situé presque entièrement en France continuera d'appartenir avec ses rives, telles que les a modifiées le passage de la route impériale allant en Espagne et avec le caractère de propriété privée, à la ville de Puycerda, comme avant le partage de la Cerdagne entre les deux Couronnes.

Les relations entre le proriétaire et ceux qui ont le droit d'arroser seront fixées par la Commission internationale d'ingénieurs qui sera nommée pour le règlement de tout ce qui se rapporte à l'usage des eaux conformément à l'Acte additionnel concernant les dispositions applicables à toute la frontière et portant la même date que le présent traité.

Les trois Traités de Bayonne sont complétés par un Acte additionnel en date du 26 Mai 1886, oú figurent, entre autres, les dispositions suivantes:

ACTE ADDITIONNEL AU TRAITÉS DE DÉLIMITATION CONCLUS LES 2 DÉCEMBRE 1856, 14 AVRIL 1862 ET 28 MAI 1866

SIGNÉ A BAYONNE, LE 26 MAI 1866

Les soussignés, Plénipotentiaires de France et d'Espagne pour la délimitation internationale des Pyrénées, dûment autorisés par leurs Souverains respectifs à l'effet de réunir dans un seul acte les dispositions applicables sur toute la frontière dans l'un et l'autre pays et relatives à la conservation de l'abornement, aux troupeaux et pâturages, aux propriétés coupées par la frontière et à la jouissance des eaux d'un usage commun, dispositions qui, à cause de leur caractère de généralité, réclament une place spéciale qu'elles ne pouvaient trouver dans les traités de Bayonne des 2 Décembre 1856 et 14 Avril 1862, non plus que dans celui sous la date de ce jour, sont convenus des articles suivants...

Régime et jouissance des eaux d'un usage common entre les deux pays

ART. 8. - Toutes les eaux stagnantes et courantes, qu'elles soient du domaine public ou privé, sont soumises à la souveraineté du Pays oú elles se trouvent, et par suite à sa législation, sauf les modifications convenues entre les deux Gouvernements.

Les eaux courantes changent de juridiction du moment oú elles passent d'un Pays dans l'autre et, quand les cours d'eau servent de frontière, chaque Etat y exerce sa juridiction jusqu'au milieu du courant.

ART. 9. - Pour les cours d'eau qui passent d'un Pays dans l'autre, ou qui servent de frontière, chaque Gouvernement reconnait, sauf à en faire, quand il y aura utilité, une vérification contradictoire, la légalité des irrigations, des usines et des jouissances pour usages domestiques existantes actuellement dans l'autre Etat, en vertu de concession, de titre ou par prescription, sous la réserve qu'il n'y sera employé que l'eau nécessaire à la satisfaction des besoins réels, que les abus devront être supprimés, et que cette reconnaissance ne portera point atteinte aux droits respectifs des Gouvernements d'autoriser des travaux d'utilité publique, à condition des indemnités légitimes.

ART. 10. - Si, après avoir satisfait aux besoins réels des usages reconnus respectivement de part et d'autre comme réguliers, il reste à l'étiage des eaux disponibles au passage de la frontière, on les partagera d'avance entre les deux Pays, en proportion de l'étendue des fonds arrosables appartenant aux riverians respectifs immédiats, défalcation faite des terres déjà irriguées.

ART. 11. - Lorsque, dans l'un des deux Etats, on se proposera de faire des travaux ou de nouvelles concessions susceptibles de changer le régime ou le volume d'un cours d'eau dont la partie inférieure ou opposée est à l'usage des riverains de l'autre Pays, il en sera donné préalablement avis à l'autorité administrative supérieure du département ou de la province de que ces riverains dépendent par l'autorité correspondante dans la

juridiction de laquelle on se propose de tels projets, afin que, s'ils doivent porter atteinte aux droits des riverains de la Souveraineté limitrophe, on puisse réclamer en temps utile à qui de droit, et sauvegarder ainsi tous les intérêts qui pourraient se trouver engagés de part et d'autre. Si les travaux et concessions doivent avoir lieu dans une commune contiguë à la frontière, les ingénieurs de l'autre Pays auront la faculté, sur avertissement régulier à eux donné en temps opportun, de concourir à la visite des lieux avec ceux qui en seront chargés.

ART. 12. - Les fonds inférieurs sont assujettis à recevoir des fonds plus élevés du Pays voisin les eaux qui en découlent naturellement avec ce qu'elles charrient, sans que la main de l'homme y ait contribué. On n'y peut construire ni digue, ni obstacle quelconque susceptible de porter préjudice aux riverains supérieurs, auxquels il est également défendu de rien faire qui aggrave la servitude des fonds supérieurs.

ART. 13. - Quand les cours d'eau servent de frontière, tout riverain pourra, sauf l'autorisation qui serait nécessaire d'après la législation de son Pays, faire sur sa rive des plantations, des travaux de réparation et de défense, pourvu qu'ils n'apportent au cours des eaux aucun changement préjudicable aux voisins, et qu'ils n'empiètent pas sur le lit, c'est-à-dire sur le terrain que l'eau baigne dans les crues ordinaires.

Quant à la rivière de la Raour, qui sert de frontière entre les territoires de Bourg-Madame et de Puycerda, et qui, par des circonstances particulières n'a point de bords naturels bien déterminés, on procédera à la démarcation de la zone oú il sera interdit de faire des plantations et des ouvrages, en prenant pour base ce qui a été convenu entre les deux Gouvernements en 1750 et renouvelé en 1820; mais avec la faculté d'y apporter des modifications si on le peut, sans nuire au régime de la rivière, ni aux terrains contigus, afin que, lors de l'exécution du présent acte additionnel, on cause le moins de préjudice possible aux riverains, en débarrassant le lit, qui sera fixé, des obstacles qu'ils y auraient élevés.

ART. 14. - Si par des éboulements de berges, par des objets charriés ou déposés, ou par d'autres causes naturelles, il peut résulter quelque altération ou embarras dans le cours de l'eau, au détriment des riverains de l'autre Pays, les individus lésés pourront recourir à la juridiction compétente pour obtenir que les réparations et déblaiements soient exécutés par qui il appartiendra.

ART. 15. - Quand, en dehors des questions contentieuses du ressort exclusif des tribunaux ordinaires, il s'élévera entre riverains de nationalité différente des difficultés ou des sujets de réclamations touchant l'usage des eaux, les intéressés s'adresseront de part et d'autre à leurs autorités respectives, afin qu'elles s'entendent entre elles pour résoudre le différend, si c'est de leur juridiction, et dans le cas d'incompétence ou de désaccord, comme dans celui oú les intéeressés n'accepteraient pas la solution prononcée, on aura recours à l'autorité administrative supérieure du département et de la province.

ART. 16. - Les administrations supérieures des départements et provinces limotrophes se concerteront dans l'exercise de leur droit de réglementation des intérêts généraux et d'interprétation ou de modification de leurs règlements toutes les fois que les intérêts respectifs seront engagés, et, dans le cas où elles ne pourraient pas s'entendre, le différend sera soumis aux deux Gouvernments.

ART. 17. - Les Préfets et les Gouverneurs civils des deux côtés de la frontière pourront, s'ils le jugent convenable, instituer de concert, avec l'approbation des Gouvernements, des syndicats électifs mi-partie de riverains français et de riverains espagnols, pour vieller à l'exécution des règlements et pour déférer les contrevenants aux tribunaux compétents.

ART. 18. - Une Commission internationale d'ingénieurs constatera, où elle le jugera utile, sur la frontière du département des Pyrénées-Orientales avec la province de Girone, et sur tous les points de la frontière oú il y aura lieu, l'emploi actuel des eaux dans les communes frontalières respectives et autres, s'il est besoin, soit pour irrigations, soit pour usines, soit pour usages domestiques, afin de n'accorder dans chaque cas que la quantité d'eau nécessaire, et de pouvoir supprimer les abus; elle déterminera, pour chaque cours d'eau, à l'étiage et au passage de la frontière, le volume d'eau disponible et l'étendue des fonds arrosables appartenant aux riverains respectifs immédiats qui ne sont pas encore irrigués; elle procédera aux opérations concernant la Raour indiquées à l'article 13; elle proposera les mesures et précautions propres à assurer de part et d'autre la bonne exécution des règlements et à prévenir, autant que possible, toute querelle entre riverains respectifs; elle examinera enfin, pour le cas où on établirait des syndicats mixtes, quelle serait l'étendue à donner à leurs aattributions.

ART. 19. - Aussitôt que le présent acte aura été ratifié, on pourra nommer la Commission d'ingénieurs dont il est parlé à l'article 18 pour qu'elle procède immédiatement à ses travaux, en commençant par la Raour et la Vanera, où c'est le plus urgent.

Aux traités de Bayonne sont encore rattachés trois accords additionnels; le premier destiné à assurer l'exécution du Traité du 1er Décembre 1856, le second, du Traité du 14 Avril 1862 et le troisième dénommé "Acte final de la délimitation de la frontière internationale des Pyrénées", du Traité du 26 Mai 1866 et de l'Acte additionnel de la même date.

A l'Acte final sont consignés différents règlements concernant l'usage de certaines eaux, règlements établis en vertu de l'article 18 de l'Acte additionnel. Aucun de ces règlements ne vise cependant le Carol et il ne paraît pas non plus qu'à une époque ultérieure les eaux de cette rivière aient fait l'objet d'un tel règlement.

En revanche, la question de l'utilisation des eaux du lac Lanoux a fait depuis 1917, à plusieurs reprises, l'objet d'échanges de vues entre les Gouvernements français et espagnol. Ainsi, quand en 1917, les autorités françaises étaient saisies d'un projet tendant à dériver les eaux du lac Lanoux vers l'Ariège et donc vers l'Atlantique, le gouvernement espagnol fit valoir auprès du Gouvernement français que ce projet affecterait des intérêts espagnols et demanda que le projet ne fût pas mis en exécution sans préavis au Gouvernement espagnol et accord entre les deux Gouvernements (annexe 4 du Mémoire espagnol). Un effet de cette démarche fut que, le 31 janvier 1918, le Ministère des Affaires Étrangères de France informa l'Ambassadeur d'Espagne à Paris que le Ministère des Travaux Publics de France ne prendrait aucune décision concernant la dérivation des eaux du lac Lanoux vers l'Ariège sans que les autorités espagnoles fussent avisées d'avance (annexe 7 du Mémoire espagnol). En réponse, le Gouvernement espagnol fit savoir, le 13 Mars 1918, qu'il voyait ainsi garanti le maintien scrupuleux du statu quo jusqu'au jour où, le Gouvernement français croyant devoir adopter définitivement un plan modifiant l'état de choses actuel, un accord amical et équitable interviendrait entre les Parties intéressées agissant conformément aux stipulations concertées par les deux pays (annexe 8 du Mémoire espagnol).

Des projets de déviation des eaux du lac Lanoux continuant d'être étudiés par les autorités françaises, le Gouvernement espagnol, dans une communication du 15 Janvier 1920 au Ministères des Affaires Étrangères de France, rappela son désir d'être consulté et demanda qu'il soit procédé à la désignation d'une Commission internationale qui, selon les dispositions des traités existants, examinerait la question au nom des deux Gouvernements et parviendrait à un accord sur les travaux à entreprendre qui sauvegarderait les intérêts espagnols et français en jeu (annexe 11 du Mémoire espagnol). Comme suite à cette démarche, le Ministère des Affaires Étrangères de France communiqua, le 29 février 1920, à l'Ambassade d'Espagne à Paris que le Gouvernement français était entièrement d'accord avec le Gouvernement espagnol pour considérer que la dérivation des eaux du Lanoux ne pouvait être résolue définitivement que moyennant entente avec le Gouvernement espagnol. Toutefois, le Ministère indiqua en même temps que, les études en cours n'étant pas terminées, le Gouvernement français ne pouvait pas encore saisir le Gouvernement espagnol de propositions fermes (annexe 13 du Mémoire espagnol.).

Les années suivantes virent une série d'échanges de vues sur la constitution de la Commission internationale et sur la tâche qui lui serait confiée, le Gouvernement français désirant limiter le mandat de la Commission à prendre connaissance des observations faites par les usagers espagnols et à en apprécier le bienfondé, tandis que, selon l'opinion du Gouvernement espagnol, la Commission serait compétente pour toutes les autres questions concernant le projet dont les délégations respectives jugeraient l'examen nécessaire. Sur ces entrefaites, le Gouvernement français fit savoir, le 17 janvier 1930, que de nouveaux projets pour l'utilisation de eaux du lac Lanoux avaient pris la place de ceux étudiés antérieurement et que, à ces nouveaux projets n'ayant pas été suffisamment examinés par les services techniques de l'Administration française, il n'était pas possible d'établir sur les nouveaux projets une documentation telle que l'avait demandée le Gouvernement Espagnol (annexe 30 du Mémoire espagnol). La situation mondiale ayant ensuite arrêté les négociations sur le lac Lanoux, celles-ci ne furent reprises qu'en 1949.

La reprise des négociations eut lieu à l'occasion d'une réunion à Madrid, le 3 février 1949, de la Commission internationale des Pyrénées, créée par un échange de notes entre les Gouvernements espagnol et français en date du 30 mai et du 19 juillet 1875. A cette réunion, la délégation française souleva de nouveau la question de l'utilisation des eaux du lac Lanoux et proposa la constitution d'une Commission mixte d'ingénieurs avec mandat d'étudier la question et faire rapport aux deux Gouvernements. Cette proposition fut acceptée par la Délégation espagnole. Il fut en outre entendu selon le procès-verbal de la réunion que l'état de choses actuel ne serait pas modifié jusqu'à ce que les Gouvernements en eussent décidé autrement, d'un commun accord (annexe 31 du Mémoire du espagnol). La Commission d'ingénieurs s'étant réunie les 29 et 30 Août à Gerone, la Délégation française expliqua que le Gouvernement français, se trouvait en face de plusieurs projets concernant l'utilisation des eaux du lac Lanoux et n'avait encore pris aucune décision, mais que la procédure prévue à l'article 11 de l'Acte additionnel serait mise en oeuvre dès que le Gouvernement aurait fait son choix (annexe 32 du Mémoire espagnol). La réunion de Gérone ne donna donc pas de résultat en ce qui concerne le lac Lanoux.

Entre-temps, l'Electricité de France présenta, le 21 septembre 1950, auprès du Ministère de l'Industrie de France, une demande de concession, basée sur un projet comportant la dérivation des eaux du lac Lanoux vers l'Ariège et la restitutions intégrale au Carol des eaux dérivées, restitution qui s'effectuerait par une galerie conduisant du cours supérieur de l'Ariège à un point situé sur le Carol en amont de la prise d'eau du canal du Puigcerda (annexe 5 du Mémoire français). Le Gouvernement français, cependant, tout en acceptant le principe d'une restitution des eaux dérivées, ne s'estima

tenu qu'à rendre un volume d'eau correspondant aux besoins réels des usagers espagnols. En conséquence, et sans qu'il y eût recours à la Commission mixte d'ingénieurs, le Préfet des Pyrénées-Orientales, par lettre du 26 mai 1953, fit connaître au Gouverneur de la province de Gérone que la France allait procéder à un aménagement du lac Lanoux comportant la dérivation de ses eaux vers l'Ariège, mais que certains débits d'eaux limités correspondant aux besoins réels des riverains espagnols seraient assurés au niveau de la prise d'eau du canal de Puigcerda et que le Gouvernement espagnol était intivé à préciser les indemnités auxquelles ces travaux d'utilité publique pourraient donner lieu conformément à l'article 9 de l'Acte additiionnel (annexe 7 du Mémoire français). Le Gouvernement espagnol réagit en demandar.t, le 18 juin 1953, que les travaux du lac Lanoux ne fussent entrepris qu'après une réunion de la Commission mixte d'ingénieurs (annexe 36 du Mémoire espagnol). Le Gouvernement français répondit, par note du 27 juin 1953, qu'il donnait bien volontiers l'assurance que rien n'avait encore été entrepris ou n'était sur le point de l'être en ce qui concernait le lac Lanoux, bien que l'Acte additionnel ne prévît pas que les travaux portant atteinte au régime des eaux pussent être suspendus à la demande de l'autre Partie. En outre, le Gouvernement français donna son accord à ce que la Commission mixte d'ingénieurs se réunisse (annexe 27 du Mémoire espagnol.

Entre-temps, le Gouvernement français vint à réviser sa position concernant la quantité d'eau qu'il fallait restituer au Carol et se décida à accepter le projet de restitution intégrale qu'avait présenté l'Électricité de France en demandant la concession. En conséquence, le Préfet des Pyrénées-Orientales communiqua au Gouverneur de Gérone, par lettre du 21 janvier 1954, le dossier technique de ce projet. Il était signalé, dans sa lettre, que le projet n'apporterait aucun changement au régime des eaux sur le versant espagnol, puisque l'intégralité des apports dérivés vers l'Ariège serait restituée au Carol: l'état de choses actuel ne devant pas être modifié, les engagements pris lors de la réunion de la Commission des Pyrénées à Madrid, le 3 février 1949, se trouveraient donc respectés (annexe 8 du Mémoire français).

A la suite la communication ainsi faite au Gouverneur de la province de Gérone, le Gouvernement espagnol, par note du 9 avril 1954, attira l'attention sur les graves préjudices que les travaux envisagés occasionneraient, à son avis, à la Cerdagne espagnole et demanda une réunion de la Commission mixte d'ingénieurs. Dans sa réponse en date du 18 juillet 1954, le Gouvernement français souligna la différence qu'il y avait entre les projets mis à l'étude en 1949 et 1953, qui ne prévoyaient qu'une restitution partielle des eaux, et le projet adopté en dernier lieu, qui comportait que les eaux seraient intégralement restituées au Carol avant leur entrée en territoire Espagnol. Dans le premier cas, les autorités françaises avaient, selon l'article 11 de l'Acte additionnel, l'obligation d'informer les autorités espagnoles des travaux envisagés et ceci dans le but d'arriver à une fixation des indeminités qu'il y aurait éventuellement lieu de verser. C'était dans cet esprit qu'avaient été rédigées la communication du 26 mai 1953 du Préfet des Pyrénées-Orientales au Gouverneur de Gérone et la note du Gouvernement français du 27 juin 1953. Ainsi, cette dernière s'était bornée à donner l'assurance que rien n'avait encore été entrepris ou n'était sur le point de l'être en ce qui concernait le lac Lanoux et n'avait pas subordonné l'ouverture des travaux aux résultats des travaux de la Commission mixte d'ingénieurs. Dans le cas du dernier projet français, au contraire, les riverains espagnols ne devraient subir aucun préjudice puisque, sur le territoire espagnol, ni le débit, ni le régime, ni le tracé du Carol ne seraient modifiés. L'article 11 de l'Acte additiionnel n'était donc pas applicable et les autorités françaises n'étaient nullement tenues à faire dépendre l'ouverture des travaux de la réunion de la Commission mixte d'ingénieurs. Toutefois, le Gouvernement français, dans un souci de compréhension et de coopération mutuelles, ne s'opposait pas à ce que cette Commission fût réunie pour étudier le détail de la restitution des eaux du Carol, étant entendu que la question de principe ne saurait être débattue (annexe 9 du Mémoire français).

La réunion de la Commission mixte d'ingénieurs eut lieu à Perpignan le 5 août 1955 sans donner aucun résultat (annex 39 du Mémoire espagnol). La question de l'aménagement du lac Lanoux fut ensuite reprise à la prochaine réunion de la Commission Internationale des Pyrénées, tenue à Paris du 3 au 14 novembre 1955. A cette occasion, le projet français communiqué au Gouverneur de Gérone le 21 janvier 1954, fut l'objet d'un échange de vues, au cours duquel la délégation française formula un certain nombre de propositions, liant l'exécution des travaux projetés à des garanties pour les intérêts des riverains espagnols. Aucun accord n'ayant cependant pu intervernir, la Commission décida, en acceptant une proposition française à cet effet, qu'il serait constitué une Commission mixte spéciale, chargée d'élaborer un projet pour l'utilisation des eaux du lac Lanoux, qui serait soumis aux deux Gouvernements. La délégation française précisa toutefois que si, dans un délai de trois mois à partir du 14 novembre 1955, la nouvelle Commission n'avait pas abouti à une conclusion, les autorités françaises reprendraient leur liberté dans la limite de leurs droits (annexe 10 du Mémoire français).

La Commission mixte spéciale se réunit à Madrid du 12 au 17 décembre 1955. La délégation française déposa le texte d'un projet, qui correspondait au contenu du projet cmmuniqué au Gouverneur de Gérone le 21 janvier 1954 et aux propositions françaises faites à la réunion de la Commission Internationale des Pyrénées au mois de novembre 1955 (annexe 11 du Mémoire français).

Le projet français d'aménagement du lac Lanoux

(Mémoire français, pages 3 à 9, ainsi que les annexes, p. 111 à 115) comporte essentiellement les traits suivants.

Sans que soient modifiés les sources et le ruissellement qui alimentent actuellement le lac, celui-ci serait transformé, notamment par la constitution d'un barrage, de manière à pouvoir accumuler une quantité d'eau qui ferait passer sa capacité de 17 à 70 millions de mètres cubes. Les eaux du lac, qui se déversent naturellement par un ruisseau afluent du Carol et par là coulent vers l'Espagne cesseraient normalement de suivre ce cours. Elles seraient employées à produire de l'énergie électrique par une dérivation qui les mènerait vers l'Ariège, affluent de la Garonne. Ces eaux iraient donc se perdre dans l'Océan Atlantique et non plus dans la Méditerranée. Pour compenser ce prélèvement dans les eaux qui alimentent le Carol, une galerie souterraine de restitution conduirait une partie des eaux de l'Ariège vers le Carol, auquel elles seraient restituées en territoire français en amont de la prise d'eau du canal de Puigcerda.

Ce projet se propose donc de construire un grand bassin d'accumulation dans le site très favorable du lac Lanoux, d'utiliser les eaux de ce bassin sous une hauteur de chute élevée et de restituer au Carol, en l'empruntant à l'Ariège, une quantité d'eau égale à celle qui est apportée au lac Lanoux par les sources et le ruissellement naturel. La mesure des apports naturels au lac Lanoux est déterminée selon un principe simple. On mesure périodiquement - en principe toutes les semaines - le volume d'eau du lac pour déterminer l'accroissement des eaux; on ajoute ensuite à ce volume la qunatité d'eau utilisée dans la chute et restitée après turbinage à l'Ariège; l'on retranche le volume d'eau artificiellement repompée dans le lac pour utiliser la force électrique à des heures où elle ne trouve pas un emploi plus rentable. On obtient ainsi la consistance au cours d'une période donnée des apports naturels reçus par le lac; il est facile d'en déduire le débit horaire moyen de la restitution qui doit être opérée par le canal qui dérive une part des eaux de l'Ariège vers le Carol. Ce procédé de calcul est susceptible d'introduire dans le régime des eaux du Carol une certaine modification, qui est fonction de la durée de la période choisie. En effet, il introduit tout d'abord un décalage dans le temps: le volume des restitutions est pendant une période, fonction des apports naturels reçus pendant la période immédiatement antérieure; d'autre part, la restitution est opérée selon une valeur moyenne des apports, qui fait abstraction des écarts par rapport à cette moyenne pendant cette même période. Rien n'empêche toutefois de prendre des périodes de références très courtes (une semaine, plusieurs jours, un jour ou même moins), de telle sorte que la différence de régime du fleuve, toute signification pratique. Pour assurer la restitution d'eaux équivalentes à celles des apports naturels, même dans l'hypothèse où un incident technique ne permettrait pas à la restitution de s'opérer à partir de l'Ariège par la galerie prévue à cet effet, un double jeu de robinetterie permettrait d'assurer la restitution à partir des eaux du lac Lanoux lui-même, qui retrouveraient ainsi pour un temps leur cours actuel.

Le projet français comporte, à côté de ces dernières garanties d'ordre technique, deux autres garanties et un avantage; une Commission mixte paritaire franco-espagnole assure le contrôle des travaux ainsi que de la régularité des restitutions. Un membre du Consulat Espagnol de Toulouse, bénéficiant des immunités et des privilèges prévus par la Convention franco-espagnole du 7 janvier 1862, aura toujours accès à toutes les installations du projet. Le volume des restitutions, sans être jamais inférieur aux apports réels, sera fixé à un minimum annuel de 20 millions de mètres cubes.

La délégation espagnole ayant maintenu son opposition de principe contre toute dérivation des eaux du lac Lanoux, la réunion de la Commission mixte spéciale du mois de Décembre 1955 n'aboutit à aucun résultat. Il fut toutefois convenu qu'une nouvelle réunion de la même Commission aurait lieu à Paris, où elle s'ouvrit le 2 mars 1956. Au cours de cette réunion, la délégation française fit savoir qu'elle pourrait offrir encore certaines modalités et garanties destinées à servir les intérêts des riverains espagnols, en dehors de celles déjà incluses dans le projet français. La délégation espagnole, d'autre part, présenta un contre-projet d'utilisation des eaux du lac Lanoux sans leur déviation du cours du Carol. Les points de vue des deux délégations ne purent être rapprochés et la Commission, n'ayant pas pu parvenir à un accord, décida, le 6 mars 1956, de cloturer ses travaux et d'en rendre compte aux deux Gouvernements (annexe 11 du Mémoire français).

Faisant suite à la déclaration de la délégation française à la réunion de la Commission Internationale des Pyrénées au mois de novembre 1955, le Gouvernement français informa, par note du 21 mars 1956, le Gouvernement espagnol de sa détermination d'user désormais de sa liberté dans la limite de ses droits (annexe 12 du Mémoire français). En conséquence, les travaux d'aménagement du lac Lanoux - qui, déclarés d'utilité publique par arrêté du 20 Octobre 1954, n'avaient jusqu'alors consisté qu'en la construction d'une route et l'installation d'un téléphérique - reprirent le 3 avril 1956. Ils ont été depuis cette date réalisés en grande partie, sans toutefois comporter aucune dérivation des eaux s'écoulant du lac Lanoux.

Le Gouvernement espagnol a demandé au Tribunal de vouloir déclarer que le Gouvernement français ne peut pas exécuter les travaux d'utilisation des eaux du lac Lanoux, conformément aux modalités et garanties prévues dans le projet d' "Électricité de France", car si préalablement un accord n'intervenait pas entre les deux Gouvernements sur le problème de l'aménagement des

dites eaux, le Gouvernement français commettrait une infraction aux dispostions pertinentes du Traité de Bayonne du 26 mai 1866 et de l'Acte additionnel de la même date (Contre-Mémoire espagnol, p. 144).

Le Gouvernement français a demandé au Tribunal de dire et juger que le Gouvernement français est fondé à soutenir qu'en exécutant, sans un accord préalable entre les deux Gouvernements, des travaux d'utilisation des eaux du lac Lanoux dans les conditions prévues au projet et aux propositions français visés au préambule du compromis d'arbitrage du 19 Novembre 1956, il ne commettrait pas une infraction aux dispositions du Traité de Bayonne du 26 mai 1866 et de l'Acte additionnel de la même date (Mémoire français: p.67).

Les principaux arguments avancés par les Parties sont les suivants:

Le Mémoire espagnol contient des conclusions qui, répétées dans le Contre-Mémoire, sont rédigées ainsi:

1. Les projet d'Electircité de France affecte la totalité du régime et du débit des eaux qui proviennent du lac Lanoux et s'écoulent par le Carol, parce que l'un et l'autre se verraient prédéterminés par la modification de la cause physique qui détermine l'écoulement de ces eaux par le lit de cette rivière.

2. Le projet d'Electricité de France est fondé sur la dérivation des eaux du bassin du Carol, qui se déversent à travers le Sègre et l'Ebre dans la Méditerranée, pour les transporter à l'Ariège, dont les eaux s'unissent à la Garonne et se déversent dans l'Atlantique. Ce détournement produirait une modification de la physionomie physique du bassin hydrographique du Carol, car il transformerait radicalement sa structure dès son origine, par l'effet de la soustraction totale du volume d'eau qui coule actuellement par son cours naturel.

3. La restitution de l'équivalent du débit capté selon qu'il est prévu dans le projet d'Electricité de France, implique que ce débit ne coulera plus naturellement dans son cours, la cause physique de son actuel écoulement étant supplantée et remplacée par la volonté d'un seul pays, tant dans la captation des eaux du Lanoux que dans la restitution d'un éventuel équivalent prélevé sur l'Ariège. Cette modification unilatérale de la cause physique de l'écoulement de l'actuel débit du Carol et la substitution de sa substance hydraulique par une autre, de provenance différente, transformeraient les eaux du bassin versant qui sont communes par nature, en des eaux à l'usage prédominant d'un seul pays, consacrant ainsi une prépondérance physique, qui aujourd'hui n'existe pas, comme le met en lumière le fait que les eaux coulent actuellement sous l'empire d'une loi physique, tandis qu'après l'exécution du projet, leur éventuel équivalent serait restitué, exclusivement, par l'oeuvre de la volonté humaine qui les a captées.

4. La possibilité technique de restituer l'équivalent des eaux captées, selon ce que prévoit le projet d'Electricité de France, n'amoindrit en rien la profonde transformation que subirait, dans sa structure physique, le bassin versant du Carol, en raison de l'interposition humaine dans le cours des eaux qui, jusqu'à présent, coulent naturellement. La restitution de cet équivalent ne ferait qu'atténuer les conséquences de ladite transformation, mais ne déforcerait *(sic)* pas l'effectivité de la prépondérance physique acquise par une Partie, une fois le projet exécuté, prépondérance qui ne serait pas non plus palliée par un régime juridique répondant à une conception unilatérale, contraire au régime de communauté que l'Acte sanctionne.

5. Les garanties et les prétendus avantages prévus dans le projet d'Electricité de France (création d'une Commission hispano-française, qui contrôlerait les travaux des installations de restitution, nomination d'un ingénieur espagnol, jouissant du statut consulaire, qui inspecterait ensuite leur fonctionnement, plus grandes disponibilités d'eau à l'époque des irrigations, et création d'une réserve, dans le lac Lanoux, à utiliser en Espagne), ne constituent pas en eux-mêmes une contrepartie qui permettrait de rétablir juridiquement le régime de communauté, ruiné par la réalisation unilatérale du projet mentionné.

6. Les caractéristiques du projet d'Electricité de France, et les effets que doit entrainer son exécution, prouvent que les travaux appropriés sont du genre de ceux qui requièrent l'accord préalable des deux Gouvernements avant exécution, comme il ressort des dispositions de l'article 11 en relation avec les articles 12, 15 et 16 de l'Acte du 26 mai 1866, point de vue qu'a soutenu le Gouvernement français lui-même concernant le projet d'aménagement hydraulique, connu sous le nom de "Ojo de Toro" dans le Val d'Aran.

7. En conséquence, l'exécution du projet d'Electricité de France, sans l'accord préalable des deux Gouvernements, entrainerait, de la part du Gouvernement français, une infraction aux articles 11, 12, 15 et de l'Acte de 1866 pour destruction du régime de communauté que sanctionnent cet instrument international et les Traités de délimitation auxquels il sert de complément, régime dont le projet espagnol est respectueux par l'évaluation adéquate qu'il fait des intérêts de l'Espagne et de la France. (Contre-Mémoire espagnol. p. 141-143.)

Le Mémoire français continent les conclusions suivantes:

1. Le Traité de Bayonne du 26 mai 1866 et l'Acte additionnel de la même date n'ont pas eu pour objet de "figer" à perpétuité les conditions naturelles existant à l'époque: ils se sont bornés, en la matière, à énoncer les règles selon lesquelles celles-ci pourraient, le cas échéant, être modifiées.

2. La souveraineté de chacun des deux Etats sur son territoire demeure consacrée, avec les seules restrictions prévues par les actes internationaux en vigueur entre eux.

3. En particulier, leur droit d'entreprendre des travaux d'utilité publique est expressément confirmé.

4. La faculté pour un Etat de procéder à de tels travaux n'est subordonnée à l'assentiment préalable de l'autre Etat par aucune des dispositions des Actes ci-dessus visés, notamment par les articles 11 out 16 de l'Acte additionnel. Le Gouvernement espagnol en a lui-même jugé ainsi en autorisant non seulement sans assentiment, mais même sans consultation du Gouvernement français, des travaux au Val d'Aran.

5. Le Gouvernement français, a observé les règles de procédure destinées à préserver, en pareille matière, tous les droits et intérêts en cause.

6. Le projet français avec les garanties et modalités dont il est assorti, sauvegarde entièrement les droits et intérêts de l'Espagne dont il ne compromettrait en aucune manière l'indépendance.

7. Les droits et intérêts français seraient en revanche sérieusement lesés si ce projet n'était pas réalisé ou même s'il était remplacé par le projet espagnol, dont la valeur économique serait sensiblement moindre.

8. Le projet français, tel qu'il a été conçu, présenté et garanti, répond donc pleinement aux conditions requises par les dispositions conventionnelles en vigueur entre les deux Etats pour être valablement exécuté, même en l'absence de l'assentiment, non obligatorie, du Gouvernemnt espagnol. Mémoire français, p. 66-67.

Le Contre-Mémoire espagnol répond aux conclusions du Mémoire français dans les termes suivants:

1. Le Traité de Bayonne du 26 mai 1866 et l'Acte additionnel de la même date n'ont pas voulu cristalliser à perpétuité les conditions qui existaient à l'époque; ils se sont bornés à énoncer des règles en la matière, règles suivant lesquelles ces conditions peuvent être modifiées. Mais ces règles ont été conçues et rédigées dans un esprit d'amitié, de confiance réciproque et dans l'idée de l'accord mutuel nécessaire qui informent tout le régime du "communauté de pàturages" qui est latent dans ce Traité, et sous-jacent à l'Acte additionnel.

2. La souveraineté des Etats contractants sur les eaux des fleuves successifs, qui coulent sur leur territoire, n'est pas absolue, mais elle est soumise aux modifications convenues entre les deux Parties.

3. La règle de la reconnaissance prioritaire des légitimes utilisations existantes et la règle de la distribution du volume d'eau excédentaire, en saison d'été, sont de claires limitations à la souveraineté territoriale, puisqu'elles sont été établies au bénéfice de la jouissance, commune et pacifique, des eaux des fleuves, qui coulent sur le territoire des deux Etats. Et le droit de chaque pays d'exécuter des travaux *d'utilité publique* ne peut primer celui de *l'utilité* commune qui découle de ces règles, car le concept de droit intérieur est subordonné à ce dernier principe de droit international.

4. La faculté, que possède chaque Etat, de procéder à des travaux d'utilité publique est nécessairement subordonnée à l'accord avec l'autre Etat, si ces travaux affectent le régime et le débit des fleuves, et, en ce sens, peuvent causer préjudice aux riverains de l'autre Etat. Ceci ressort clairement de l'article 11 de l'Acte, puisqu'il ne dit pas un mot d'indemnités grâce auxquelles on pourrait compenser d'éventuels préjudices, mais établit l'obligation de donner avis à qui de droit (imprécision significative comme on l'a expliqué en temps opportun, *de manière que ne soient pas lésés les intérêts qui pourraient se trouver engagés.* Et ceci exige nécessairement la conciliation des intérêts opposés grâce à l'accord des Parties. L'article 11, en rapport avec le 15 et le 16, où est stipulée la collaboration administrative ou gouvernementale entre les deux Etats, confirme la nécesssité de cet accord, selon qu'il ressort de l'exégèse correcte de ces dispositions. Pareil accord est beaucoup plus justifié, quand les travaux d'utilité publique affectent, non des causes secondaires, comme le régime et le débit des fleuves, mais une cause principale, comme la raison physique de leur écoulement, ou leur substance hydraulique, ainsi qu'il advient dans le projet d'Electricité de France, occurrence dans laquelle le Gpouvernment espagnol et le Gouvernement français ont concordé successivement pour considérer que pareil accord est inévitable. Car si le Gouvernement espagnol défend à présent ce point de vue au sujet du projet français précité, le Gouvernement français a, lui aussi, abondé dans ce sens au sujet du projet de l'entreprise "Productora de Fuerzas Motrices" qui était axé sur le détournement des eaux dans la partie haute du Val d'Aran (affaire "Ojo de Toro" précédemment évoquée).

5. Les règles de procédure, que le Gouvernment français a observées, ne suffisent pas à préserver tous les intérêts et droits en présence, puisque l'avis qu'il a pu donner concernant les travaux ne s'épuise pas en lui-même, mais constitue simplement une notification qui permet à l'autre Partie d'adopter l'attitude la plus propre à sauvegarder ces droits et intérêts. Et cette attitude peut être le silence, l'acceptation ou l'opposition, en ce dernier cas afin d'entamer les conversations conduisant à la conciliation des intérêts et à l'éventuel accord. C'est pourquoi la simple observance des règles de procédure par le Gouvernement français ne signifie pas qu'il ait accompli toutes les obligations de l'Acte, puisque cette affirmation équivaudrait à tenir pour valable la prétention que

cet instrument international n'établit que des règles de procédure s'appliquant aux modalités d'exercice de la souveraineté des Parties, mais sans proprement limiter cette dernière, alors que les limitations que renferme cet Acte ont une portée essentielle, ainsi qu'on l'a maintes fois exposé.

6. Les garanties et modalités du projet français ne sauvegardent pas les intérêts et les droits espagnols, encore que, naturellement, elles ne compromettent pas l'indépendance matérielle du pays; les conséquences de l'aménagement des eaux du lac Lanoux ne peuvent aller si loin. Mais ce projet affecte son droit à l'indépendance et compromet sérieusement des intérêts très importants, qui touchent le point le plus sensible de l'agronomie du pays, c'est-à-dire le manque d'eau pour les irrigations, et il en résulterait des dommages très graves, si l'on ne pouvait régulariser l'utilisation intégrale des eaux de ce lac, suivant son bassin versant naturel. En tous cas, les garanties du projet français sont insuffisantes, parce qu'elles ont été conçues unilatéralement, en partant du concept erroné que l'on peut disposer librement de ces eaux en territoire français, raison pour laquelle ce projet répond à un critère unilatéral, qui fait abstraction d'un aménagement rationnel des eaux du bassin au bénéfice des deux Parties et d'une régularisation juridique bilatérale de cet aménagement, comme garantie efficace pour les deux Parties.

7. L'affirmation est purement gratuite, selon laquelle, les intérêts et les droits français seraient lésés, si l'on ne réalisait pas le projet français et s'il était remplacé par l'espagnol, dont on prétend que la valeur économique est sensiblement moindre. Et l'affirmation est gratuite, car la dernière observation n'envisage que le total de l'énergie produite et omet de dire que, selon les calculs techniques, les deux projets ne diffèrent que de 10%. Mais elle ne tient pas compte que le projet espagnol est conçu sur la base de l'aménagement des eaux suivant leur bassin versant naturel, ce qui en permet une régularisation plus parfaite pour les irrigations et fait que les intérêts des deux Parties en bénéficient également, au lieu de favoriser les intérêts d'une seule, comme le fait le projet français, dont le fondement consacre une prépondérance qui répugne à l'esprit d'égalité, dont l'Acte additionnel s'inspire. Et c'est là l'autre aspect que le projet d'Electricité de France ne met pas dûment en valeur, car il affecte jusqu'à l'équilibre politique entre les deux souverainetés, équilibre que sanctionnent les Traités de délimitation, point que respecte le projet espagnol. Par conséquent, le dommage que le projet français causerait aux intérêts espagnols serait important, permanent et contraire au régime de communauté établi par le Traité de Bayonne et son Acte additionnel, tandis que le prétendu dommage que subiraient les intérêts français, si leur projet n'était pas réalisé, se réduit à n'obtenir qu'une production hydro-électrique relativement plus faible, ce qui ne laisse pas d'être un inconvénient minime, qui peut bien être supporté au bénéfice des relations de bon voisinage entre les deux pays et conformément à l'esprit qui inspire les Traités de délimitation et leur Acte additionnel.

8. Le projet d'Electricite de France ne répond pas aux exigences de dispositions conventionnelles en viguer, parce qu'il été conçu unilatéralement sur le principe que la France peut disposer librement des eaux qui coulent sur son terriotire. C'est pourquoi, tant sa conception technique que sa réglementation juridique sont contraires au régime de communauté que sanctionne l'Acte, dont la lettre et l'esprit seraient méconnus, si le projet était exécuté sans arriver d'abord à un accord avec le Gouvernement espagnol, étant donné que la nècessité de cet accord ressort de l'applicatin correcte des dispositons de cet Acte. (Contre-mémoire espagnol, p. 135-140.)

Le Contre-Mémoire français répond aux conclusion sdu Mémoire espagnol dans ces termes:

1. Il importe de préciser, une tois de plus, pour marquer l'exacte protéematerielle du projet d'Electricité de France, que ce dernier n'affecterait pas l'ensemble des eaux du bassin du Carol. Il ne comporterait que la dérivation des eaux provenant du Lanoux et qui ne representant que le quart environ de celles qui alimentent le Carol. Jusqu'à concurrence des trois quarts, les eaux de ce bassin garderaient donc leur destination naturelle. Les modifications résultant de l'exécution du projet porteraient uniquement sur une courte portion du cours du Carol, située en France. La restitution complète du volume d'eau dérivé aurait lieu bien en amont de la téte du canal de Puigcerda et. à fortiori, de la frontière espagnole. Sur le territoire espagnol, ni le régime ni le débit du Carol ne subraient le mondre changement.

2. La dérivation non pas des eaux du bassin du Carol, comme le dit le Mémoire espagnol, mais seulement des apports du Lanoux à ladite rivière, entrainerait sans doute, dans cette très faible mesure, et seulement en territoire français, une modification physique dudit bassin. Mais une telle modification, dans les conditions prévues, n'est interdite in par le Traité du 26 mai 1866, ni par l'Acte additionnel de la même date.

3. On ne peut pas dire que le Carol cesserait de suivere son cours naturel. Sauf sur une minime partie du territoire français, aucun changement ne serait apporté à ce cours. Ce n'est — on s'excuse d'avoir à le répéter — qu'une quantité très limitée de ses eaux qui serait utlisée d'une manière a prédominante a par la France. Rien ne prohibe une telle utilisation, si celle-ci est compensée par la restitution d'une quantité d'eau équivalente, ce qui serait le cas.

4. La restitution des apports dérivés ne serait pas partielle, mais totale. C'est là la base même du projet de l'

"Electricité de France". Cette restitution totale a fait l'objet d'engagements formels et inconditionnels de la part du Gouvernement français. Dans ces conditions, dire que la restitution dépendrait du "bon vouloir" de la France est faire à cette dernière un procès de tendance que rien n'autorise et manifester un esprit de suspicion qui rendrait impossibles les relations internationales.

5. Le fonctionnement du système aboutirait, grâce à la restitution complète du volume d'eau dérivé, au maintien du régime d'utilisation des eaux d'usage commun, tel qu'il a été établ par l'Acte additionnel. L'analyse à laquelle il a été procédé ci-dessus (p. 41-43), des garanties offertes par le Gouvernement français suffit à en montrer l'indiscutable efficacité, tant sur le plan juridique que sur le plan pratique romprait, au détriment de la France, un veto espagnol de nature à préjudicier gravement aux intérêts de celle-ci, alors que la réalisation du projet ne porterait aucune atteinte aux intérêts espagnols.

6. Sur ce point, qui constitue le fond même du débat, la divergence d'opinion entre les deux Gouvernments est complète et il appartient du Tribunal de statuer, sans qu'il soit besoin d'exposer à nouveau les arguments invoqués par le Gouvernement français dans son Mémoire et au présent Contre-Mémoire.

7. La divergence d'opinion sur le point precédent entraine inévitablement le même dissentiment sur celui-ci; le Gouvernmenet français maintient que, pour l'ensemble des motifs exposés par lui, la réalisation de son projet ne modifierait pas le régime établi par l'Acte additionnel et qui ne prescrit nulle part, en pareil cas, la nécessité d'un accord préalable de l'autre Etat. Il remarque d'ailleurs que, dans ces conclusions, le Gouvernement espagnol ne vise que cet Acte et ne paraît plus se référer au Traité de Bayonne lui-même. (Contre-Mémoire français, p. 61-63.)

En outre, le Contre-Mémoire français ajoute les conclusions suivantes:

1. Le Mémoire espagnol fait abstraction, dans sa discussion juridique, de la disposition finale de l'article 9 de l'Acte additionnel, qui réserve le droit respectif de chacun des Gouvernments d'autoriser des travaux d'utilité publique.

2. Il laisse dans l'ombre le fait que le projet français prévoit la restitution totale du volume d'eau dérivé et non, comme il l'indique à plusieurs reprises, une restitution partielle.

3. Il passe sous silence les engagements formels pris, au sujet de cette restitution totale, par le Gouvernement français.

4. Il analyse d'une manière manifestement insuffisante les garanties offertes par ce dernier.

5. Il ne fait pas apparaître assez clairement que le projet français n'affecte pas la totalité des eaux du bassin du Carol, mais seulement le quart environ de celles-ci.

6. Il n'apporte aucune précision concrète sur les dommages que la réalisation du projet français causerait aux intérêts espagnols. (Contre-Mémoire français, p.63.)

En ce qui concerne les nouveaux arguments avançés au cours des plaidoiries orales, il en sera tenu compte dans les considérations du Tribunal, pour autant que de besoin.

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En droit le Tribunal considère:

1. Les travaux publics prévus dans le projet français sont entièrement situés en France: la part la plus importante sinon la totalité de leurs effets se fait sentir en territoire français: ils portent sur des eaux que l'Acte additionnel soumet à la souveraineté terriotriale française selon son article 8:

Toutes les eaux stagnantes et courantes, qu'elles soient du domaine public ou privé, sont sourmises à la souveraineté du Pays où elles se trouvent et, par suite, à sa législation, sauf les modifications convenues entre les deux Gouvernements.

Les eaux courantes changent de juridiction du moment où elles passent d'un Pays dans l'autre et, quand les cours d'eau servent de frontière, chaque Etat y exerce sa juridiction jusqu'au milieu du courant.

Ce texte pose lui-même une réserve au principe de la souveraineté territoriale ("sauf les modifications convenues entre les deux Gouvernments"); des dispositions du Traité et de l'Acte additionnel de 1866 énoncent les plus importantes de ces modifications: il peut y en avoir d'autres. Il a été soutenu, devant le Tribunal, que ces modifications devaient être interprétées d'une manière restrictive, parce que dérogeant à la souveraineté. Le Tribunal ne saurait admettre une formule aussi absolue. La souveraineté territoriale joue à la manière d'une présomption. Elle doit fléchir devant toutes les obligations internationales, quelle qu'en soit la source, mais elle ne fléchit que devant elles.

La question est donc de savoir quelles sont, en l'espèce, les obligations du Gouvernement français. Le Gouvernement espagnol s'est efforcé de les établir: c'est à partir de son argumentation que le problème doit être examiné.

2. L'argumentation du Gouvernement espagnol présente un caractère général qui appelle des remarques

préliminiaires. Le Gouvernement espagnol fonde son argumentation d'abord sur le texte du Traité et de l'Acte Additionnel de 1866. Elle correspond ainsi exactement à la compétence du Tribunal telle qu'elle est fixée par le compromis d'arbitrage (article premier). Mais de plus, le Gouvernement espagnol se base à la fois sur les traits généraux et traditionnels du régime des frontières pyrénéenes et sur certaines règles de droit international commun pour procéder à l'interprétation du Traité et de l'Acte additionnel de 1866.

Par ailleurs, le Mémoire français (p.58) examine la question posée au Tribunal à la lumière du "droit des gens". Le Contre-Mémoire français (p.48) fait de même avec la réserve suivante: "quoique la question soumise au Tribunal soit nettement circonscrite par le compromis à l'interprétation, dans le cas envisagé, du Traité de Bayonne du 26 mai 1866 et de l'Acte additionnel de la même date". Dans ses plaidoiries orales, l'Agent du Gouvernement français a déclaré: "le compromis ne charge pas le Tribunal de rechercher s'il existe, en la matière, des principes généraux du droit des gens applicables à l'espèce" (3e séance, p.7) et: "Un traité s'interprète dans le contexte du droit international positif du moment où il peut être appliqué" (7e séance, p.6).

Dans un cas analogue, la Cour Permanente de Justice Internationale (*Prises d'eau à la Meuse,* Cour permanente de Justice internationale, série A B 70, p.16) a déclaré:

Au cours des débats, tant écrits qu'oraux, il a été fait allusion incidemment à l'application des règles générales du droit international fluvial. La Cour constate que les questions litigieuses, telles qu'elles lui sont posées par les parties dans la présente affaire, ne lui permettent pas de sortir du cadre du Traité de 1863.

La question posée par le compromis étant uniquement relative au Traité et à l'Acte additionnel de 1866, le Tribunal appliquera, à propos de chaque point particulier, les règles suivantes:

Les dispositions claires du droit conventionnel n'appellent aucune interprétation: le texte traduit une règle objective qui saisit la matière à laquelle elle s'applique; quand il y a matière à interprétation, celle-ci doit être opérée selon le droit international; celui-ci ne consacre aucun système absolu et rigide d'interprétation; il est donc permis de tenir compte de l'esprit qui a présidé aux traités pyrénéens, ainsi que des règles du droit international commun.

Le Tribunal ne pourrait s'écarter des règles du Traité et de l'Acte additionnel de 1866 que si ceux-ci renvoyaient expressément à d'autres règles ou avaient été, de l'intention certaine des Parties, modifiés.

3. Le conflit actuel peut être ramené à deux questions fondamentales:

a) Les travaux d'utilisation des eaux du lac Lanoux, dans les conditions prévues au projet et aux propositions français visés au préambule du compromis constitueraient-ils, en eux-mêmes, une infraction aux droits reconnus à l'Espagne par les dispositions de fond du Traité de Bayonne du 26 mai 1866 et de l'Acte additionnel de la même date?

b) En cas de réponse négative à la question précédente, l'exécution desdits travaux constituerait-elle une infraction aux dispositions du Traité de Bayonne du 26 mai 1866 et de l'Acte additionnel de la même date, pour la raison que ces dispositions subordonneraient, en tout cas, ladite exécution à un accord préalable entre les deux Gouvernements ou que d'autres règles de l'article 11 de l'Acte additionnel concernant les tractations entre les deux Gouvernements n'auraient pas été respectées?

I. - *Sur la première question* (énoncée sous 3, a)

4. L'Acte additionnel du 26 mai 1866 comporte une section intitulée "Régime et jouissance des eaux d'un usage commun entre les deux pays". Outre l'article 8 précité, il comprend trois articles fondamentaux pour le présent litige (9, 10, 11), ainsi qu'un article (18) qui pourvoit aux moyens d'en assurer l'application pratique.

Les articles 9 et 10 s'appliquent tous deux aux cours d'eau "qui passent d'un pays dans l'autre" (*cours d'eau successifs) ou qui "servent de frontière" (cours d'eau contigus).

Par l'article 9, chaque Etat reconnait la légalité des irrigations, des usines et des jouisances pour usages domestiques existantes, en vertu de concession, de titre ou par prescription dans l'autre Etat, au moment de l'entrée en vigeur de l'Acte additionnel. Selon l'article 18, une Commission internationale d'ingénieurs est chargée des opérations techniques nécessaires à l'application de l'article 9, ainsi que d'autres articles de l'Acte additionnel.

La reconnaissance de la légalité de ces usages est subordonnée aux conditions suivantes:

a) Chaque Etat pourra, quand il y aura utilité, provoquer une vérificatiion contradictoire de la concession, du titre ou de la prescription invoquée dans l'autre Etat. La reconnaissance de la légalité, par l'Etat ayant demandé la vérification contradictoire, cessera pour les jouissances qui n'auront pas surmonté cette dernière épreuve.

b) La légalité de chaque jouisance n'est reconnue que dans la limite où l'eau employée est nécessaire à la

satisfaction des besoins réels.

c) La reconnaissance de la légalité d'une jouissance cesse en cas d'abus, même d'abus autres que l'utilisation dans une mesure excédant la satisfaction des besoins réels.

5. L'article 10 prévoit qu'après avoir établi les besoins réels des usages reconnus, on calcule la masse d'eau disponible à l'étiage, au passage de la frontière, et qu'on la partage d'avance selon une clef de répartition déterminée.

Ces deux articles 9 et 10 doivent certainement être interprétés tous deux simultanément sans les opposer l'un à l'autre, puisque l'article 10 vise les "eaux disponibles" après application de l'article 9 concernant les jouissances reconnues: les deux articles réunis épuisent l'objet de la réglementation.

Cette remarque présente un certain intérêt si l'on aborde le point qui a soulevé le plus de controverses entre les Parties et qui réserve "les droits respectifs des Gouvernements d'autoriser des travaux d'utilité publique, à condition des indemnités légitimes".

Selon le Tribunal, la réserve du droit de chaque Etat contractant d'exécuter des travaux d'utilité publique a une portée générale.

Toutefois, si l'article 9 donne à l'Etat d'amont le droit, contre indemnités, de priver d'une manière définitive de la jouissance des eaux les usagers de l'Etat d'aval (pour leurs jouissances reconnues), on peut se demander si, pour l'exécution de travaux d'utilité publique, il suffit également à l'Etat d'amont, d'après l'article 10, de payer une indemnité pour priver d'une manière définitive de la jouissance des eaux l'Etat d'aval (pour la part disponible).

Il est certain que, si le droit de l'Etat d'amont n'avait, dans ce domaine, aucune limite juridique, à condition de payer des indemnités, le projet français satisferait aux conditions de fond posées par l'article 10.

Le Gouvernement espagnol a soutenu que le Gouvernement français n'avait pas le droit de priver définitivement de la jouissance de l'eau l'Etat espagnol pour la part qui lui est dévolue, en vertu de l'article 10. S'il en était ainsi, le projet français serait encore conforme à l'article 10, s'il était établi que la part des eaux du Carol dérivée vers l'Ariège est inférieure au volume d'eau affecté tant aux riverains du Carol en deçà de la frontière qu'à l'Etat français, en vertu de l'article 10. Le Tribunal ne possède pas les données de fait lui permettant de trancher ce dernier point.

La solution du problème que l'on vient d'examiner au sujet de la portée de l'article 10 n'est toutefois pas indispensable pour répondre à la question posée par le compromis.

6. En effet, grâce à la restitution opérée selon le mécanisme décrit plus haut, aucun usager garanti ne sera lésé dans sa jouissance (il n'a pas été fait état d'une réclamation fondée sur l'article 9); le volume à l'étiage des eaux disponibles du Carol, au passage de la frontière, ne subira, à aucun moment, une nution; il pourra même, en vertu du minimum garanti par la France, bénéficier d'une augmentation assurée par les eaux de l'Ariège coulant naturellement vers l'Atlantique.

On aurait pu attaquer cette conclusion de plusieurs manières.

On aurait pu soutenir que les travaux auraient pour conséquence une pollution définitive des eaux du Carol, ou que les eaux restituées auraient une composition chimique ou une température, ou telle autre caractéristique pouvant porter préjudice aux intérêts espagnols. L'Espagne aurait alors pu prétendre qu'il était porté atteinte, contrairement à l'Acte additionnel, à ses droits. Ni le dossier, ni les débats de cette affaire ne portent la trace d'une telle allégation.

On aurait pu également faire valoir que, par leurs caractères techniques, les ouvrages prévus par le projet français ne pouvaient pas assurer en fait la restitution d'un volume qui corresponde aux apports naturels du Lanoux au Carol, par défectuosité soit des instruments de mesure, soit des mécanismes de restitution. La question a été effleurée dans le Contre-Mémoire espagnol (p.86), qui a souligné "l'extraordinaire complexité" des procédés de contrôle, leur caractère "très onéreux" et les "risques d'avaries ou de négligence, dans le maniement de la vanne et d'obstruction dans le tunnel". Mais il n'a jamais été allégué que les ouvrages envisagés présentent d'autres caractères ou entrainent d'autres risques que les ouvrages du même genre qui sont aujourd'hui répandus dans le monde entier. Il n'a pas été affirmé clairement que les ouvrages prévus entraineraient un risque anormal dans les relations de voisinage ou dans l'utilisation des eaux. Comme on l'a vu plus haut, les garanties techniques de restitution des eaux sont aussi satisfaisantes que possible. Si, malgré les précautions prises, la restitution des eaux souffrait d'un accident, celui-ci n'aurait qu'un caractère occasionnel et, selon les deux Parties, ne constituerait pas une violation de l'article 9.

7. Le Gouvernement espagnol s'est placé sur un autre terrain. Déjà dans le compromis d'arbitrage il déclarait que le projet français "modifie les conditions naturelles du bassin hydrographique du lac Lanoux en détournant ses eaux vers l'Ariège et en faisant ainsi dépendre physiquement la restitution des eaux au Carol de la volonté humaine ce qui entrainerait la prépondérance de fait d'une Partie au lieu de l'égalité des deux Parties

prévue par le Traité de Bayonne du 26 mai 1866 et par l'Acte additionnel de la même date".

La position du Gouvernement espagnol devait se préciser au cours de la procédure tant écrite qu'orale. Dans le Mémoire (p.52), il invoquait l'article 12 de l'Acte additionnel:

Les fonds inférieurs sont assujettis à recevoir des fonds plus élevés du Pays voisin les eaux qui en découlent naturellement avec ce qu'elles charrient, sans que la main de l'homme y ait contribué. On n'y peut construire ni digue, ni obstacle quelconque susceptible de porter préjudice aux riverains supérieurs, auxquels il est également défendu de rien faire qui aggrave la servitude des fonds inférieurs.

Selon le Gouvernement espagnol, cette disposition consacrerait l'idée suivant laquelle aucune des Parties ne peut, sans l'accord de l'autre, modifier l'ordre naturel de l'écoulement des eaux. Le Contre-Mémoire espagnol (p.77) reconnait, toutefois, que: "A partir du moment où la volonté humaine intervient pour réaliser un aménagement hydraulique quelconque, c'est un élément extra-physique qui agit sur le courant et altère ce qu'a établi la Nature". Aussi bien le Gouvernement espagnol ne donne-t-il pas un sens absolu au respect de l'ordre naturel: selon le Contre-Mémoire (p.96): "Un Etat a le droit d'utiliser unilatéralement la part d'un fleuve qui le traverse dans la limite où cette utilisation est de nature à ne provoquer sur le territoire d'un autre Etat qu'un préjudice restreint, une incommodité minime, qui entre dans le cadre de celles qu'implique le bon voisinage."

En réalité, il semble que la thèse espagnole soit double et vise, d'une part, l'interdiction, sauf accord de l'autre Partie, de la compensation entre deux bassins, en dépit de l'équivalence de la dérivation et de la restitution, d'autre part, l'interdiction, sauf accord de l'autre Partie, de toutes les actions qui peuvent créer, avec une inégalité de fait, la possiblité physique d'une violation du droit.

Les deux points doivent être examinés successivement.

8. L'interdiction, sauf dérogation consentie par l'autre Partie, de la compensation entre deux bassins en dépit de l'équivalence de la dérivation et de la restitution, conduirait à entraver d'une manière générale un prélèvement dans un cours d'eau appartenant à un bassin fluvial A au profit d'un bassin fluvial B, même si ce prélèvement est compensé par une restitution strictement équivalente opérée à partir d'un cours d'eau du bassin fluvial B au profit du bassin fluvial A. Le Tribunal ne saurait méconnaître la réalité, au point de vue de la géographie physique, de chaque bassin fluvial, qui constitue, comme le soutient le Mémoire espagnol (p.53), "une unité". Mais cette constatation n'autorise pas les conséquences absolues que voudrait en tirer la thèse espagnole. L'unité d'un bassin n'est sanctionnée sur le plan juridique que dans la mesure où elle correspond à des réalités humaines. L'eau qui constitue par nature un bien fongible peut être l'objet d'une restitution qui n'altère pas ses qualités au regard des besoins humains. Une dérivation avec restitution, comme celle envisagée, par le projet français, ne modifie pas un état de choses ordonné en fonction des exigences de la vie sociale.

L'état de la technique moderne conduit à admettre, de plus en plus fréquemment, que les eaux consacrées à la production d'énergie électrique ne soient pas rendues à leur cours naturel. On capte l'eau toujours plus haut et on l'amène toujours plus loin, et en ce faisant, on la détourne parfois dans un autre bassin fluvial, dans le même Etat ou dans un autre pays au sein d'une même fédération ou même dans un Etat tiers. Dans les fédérations, la jurisprudence a reconnu la validité de cette dernière pratique (Wyoming *v.* Colorado, *United States Reports,* vol.259, *Cases adjuged in the Supreme Court,* p.419) et les espèces citées par D.J.E. Berber, *Die Rechtsquellen des internationalen Wassernutzungsrechts,* p. 180. et par M. Sauser Hall, *l'Utilisation industrielle des fleuves intrnationaux, Receuil des cours de l'Académie de droit international de La Haye,* 1953, t. 83, p.544; pour la Suisse, *Recueil des arrêts du Tribunal fédéral,* 78, t. I, p.14 et suiv.)

Le Tribunal estime donc que la dérivation avec restitution telle qu'elle est prévue dans le projet et les propositions français n'est pas contraire au Traité et à l'Acte additionnel de 1876.

Par ailleurs, le Gouvernement espagnol a contesté la légitimité des travaux effectués sur le territoire d'un des Etats signataires du Traité et de l'Acte additionnel, si cela est de nature à lui permettre, fût-ce en violation de ses engagements internationaux, de faire pression sur l'autre signataire. Cette règle découlerait de ce que les traités en cause consacrent le principe de l'égalité entre Etats. Concrètement, l'Espagne estime que la France n'a pas le droit de se ménager, par des travaux d'utilité publique, la possiblité physique de supprimer l'écoulement des eaux du Lanoux ou la restitution d'une quantité d'eau équivalente. Le Tribunal n'a pas à se porter juge des motifs ou des expériences qui ont pu amener le Gouvernement espagnol à exprimer certaines inquiétudes. Mais il n'est pas allégué que les travaux dont il s'agit aient pour but, en dehors de la satisfaction des intérêts français, de créer un moyen de nuire aux intérêts espagnols, au moins éventuellement: cela serait d'autant plus invraisemblable que la France ne pourrait tarir que partiellement les ressources constituant le débit du Carol, qu'elle frapperait aussi toutes les terres françaises irriguées par le Carol et qu'elle s'exposerait, sur toute la frontière, à de redoutables représailles.

D'autre part, les propositions du Gouvernement français

qui font partie intégrante de son projet comportent "l'assurance qu'il ne portera, en aucun cas, atteinte au régime ainsi établi" (annexe 12 du Mémoire française). Le Tribunal doit donc répondre à la question posée par le Compromis sur la base de cette assurance. Il ne saurait être allégué que, malgré cet engagement, l'Espagne n'aurait pas une garantie suffisante, car il est un principe général de droit bien établi selon lequel la mauvaise foi ne se présume pas. Il n'a d'ailleurs pas été soutenu qu'à aucune époque un des deux Etats ait violé sciemment, aux dépens de l'autre, une règle relative au régime des eaux. Par ailleurs, tout en s'inspirant d'un juste esprit de réciprocité, les Traités de Bayonne n'ont institué qu'une égalité juridique, non une égalité de fait. S'il en était autrement, ils auraient dû interdire, des deux côtés de la frontière, toutes les installations et travaux d'ordre militaire qui peuvent assurer à l'un des Etats une prépondérance de fait dont il peut se servir pour violer ses engagements internationaux. Mais il faut aller plus loin encore; l'emprise croissante de l'homme sur les forces et les secrets de la nature a remis en ses mains des instruments dont il peut se servir tant pour violer ses engagements que pour le bien commun de tous; le risque d'un mauvais emploi n'a pas conduit, jusqu'à présent, à soumettre la détention de ces moyens d'action à l'autorisation des Etats éventuellement menacés. Même si l'on se plaçait uniquement sur le terrain des relations de voisinage, le risque politique allégué par le Gouvernement espagnol ne présenterait pas un caractère plus anormal que le risque technique dont il a été parlé plus haut. En tout cas, on ne trouve ni dans le Traité et l'Acte additionnel du 26 mai 1866, ni dans le droit international commun une règle qui interdise à un Etat, agissant pour la sauvergarde de ses intérêts légitimes, de se mettre dans une situation qui lui permette, en fait, en violation de ses engagements internatinaux, de préjudicier même gravement à un Etat voisin.

Il reste encore à apprécier si le projet français est contraire aux règles de fond posées par l'article 11. Cette question sera examinée plus loin, dans le cadre général de cet article (cf. par. 24).

Sous cette dernière réserve, le Tribunal répond négativement à la première question, énoncée au paragraphe 3.

II. - *Sur la deuxième question* (énoncée sous 3, b)

10. Dans le compromis, le Gouvernement espagnol déclarait déjà qu'à son avis, le projet français requiert, pour son exécution, "l'accord préalable des deux Gouvernements, à défaut duquel le pays qui le propose ne peut avoir liberté d'action pour entreprendre les travaux".

Dans la procédure tant écrite qu'orale, il a développé ce point de vue, en le complétant notamment par l'exposé des principes devant présider aux tractations qui mènent à cet accord préalable. Ainsi donc deux obligations pèseraient sur l'Etat qui veut entreprendre les travaux envisagés: la plus imprtante serait d'aboutir à un accord préalable avec l'autres règles posées par l'article 11 de l'Acte additionnel.

L'argumentation présentée par le Gouvernement espagnol s'affirme, par ailleurs, sur deux plans: le Gouvernement espagnol se fonde, d'une part, sur le Traité et l'Acte additionnel de 1866, d'autre part, sur le régime des faceries ou compascuités qui subsistent sur la sur la frontière pyrénéenne, ainsi que sur les règles du droit international commun. Ces deux dernières sources permettraient d'abord d'interpréter le Traité et l'Acte additionnel de 1866, ensuite, dans une perspecitve plus large, de démontrer l'existence d'une règle générale de droit international de caractère non écrit. Celle-ci trouverait les précédents permettant de l'établir dans les traditions du régime des faceries, dans les dispositions des Traités pyrénéens, ainsi que dans la pratique internationale des Etats en matière d'utilisation industrielle des cours d'eau internationaux.

11. Avant de procéder à l'examen de l'argumentation espagnole, le Tribunal croit utile de présenter quelques observations très générales sur la nature même des obligations invoquées à la charge du Gouvernement français. Admettre qu'en une matière déterminée il ne peut plus être exercé de compétence qu'à la condition ou par la voie d'un accord entre deux Etats, c'est apporter une restriction essentielle à la souveraineté d'un Etat, et elle ne saurait être admise qu'en présence d'une démonstration certaine. Sans doute, la pratique internationale révèle-t-elle quelques cas particulier dans lesquels cette hypothèse se vérifie; ainsi parfois deux Etats exercent conjointement les compétences étatiques sur certains territoires (indivision, coïmperium ou condominium); de même, dans certaines institutions internationales, les représentants des Etats exercent conjointement certaines compétences au nom des Etats ou au nom des organisations. Mais ces cas sont exceptionnels et la jurisprudence internationale n'en reconnaît pas volontiers l'existence, surtout lorsqu'ils portent atteinte à la souveraineté territoriale d'un Etat, ce qui serait le cas dans la présente affaire.

En effet, pour apprécier, dans son essence, la nécessité d'un accord préalable, il faut se placer dans l'hypothèse dans laquelle les Etats intéressés ne peuvent arriver à un accord. Dans ce cas, il faut admettre que l'Etat normalement compétent a perdu le droit d'agir seul, par suite de l'opposition inconditionnée et discrétionnaire d'un autre Etat. C'est admettre un "droit d'assentiment", un "droit de veto", qui paralyse, à la discrétion d'une Etat, l'exercise de la compétence territoriale d'un autre Etat.

C'est pourquoi la pratique internationale recourt de

préférence à des solutions moins extrêmes, en se bornant à obliger les Etats à rechercher, par des tractations préalables, les termes d'un accord, sans subordonner à la conclusion de cet accord l'exercice de leurs compétences. On a ainsi parlé, quoique souvent d'une manière impropre, de "l'obligation de négocier un accord". En réalité, les engagements ainsi pris par les Etats prennent des formes très diverses et ont une portée qui varie selon la manière dont ils sont définis et selon les procédures destinées à leur mise en oeuvre; mais la réalité des obligations ainsi souscrites ne saurait être contestée et peut être sanctionnée, par exemple, en cas de rupture injustifiée des entretiens, de délais anormaux, de mépris des procédures prévues, de refus systématiques de prendre en considération les propositions ou les intérêts adverses, plus généralement en cas d'infraction aux règles de la bonne foi (affaire de Tacna-Arica, *Recueil des sentences arbitrales,* t. 11, p.921 et. suiv.; affaire du trafic ferroviaire entre la Lithuanie et la Pologne, Cour permanente de Justice internationale, A B 42, p.108 et suiv.)

A la lumière de ces observations générales et au regard de la présente affaire, on examinera successivement si un accord préalable est nécessaire et si les autres règles posées par l'article 11 de l'Acte additionnel ont été respectées.

A) *Nécessité d'un accord préalable*

12. On recherchera donc d'abord si la thèse suivant laquelle l'exécution du projet français est soumise à un accord préalable du Gouvernement espagnol est justifée au regard du régime des compascuités ou faceries ou du droit international commun; les indications recueillies permettraient, en cas de besoin, d'interpréter le Traité et l'Acte additionnel de 1866, ou mieux, selon la formule la plus générale donnée aux thèses espagnoles, d'affirmer l'existence d'un principe général du droit ou d'une coutume dont le Traité et l'Acte additionnel de 1866 consacreraient parmi d'autres la reconnaissance (Mémoire espagnol, p.81).

Le Gouvernement espagnol s'est attaché à démontrer que "la ligne de démarcation à la frontière pyrénéenne constitue, plutôt qu'une limite aux droits souverains des Etats frontaliers, une zone organisée conformément à un droit spécial de caractère coutumier, incorporé au droit international par les Traités de délimitation qui l'ont reconnue" (Mémoire espagnol, p.55). La manifestation la plus caractéristique de ce droit coutumier serait l'existence de "compascuités" ou "faceries" (plaidoiries, 4e séance, p.16), qui sont elles-mêmes le résidu d'un système communautaire plus vaste, qui, dans les vallées pyrénéennes, était fondé sur la règle que les matières d'intérêt commun doivent être réglées par des accords librement débattus.

En fait, le projet français ne porte aucune atteinte aux droits de pâturages sur territoire français garantis par les traités au profit de certaines communes espagnoles. Il apparaît notamment, d'après les réponses des Parties à une question posée par le Tribunal, que les droits de pâturages que possède la commune espagnole de Llivia sur le territoire français ne touchent en rien aux eaux du Lanoux ou du Carol. Aussi bien le Gouvernement espagnol invoque-t-il le régime des compascuités ou plutot celui des communautés pyrénéennes aujourd'hui disparues, dont les compascuités sont la dernière trace, pour retenir essentiellement l'esprit de ce régime, fait de bonne entente, de souci des intérêts communs et de recherche de compromis par des accords librement négociés et conclus. En ce sens, il est en effet exact que les caractères propres de la frontière pyrénéenne conduisent les Etats limitrophes à s'inspirer, plus que pour toute autre frontière, de l'esprit de collaboration et de compréhension indispensable à la solution de difficultés qui peuvent naître des rapports frontaliers, notamment dans les pays de montagne.

Mais l'on ne saurait aller plus loin; il est impossible d'étendre le régime des compascuités au-delà des limites qui leurs sont assignées par les traités, ni d'en faire découler une notion de "communauté" généralisée qui aurait un contenu juridique quelconque. Quant au recours à la notion de "frontière zone", il ne peut, par l'usage d'un vocabulaire doctrinal, ajouter une obligation à celles que consacre le droit positif.

13. Le Gouvernement espagnol s'est efforcé d'établir également le contenu du droit international positif actuel (Mémoire espagnol, p. 65; Contre-Mémoire espagnol, p. 105). Certains principes dont il fait la démonstration sont, à supposer celle-ci acquise, sans intérêt pour le problème actuellement examiné. Ainsi, en admettant qu'il existe un principe interdisant à l'Etat d'amont d'altérer les eaux d'un fleuve dans des conditions de nature à nuire gravement à l'Etat d'aval, un tel principe ne trouve pas son application à la présente espèce, puisqu'il a été admis par le Tribunal, à propos de la première question examinée plus haut, que le projet français n'altère pas les eaux du Carol. En réalité, les Etats ont aujourd'hui parfaitement conscience de l'importance des intérêts contradictoires, que met en cause l'utilisation industrielle des fleuves internationaux, et de la nécessité des les concilier les uns avec les autres par des concessions mutuelles. La seule voie pour aboutir à ces compromis d'intérêt est la conclusion d'accords, sur une base de plus en plus compréhensive. La pratique internationale reflète la convicition que les Etats doivent tendre à conclure de tels accords; il y aurait ainsi une obligation d'accepter de bonne foi tous les entretiens et les contacts qui doivent par une large confrontation d'intérêts et par une bonne volonté réciproque, les mettre dans les meilleures conditions pour conclure des accords. Cette indication sera retenue plus loin, lorsqu'il s'agira d'établir quelles obligations pèsent sur la France et

l'Espagne en ce qui concerne les contacts et les entretiens antérieurs à la mise en oeuvre d'un projet tel que celui concernant le lac Lanoux.

Mais la pratique internationale ne permet pas, jusqu'à présent, de dépasser cette conclusion; la règle suivant laquelle les Etats ne peuvent utiliser la force hydraulique des cours d'eau internationaux qu'à la condition d'un accord *préalable* entre les Etats intéressés ne peut être établie ni à titre de coutume, ni encore moins à titre de principe général du droit. Très caractéristique, à cet égard, est l'histoire de l'élaboration de la Convention multilatérale de Genève du 9 décembre 1923, relative à l'aménagement des forces hydrauliques intéressant plusieurs Etats. Le projet initial était fondé sur le caractère obligatoire et préalable des accords destinés à mettre en valeur les forces hydrauliques des cours d'eau internationaux. Mais cette formule fut repoussée et la Convention, dans sa forme finale, dispose (article premier) qu'elle "ne modifie en aucune manière la liberté pour tout Etat, dans le cadre du droit international, d'exécuter sur son territoire tous travaux d'aménagement des forces hydrauliques qu'il désire"; seule est prévue, entre Etats signataires intéressés, une obligation de se prêter à une étude en commun d'un programme d'aménagement; l'exécution de ce programme ne s'impose d'ailleurs qu'aux Etats qui s'y sont formellement engagés.

Le droit international commun, pas plus que les traditions pyrénéennes ne fournissent d'indications susceptibles ni d'orienter l'interprétation du Traité et de l'Acte additionnel de 1866 dans un sens favorable à la nécessité d'un accord préalable, ni encore moins de permettre de conclure à l'existence d'un principe général du droit ou d'une coutume ayant cet effet.

14. L'existence d'une règle imposant un accord préalable à l'aménagement hydraulique d'un cours d'eau international ne peut donc résulter, entre l'Espagne et le France, que d'un acte conventionnel. On examinera, à ce titre d'abord, le Traité et l'Acte additionnel de 1866, ensuite l'Accord de 1949. Ce dernier a fait l'objet d'une abondante argumentation; il peut s'inscrire dans le cadre de ces "modifications convenues entre les deux Gouvernements" prévues par l'article 8 de l'Acte additionnel du 26 mai 1866; à ce titre, le Tribunal est donc compétent pour l'examiner.

a) *Traité et Acte additionnel de 1866*

15. La thèse fondamentale du Gouvernement espagnol, affirmée dès le compromis, est que l'exécution du projet français est soumise à la nécessité d'un accord préalable, parce qu'elle touche aux intérêts généraux communs des deux pays.

Selon un premier argument, les eaux seraient soumises à un régime d'indivision ou plutôt de communauté. Prise à la lettre, cette thèse est en contradiction formelle avec le texte de l'article 8 de l'Acte additionnel; elle n'a pas été soutenue par le Gouvernement espagnol. Mais celui-ci a distingué la communauté de propriété et la communauté d'usage et s'est référé à une communauté d'usage qui trouverait son fondement dans le sous-titre qui, dans l'Acte additionnel, recouvre les articles 8 à 21: "Régime et jouissance des eaux d'un usage commun entre les deux pays" (Contre-Mémoire espagnol, p.42; plaidoiries orales, a^e^ séance, p.28).

Il est difficile de faire, en matière d'eaux courantes, une très grande différence entre une communauté de propriété et une communauté d'usage, toutes deux perpétuelles. Mais surtout les expressions employées par un titre ne peuvent, à elles seules, comporter des conséquences contraires aux principes formellement posés par les articles groupés sous ce titre. Or, le régime des eaux qui résulte de l'Acte additionnel n'est pas, d'une manière générale, favorable à l'indivision ou à la communauté, même réduite à l'usage; il comporte des règles précises pour un partage des eaux; peu de cours d'eau internationaux sont soumis à des règles aussi minutieuses que ceux des Pyrénées; ces prescriptions ont pour objet de répartir et de cantonner les droits afin d'éviter les difficultés des régimes d'indivision, difficultés que les Traités pyrénéens rappellent volontiers dans leurs considérants (Traité du 14 avril 1862) ou même dans leur texte (article 13 du Traité du 2 décembre 1856).

16. Un deuxième argument destiné à établir la nécessité d'un accord préalable pourrait être tiré du texte de l'article 11 de l'Acte additionnel (Mémoire espagnol, p.48). Si l'article 11 ne pose explicitement qu'une obligation d'information, "la nécessité de l'accord préalable...ressort implicitement de cette obligation d'information dont il est question ci-dessus, cette obligation ne pouvant disparaître d'elle-même, puisqu'elle a pour objet la protection des intérêts de l'autre Partie". Ce raisonnement manque, de l'avis du Tribunal, de base logique. Si les Parties contractantes avaient voulu instituer la nécessité d'un accord préalable, elles ne se seraient pas bornées à ne mentionner, à l'article 11, que l'obligation de donner un avis préalable. La nécessité d'un avis préalable de l'Etat A à l'Etat B est implicite si A ne peut entreprendre le travail envisagé sans l'accord de B; il n'aurait donc pas été nécessaire de mentionner l'obligation de l'avis préalable à B, si l'on avait établi la nécessité d'un accord préalable de B. De toute façon, l'obligation de donner l'avis préalable ne renferme pas celle, beaucoup plus étendue, d'obtenir l'accord de l'Etat avisé; le but de l'avis peut être tout autre que celui de consentir à B l'exercice du droit de veto; il peut être tout simplement (et l'article 11 de l'Acte additionnel le dit) de permettre à B de sauvegarder, d'une part, en temps utile, les droits de ses riverains à des indemnités et, d'autre part, dans la mesure du possible, ses intérêts généraux. Cela est si

vrai qu'incidemment, et sans pour autant abandonner sa thèse principale, le Contre-Mémoire espagnol (p.52) admet que, selon l'article 11, "ces travaux ou nouvelles concessions ne peuvent altérer le régime ou débit d'un cours d'eau que dans la mesure où la conciliation des intérêts compromis deviendraient impossible".

La méthode de raisonnement qui appraît dans les développements de la thèse espagnole appelle d'ailleurs une remarque plus générale. La nécessité d'un accord préalable découlerait de toutes les circonstances dans lesquelles les deux Gouvernements sont amenés à tomber d'accord: ainsi, en ce qui concerne les indemnités prévues à l'article 9 de l'Acte additionnel, ainsi même du fait des propositions françaises qui, pour le jeu de garanties, qu'elles prévoient supposeraient un accord du Gouvernement espagnol. Ce raisonnement est en contradiction avec les principes les plus généraux du droit international: il appartient à chaque Etat d'apprécier, raisonnablement et de bonne foi, les situations et les règles qui le mettent en cause; son appréciation peut se trouver en contradiction avec celle d'un autre Etat; dans ce cas, apparaît un différend que les Parties cherchent normalement à résoudre par la négociation, ou bien en se soumettant à l'autorité d'un tiers; mais l'une d'elles n'est jamais obligée de suspendre, du fait du différend, l'exercice de sa compétence, sauf engagement de sa part; en exerçant sa compétence, elle prend le risque de voir sa responsabilité internationale mise en cause s'il est établi qu'elle n'a pas agi dans la limite de ses droits. La mise en oeuvre de la procédure d'arbitrage dans la présente affaire illustre parfaitement ces règles, en fonction des obligations souscrites par l'Espagne et la France dans le Traité d'arbitrage du 10 juillet 1929.

Poussée à l'extrême, la thèse espagnole impliquerait ou bien la paralysie générale de l'exercice des compétences étatiques en présence d'un différend, ou bien la soumission de tous les différends, quels qu'ils soient, à l'autorité d'un tiers; la pratique internationale ne consacre ni l'une ni l'autre de ces conséquences.

17. Le dernier argument de texte invoqué par le Gouvernment espagnol est relatif aux articles 15 à 16 de l'Acte additionnel, qui consacreraient l'obligation d'un accord préalable. Leur portée exacte a suscité des controverses étendues; le texte français de l'article 16 concerne un "droit de réglementation des intérêts généraux et interprétation ou modification de leurs règlements; le texte espagnol, plus large, vise les affaires de convenance générale (*asuntos de conveniencia general*).

De l'avis du Tribunal, en donnant à ce texte sa portée la plus générale et en combinant, selon la thèse espagnole, l'article 15 et l'article 16 on ne peut en tirer plus que la conclusion suivante: il institue une procédure de consultation qui définit dans quelle mesure les autorités locales sont appelées à résoudre certains différends ou à harmoniser l'exercice de leur compétence; en cas d'échec, l'échelon administratif supérieur doit être saisi et finalement dans le cadre de l'article 16 "le différend sera soumis aux deux Gouvernements". Il résulte des considérations qui précèdent qu'il est impossible de déduire de cette formule la nécessité d'un accord préalable. Si la thèse espagnole était exacte, il faudrait admettre que, dans une zone variable d'une affaire à une autre, selon les intérêt généraux en cause, l'exercice des compétences des deux Etats serait suspendu par la nécessité d'un accord préalable; la pratique ne révèle aucune trace de cette obligation.

L'examen des articles 15 et 16 de l'Acte additionnel conduit donc à une conclusion négative, en ce qui concerne l'obligation d'un accord préalable. D'une manière positive, on peut seulement admettre qu'il existe une obligation de consultation et d'harmonisation des actions respectives des deux Etats, lorsque des intérêts généraux sont engagés en matière d'eaux. Sur ce point, les formules assez extensives de l'article 16 méritent d'être retenues, lorsque seront examinées plus loin les obligations des deux Parties résultant de l'article 11 de l'Acte additionnel.

18. Les Parties ont tenté de préciser le sens du Traité et de l'Acte additionnel de 1866 en se référant à leurs attitudes respectives, notamment à l'occasion de différents projets de mise en valeur des forces hydrauliques dans les Pyrénées. Le Gouvernement espagnol a invoqué, en faveur de la nécessité d'un accord, une note du 29 février 1920 du Ministère des Affaires Etrangères de France à l'Ambassadeur d'Espagne à Paris (annexe 13 du Mémoire espagnol), ainsi qu'une note verbale de l'Ambassade de France à Madrid, en date du 10 février 1932, relative au détournement des eaux dites du Trou du Toro. Il n'est pas possible de tirer une conclusion directe de cette correspondance diplomatique, car elle s'applique à des travaux qui comportaient, pour une part importante, des dérivations sans restitutions.

D'une manière plus générale, lorsqu'une question donne lieu à de longues controverses et à des négociations diplomatiques plusieurs fois amorcées, suspendues et reprises, il y a lieu, pour interpréter la portée des documents diplomatiques, de tenir compte des principes suivants:

Comme il l'a été reconnu par la jurisprudence internationale, tant par la Cour permanente d'Arbitrage, dans l'affaire des Pêcheries de l'Atlantique Nord (1910), que par la Cour internationale de Justice, dans l'affaire des Pêcheries (1951) et dans celle des ressortissants des Etats-Unis au Maroc (1952), il ne faut pas s'attacher à des expressions isolées ou à des attitudes ambiguës qui n'altèrent pas les positions juridiques prises par les Etats. Toute négociation tend à revêtir un caractère global, elle

porte à la fois sur des droits, les uns reconnus et les autres contestés, et sur des intérêts; il est normal qu'en prenant en considération les intérêts adverses, une Partie ne se montre pas intransigeante sur tous ses droits; c'est la seule manière, pour elle, de faire prendre en considération certains de ses propres intérêts.

Par ailleurs, pour qu'une négociation se déroule dans un climat favorable, il faut que les Parties consentent à suspendre, pendant la négociation, le plein exercice de leurs droits. Il est normal qu'elles prennent des engagements à cet effet. Si ces engagements devaient les lier inconditionnellement jusqu'à la conclusion d'un accord, elles perdraient, en les signant, la faculté même de négocier; cela ne saurait être présumé.

Il est nécessaire de garder ces considérations présentes à l'esprit, lorsqu'il s'agit de tirer des conclusions juridiques de la correspondance diplomatique.

En l'espèce, il est certain que l'Espagne et la France ont toujours maintenu leurs thèses essentielles en ce qui concerne la nécessité d'un accord préalable. Comme la reconnaît le Mémoire espagnol (p.35), aucun des deux Gouvernements n'a jamais modifié la position qu'il avait prise dès origine. Le Gouvernement français a notamment rappelé à plusieurs reprises la sienne, ainsi dans la dépêche du 1er mai 1922 (annexe 25 du Mémoire espagnol), ou dans les entretiens relatés dans un compte rendu de la réunion du 5 août 1955 de la Commission mixte d'Ingénieurs (annexe 39 du Mémoire espagnol). Le Tribunal estime n'avoir pas trouvé dans la correspondance diplomatique d'éléments qui impliquent la reconnaissance par la France de l'interprétation du Gouvernment espagnol selon laquelle la réalisation de travaux tels que ceux envisagés dans la présente espèce serait subordonnée à un accord préalable des deux Gouvernements.

b) *Accord de 1949*

19. Mais une place à part doit être faite à un accord conclu en 1949 auquel l'argumentation espagnole attache une importance essentielle.

Lors de la réunion de la session du 31 janvier-3 février 1949 de la Commission internationale des Pyrénées, la question du lac Lanoux fut évoquée sous le point "divers" de l'ordre du jour, par la délégation française, qui proposa la constitution d'une Commission mixte d'ingénieurs. La délégation espagnole accepta la constitution de cette Commission, "laquelle se chargera d'étudier l'affaire et de faire rapport aux Gouvernments respectifs, étant bien entendu que l'état de choses actuel ne serait pas modifié jusqu'à ce que les Gouvernements en aient décidé autrement, d'un commun accord" [annexe 31 (I) du Mémoire espagnol]. Le 13 mars 1950, le Gouvernement espagnol, dans une note verbale adressée au Gouvernement français (annexe 33 du Mémoire espagnol) estimait que l'installation au lac Lanoux d'appareils de mesure des eaux constituait une violation de cet accord. Puis la France envisagea un autre projet assurant une restitution partielle des eaux, qui fut notifié en application de l'article 11 de l'Acte additionnel, le 26 mai 1953. En réponse à une démarche de l'Ambassade d'Espagne à Paris, le Gouvernement français par une note du 27 juin 1953, acceptait la réunion de la Commission mixte d'ingénieurs prévue à la réunion de la Commission internationale des Pyrénées, en 1949; de plus, la note précisait: "Bien que l'Acte additionnel de Bayonne du 26 mai 1866, qui règle la matière, en particulier dans son article 11, ne prévoie pas que les travaux portant atteinte au régime des eaux puissent être suspendus sur demande de l'autre Partie, le Ministère des Affaires Etrangères donne bien volontiers à l'Ambassade d'Espagne l'assurance que rien n'a encore été entrepris ou n'est sur le point de l'être en ce qui concerne le lac Lanoux." (Annexe 37 du Mémoire espagnol.)

En 1954, le Préfet des Pyrénées-Orientales, agissant sur instructions de son Gouvernement, portait à la connaissance du Gouverneur de Gérone qu'une modification essentielle était apportée au projet français, puisqu'il prévoyait désormais la restitution des eaux dérivées et estimait que, dès lors, "l'état des choses actuel n'étant pas modifié, les engagements pris lors de la réunion de la Commission internationale des Pyrénées à Madrid, en février 1949, se trouvent respectés" (annexe 8 du Mémoire français). A une note espagnole du 9 avril 1954, le Ministère des Affaires Etrangères de France répondait par une note verbale du 18 juillet 1954 (annexe 9 du Mémoire français). Il précisait que, "contrairement à ce qu'affirme l'Ambassade d'Espagne, dans l'avant-dernier alinéa de sa note du 9 avril 1954, le Ministère des Affaires Etrangères n'a pas, dans sa note du 27 juin 1953, donné l'assurance "que de tels travaux ne seraient pas commençés avant la réunion de la Commission mixte d'ingénieurs", mais plus exactement que rien n'avait été entrepris ou n'était sur le point de l'être, en ce qui concerne le lac Lanoux, sans subordonner l'ouverture des travaux aux résultats des travaux de la Commission". Par ailleurs, la note estimait que les riverains espagnols du Carol n'étaient appelés à subir aucun préjudice: "l'article 11 de l'Acte additionnel ne saurait être invoqué par l'une ou l'autre Partie et les autorités français ne sont nullement tenues à subordonner l'ouverture des travaux à la réunion de la Commission mixte prévue à la Commission Internationale des Pyrénées en 1949". La Commission mixte d'ingénierus se réunit à Perpignan le 5 août 1955 et n'aboutit à aucun résultat. En répondant à une note verbale espagnole du 19 août 1955 (annexe 40 du Mémoire espagnol) qui se fondait sur les engagements précédents pour refuser au Gouvernement français le droit d'exécuter les travaux envisagés celui-ci renouvelait, le 3 octobre 1955, auprès des autorités espagnoles, "l'assurance qu'aucun travail

n'a été ou ne sera entrepris qui puisse modifier le régime des eaux sur le versant espagnol avant que la Commission des Pyrénées ne se réunisse à Paris, le 3 novembre prochain. Certains travaux accessoires qui avaient été commencés ont été suspendus" (annexe 41 du Mémoire espagnol). Avec la réunion de la Commission internationale des Pyrénées les négociations devaient suivre un autre cours; les deux délégations manifestèrent leur dissentiment sur des points de droit importants, mais il fut décidé qu'une nouvelle Commission, la Commission mixte spéciale, se réunirait à Madrid, le 12 décembre 1955, pour "élaborer un projet pour l'utilisation des eaux du lac Lanoux" (annexe 10 du Mémoire français, p. 102). Toutefois, la délégation française précisa que "si, dans un délai de trois mois, à compter de ce jour, la Commission dont la réunion est prévue au procès-verbal, n'avait pas abouti à une conclusion, les autorités françaises reprendraient leur liberté dans la limite de leur droits". La Commission mixte spéciale se réunit une première fois à Madrid, le 12 décembre 1955, puis une deuxième fois à Paris, le 2 mars 1956, sans aboutir à aucun résultat et sans que de nouveaux engagements fussent pris.

L'examen de la correspondance diplomatique montre donc que trois engagements distincts (avant la procédure d'arbitrage) ont été pris par le Gouvernement français. Les deux derniers, celui du 3 octobre 1955 et celui du 14 novembre 1955, n'étaient pris que pour une durée limitée; celui de 1949 ne mentionnait aucune durée d'application: c'est pourquoi il présente au regard de l'argumentation espagnole, une importance particulière.

20. Un seul point n'est pas contesté: l'engagement a existé valablement; mais les Parties ne sont d'accord ni sur sa durée, ni sur son étendue.

Il n'est pas douteux que chacune des Parties comprend cet engagement à la lumière de sa propre interprétation du Traité et de l'Acte additionnel de 1866. La France a pu considérer qu'en l'absence d'un droit d'assentiment de l'Espagne et en présence de travaux qu'elle pouvait estimer conformes aux règles de fond des Traités, elle n'était pas tenue de suspendre l'exécution des travaux; dans cette perspective, l'accord de 1949 serait une mesure aménageant une négociation et n'ayant de sens que dans son cadre concret. Cette position était déjà, en 1922, celle de la France qui, dans une note du 5 janvier 1922 (annexe 21 du Mémoire espagnol) affirmait que la constitution d'une commission d'études ne pouvait, en aucun cas, porter atteinte au Traité du 26 mai 1866. L'Espagne, d'une part, a pu considéer que, en tout état de cause, la France était obligée de ne faire, sans son accord, aucun travail et que, par conséquent, l'accord de 1949, loin de donner naissance à une obligation nouvelle, ne faisait que confirmer une obligation générale pré-existante. Cette différence de perspective explique également que les Parties donnent à leur engagement une portée différente. Il semble que le Gouvernement français en marquant quelques hésitations regrettables, ait estimé tantôt qu'il n'était tenu qu'à assurer au Carol un régime et un débit équivalents à son régime et à son débit naturel, tantôt qu'il n'était tenu qu'à ne pas dériver les eaux; l'Espagne, au contraire, a toujours estimé que la France ne devait effectuer aucun travail qui, ni de près, ni de loin, ait un rapport direct out indirect avec le projet d'aménagement.

La bonne foi des deux Parties étant absolument hors de cause, il appartient au Tribunal de rechercher objectivement la portée de l'engagement; il n'est pas nécessaire, en fait, qu'il en détermine l'étendue, il lui suffira d'en établir la durée.

D'après les circonstances qui ont présidé à sa conclusion, il est normal de situer cet accord dans le cadre d'une négociation diplomatique. Il a été conclu, au sein de la Commission internationale des Pyrénées, qui ne possède aucun pouvoir propre pour décider des questions qui lui sont soumises, mais dont la compétence est limitée à une fonction d'études et d'information. L'Accord ne comprenait pas seulement l'engagement de maintenir l'état de choses actuel, mais surtout et essentiellement la constitution d'une Commission mixte d'ingénieurs dont le mandat assez vague était d'étudier la question du lac Lanoux et de soumettre le résultat de ses travaux aux Gouvernements. L'engagement de maintenir les choses en leur état actuel apparaît donc comme une conséquence accesseoire de la tâche confiée à cette Commission. Le maintien des choses en l'état est donc, en quelque sorte, une mesure provisionnelle, qui ne pouvait durer qu'à la condition que la Commission mixte d'ingénieurs ait une activité réelle. Or, cette Commission après sa première réunion tenue à Gérone les 29 et 30 août 1949, tomba en sommeil après n'avoir fait aucune oeuvre utile. L'engagement du Gouvernement français prenait normalement fin dès que celui-ci, devant cette carence, recourait à une procedure prévue conventionnellement pour saisir l'Espagne d'un projet nouveau comportant, à la différence de tous les précédents, la restitution d'abord partielle, puis totale des eaux dérivées. Cependant, certains doutes peuvent persister, car tant la Note française du 27 juin 1953 que celle du 18 juillet 1954, font allusion à la Commission mixte d'ingénieurs; et celle-ci se réunit à Perpignan le 5 août 1955, pour enregistrer son impuissance définitive. Après cet échec, il peut être tenu comme certain qu'elle disparaît comme instrument d'études et de négociation et que les engagements liés à son existence disparaissent avec elle. La Commission internationale des Pyrénées se réunit en novembre 1955 et institue une procédure de négociation nouvelle, une Commission mixte spéciale d'une composition originale et dont l'un des Gouvernements fixait le mandat à une durée de trois mois. Aucun engagement semblable à celui de 1949 ne fut souscrit, L'accord de 1949 ne pouvait donc prolonger son effet au delà de l'existence de la Commission mixte d'ingénieurs, à moins

d'avoir une durée indéfinie. Mais, dans cette dernière hypothèse, il perdrait son caractère provisionnel; il subordonnerait à la nécessité d'un accord le droit même d'exécuter des travaux, alors qu'un tel accord devait simplement marquer le moment où pouvait commencer leur exécution.

B) *Autres obligations découlant de l'article 11 de l'Acte additionnel*

21. L'article 11 de l'Acte additionnel impose aux Etats dans lesquels on se propose de faire des travaux ou de nouvelles concessions susceptibles de changer le régime ou le volume d'un cours d'eau successif, une double obligation. L'une est d'en donner préalablement avis aux autorités compétentes du pays limitrophe; l'autre est d'aménager un régime de réclamations et de sauvegarde de tous les intérêts engagés de part et d'autre.

La première obligation n'appelle pas beaucoup de commentaires puisqu'elle a pour seul objet de permettre la mise en oeuvre de la seconde. Toutefois, l'éventualité d'une atteinte au régime ou au volume des eaux envisagé à l'article 11 ne saurait, en aucun cas, être laissée à l'appréciation exclusive de l'Etat qui se propose d'exécuter ces travaux ou de faire de nouvelles concessions; l'affirmation du Gouvernement français, suivant laquelle les travaux projetés ne peuvent causer aucun préjudice aux riverains espagnols ne suffit pas, contrairement à ce qui a été soutenu (Mémoire français, p. 36), à dispenser celui-ci d'aucune des obligations prévues à l'article 11 (note verbale du Ministère des Affaires Etrangères de France à l'Ambassade d'Espagne du 18 juillet 1954; annexe 9 du Mémoire français p. 100). L'Etat exposé à subir les répercussions des travaux entrepris par un Etat limitrophe est seul juge de ses intérêts, et si ce dernier n'en a pas pris l'initiative, on ne saurait méconnaître à l'autre le droit d'exiger notification des travaux ou concessions qui sont l'objet d'un projet.

Il n'a pas été contesté que la France ait satisfait, en ce qui concerne l'aménagement du lac Lanoux, à l'obligation d'avis.

22. Le contenu de la deuxième obligation est plus délicat à déterminer. Les "réclamations" visées à l'article 11 sont relatives aux différents droits protégés par l'Acte additionnel, mais le problème essentiel est d'établir comment doivent être sauvergardés "tous les intérêts qui pourraient être engagés de part et d'autre".

Il faut d'abord déterminer quels sont les "intérêts" qui doivent être sauvegardés. L'interprétation stricte de l'article 11 permettrait de soutenir qu'il ne s'agit que des intérêts correspondant à un droit des riverains. Cependant, diverses considérations déjà dégagées par le Tribunal conduisent à une interprétation plus large. Il faut tenir compte, quelle qu'en soit la nature, de tous les intérêts qui risquent d'être affectés par les travaux entrepris, même s'ils ne correspondent pas à un droit. Seule cette solution correspond aux termes de l'article 16, à l'esprit des Traités pyrénéens, aux tendances qui se manifestent en matière d'aménagements hydro-électriques dans la pratique internationale actuelle.

La deuxième question est de déterminer la méthode suivant laquelle ces intérêts pourront être sauvegardés. Si cette méthode implique nécessairement des entretiens, elle ne saurait se ramener à des exigences purement formelles, telles que de prendre connaissance des réclamations, protestations ou regrets présentés par l'Etat d'aval. Le Tribunal est d'avis que l'Etat d'amont a, d'après les règles de la bonne foi, l'obligation de prendre en considération les différents intérêts en présence, de chercher à leur donner toutes les satisfactions compatibles avec la poursuite de ses propres intérêts et de montrer qu'il a, à ce sujet, un souci réel de concilier les intérêts de l'autre riverain avec les siens propres.

Il est délicat d'apprécier s'il a été satisfait à une telle obligation. Mais, sans se substituer aux Parties, le juge est en mesure de procéder à cette appréciation sur la base des éléments fournis par les négociations.

23. Dans la présente affaire, le Gouvernement espagnol reproche au Gouvernement français de ne pas avoir défini sur la base d'une égalité absolue le projet d'aménagement des eaux du lac Lanoux; ce reproche est double: il vise à la fois la forme et le fond. En la forme, le Gouvernement français aurait imposé son projet unilatéralement, sans associer le Gouvernement espagnol à la recherche commune d'une solution acceptable. Au fond, le projet français ne tiendrait pas un juste équilibre entre les intérêts français et les intérêts espagnols. Le projet français servirait parfaitement les intérêts français, surtout orientés vers la production d'énegie électrique dite "de pointe" mais ne tiendrait pas suffisamment compte des intérêts espagnols en matière d'irrigation. Selon le Gouvernement espagnol, le Gouvernement français aurait refusé de prendre en considération des projets qui, de l'avis du Gouvernement espagnol, auraient comporté un faible sacrifice pour les intérêts français et de grands avantages pour l'économie rurale espagnole. L'Espagne s'appuie notamment sur les faits suivants: au cours des travaux de la Commission mixte spéciale à Madrid (12-17 décembre 1955), la délégation française compara trois projets d'aménagement du lac Lanoux et marqua les avantages considérables que; à ses yeux, le premier projet (conforme au projet définitif) présentait par rapport aux deux autres. La délégation espagnole, n'ayant pas d'objection spéciale à l'encontre de ces derniers projets, se déclara prête à accepter n'importe lequel des deux. La délégation française jugea ne pouvoir se départir de l'exécution du projet n° 1, plus favorable aux intérêts de la France et fondé, selon elle, sur un droit (Mémoire

français, p. 117 et suiv.; p. 127).

Sur le plan des principes, la thèse espagnole ne peut être acceptée par le Tribunal, car elle tend à mettre sur le même plan les droits et les simples intérêts. L'article 11 de l'Acte additionnel comporte cette distinction que les deux Parties ont reproduite dans l'exposé fondamental de leurs thèses qui se trouve en tête du compromis:

Considérant que, de l'avis du Gouvernement français, la réalisation de son projet.. ne lèserait aucun des droits ou intérêts visés au Traité de Bayonne du 26 mai 1866 et à l'Acte additionnel de la même date,

Considérant que, de l'avis du Gouvernement espagnol, la réalisation de ce projet lèserait les intérêts et les droits espagnols.

La France peut user de ses droits, elle ne peut ignorer les intérêts espagnols.

L'Espagne peut exiger le respect de ses droits et la prise en considération de ses intérêts.

En la forme, l'Etat d'amont a, en vertu de la procédure, un droit d'initiative, il n'est pas obligé d'associer à l'élaboration de ses projets l'Etat d'aval. Si, au cours des entretiens, l'Etat d'aval lui soumet des projets, l'Etat d'amont doit les examiner, mais il a le droit de préférer la solution retenue par son projet, s'il prend en considération d'une manière raisonnable les intérêts de l'Etat d'aval.

24. Dans le cas du lac Lanoux, la France a maintenu jusqu'au bout la solution qui consiste à dériver les eaux du Carol vers l'Ariège, avec restitution intégrale. Par ce choix, la France ne fait qu'user d'un droit; les travaux d'aménagement du lac Lanoux se font en territoire français, la charge et la responsabilité de l'entreprise incombent à la France et celle-ci est seule juge des travaux d'utilité publique à exécuter sur son territoire, sous la réserve des articles 9 et 10 de l'Acte additionnel que le projet français ne viole pas.

De son côté, l'Espagne ne peut invoquer un droit à obtenir un aménagement du lac Lanoux basé sur les besoins de l'agriculture espagnole. En effet, si la France reconçait à tous les travaux envisagés sur son territoire, l'Espagne ne pourrait exiger que d'autres travaux conformes à ses voeux soient réalisés. Elle peut donc simplement faire valoir ses intérêts pour obtenir, dans le cadre du projet retenu par la France, des modalités permettant raisonnablement de les sauvegarder.

Il reste à établir si cette exigence est remplie.

Quelle que soit la manière dont on juge le déroulement des tractations qui couvrent la période 1917-1954, il n'est pas douteux que la position française se soit largement assouplie et même transformée: d'une promesse d'indemnité sans restitutions des eaux dérivées, on est passé à une restitution minimum de 20 millions de mètres cubes; cette offre n'était possible que dans le cadre de la dérivation des eaux atlantiques vers la Méditerranée, puisque par ailleurs, la France assurait la restitution intégrale des eaux du Carol. En 1956, au mois de mars, lors de la seconde réunion des experts, la France fit à l'Espagne deux propositions nouvelles. Les restitutions opérées par la France, au lieu de suivre le rythme des apports naturels du Lanoux, seraient modulées selon les besoins de l'agriculture espagnole; pendant la période des irrigations, toute l'eau serait dérivée sur le Carol et au contraire, pendant la période d'hiver, la France réduirait le débit de façon à assurer sur une année l'équivalence des dérivations et des restitutions (système dit du "compte courant d'eau"). D'autre part, une réserve interannuelle permettrait à l'Espagne de bénéficier d'un apport supplémentaire en année exceptionnellement sèche (annexe 11 du Mémoire français, p.147). Le 5 mars 1956, le président de la délégation espagnole répondit, suivant le procès-verbal, de la manière suivante: "Les nouvelles propositions formulées par la délégations française ne peuvent être prises en considération, car toute solution qui suppose la dérivation des eaux du lac Lanoux hors de leur cours naturel est inacceptable par l'Espagne. Il ajoute que l'attitude de la délégation espagnole n'obéit au désir d'obtenir des compensations ni en augmentation des volumes d'eau garantissant les irrigations espagnoles, ni davantage en énergie électrique, de sorte qu'il est complèment inutile de discuter sur des volumes d'eau destinés à compensation, puisqu'on n'est pas d'accord sur la cause qui les motiverait." (Mémoire français, p.156.)

Quand on examine si la France a, tant dans les tractations que dans les propositions, pris suffisamment en considération les intérêts espagnols, il faut souligner combien sont intimement liées l'obligation de tenir compte, au cours des tractations, des intérêts adverses et l'obligation de faire à ceux-ci, dans la solution retenue, une place raisonnable. Un Etat qui a conduit des négociations, avec compréhension et bonne foi, selon l'article 11 de l'Acte additionnel, n'est pas dispensé de faire, dans la solution retenue, une place raisonnable aux intérêts adverses, parce que les conversations ont été interrompues, fût-ce par l'intransigeance de son partenaire. A l'inverse, lorsqu'il s'agit d'apprécier la manière dont un projet tient compte des intérêts en présence, la façcon dont les négociations se sont déroulées, l'inventaire des intérêts qui a pu y être présenté, le prix que chacune des parties était prête à payer pour en obtenir la sauvegarde sont des facteurs essentiels pour établir, au regard des obligations de l'article 11 de l'Acte additionnel, le mérite de ce projet.

Au regard de toutes les circonstances de l'affaire, ci-dessus rappelées, le Tribunal est d'avis que le projet

français satisfait aux obligations de l'article 11 de l'Acte additionnel.

POUR CES MOTIFS

Le Tribunal décide de répondre affirmativement à la question exposée à l'article premier du compromis. En exécutant, sans un accord préalable entre les deux Gouvernements, des travaux d'utilisation des eaux du lac Lanoux, dans les conditions prévues au projet d'utilisation des eaux du lac Lanoux, notifié au Gouverneur de la province de Gérone le 21 janvier 1954 et porté à la connaissance des représentants de l'Espagne à la Commission des Pyrénées, lors de sa session tenue du 3 au 14 novembre 1955, et selon les propositions présentées par la délégation française à la Commission mixte spéciale, le 13 décembre 1955, le Gouvernement français ne commettrait pas une infraction aux dispostions du Traité de Bayonne du 26 mai 1866 et de l'Acte additionnel de la même date.

FAIT à Genève au Bâtiment Electoral, le 16 novembre 1957 en quatre exemplaires authentiques, deux en langue espagnole et deux en langue française, dont un exemplaire en chaque langue est remis à chaque Partie.

Le Président,
Sture PETRÉN

Le Secrétaire,
Axel EDELSTAM

INTERNATIONAL COURT OF JUSTICE

Order Concerning Interim Measures of Protection

[June 22, 1973]

NUCLEAR TESTS CASE[1] (AUSTRALIA v. FRANCE)

REQUEST FOR THE INDICATION OF INTERIM MEASURES OF PROTECTION

1973
23 June
General List
No. 58

ORDER

Present: Vice-President AMMOUN, *Acting President; Judges* FORSTER, GROS, BENGZON, PETREN, ONYEAMA, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMENEZ DE ARECHAGA, Sir Humphrey WALDOCK, NAGENDRA SINGH, RUDA; *Judge* ad hoc Sir Garfield BARWICK; *Registrar* AQUARONE.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court,

Having regard to Article 66 of the Rules of Court,

Having regard to the Application by Australia filed in the Registry of the Court on 9 May 1973, instituting proceedings against France in respect of a dispute concerning the holding of atmospheric tests of nuclear weapons by the French Government in the Pacific Ocean, and asking the Court to adjudge and declare that the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law, and to order that the French Republic shall not carry out any further such tests,

Makes the following Order:

1. Having regard to the request dated 9 May 1973 and filed in the Registry the same day, whereby the Government of Australia, relying on Article 33 of the General Act of 1928 for the Pacific Settlement of International Disputes and on Article 41 of the Statute and Article 66 of the Rules of Court, asks the Court to indicate, pending the final decision in the case brought before it by the Application of the same date, the following interim measures of protection:

> "The provisional measures should be that the French Government should desist from any further atmospheric nuclear tests pending the judgement of the Court in this case";

2. Whereas the French Government was notified by telegram the same day of the filing of the Application and request for indication of interim measures of protec-

[1] [Reproduced from the text provided by the International Court of Justice.

[The Court issued a similar Order in the Nuclear Tests Case instituted against France by New Zealand. The language of that Order and of the declarations and dissenting opinions was virtually the same as in Australia v. France. Where the language differed, excerpts have been reproduced. These excerpts are highlighted by a star (*) sign either opposite the corresponding paragraphs of the Order in Australia v. France or at the end of the corresponding dissenting opinions.

[A map showing the French Pacific Tests Center appears at the back of the judgment. The map was reproduced from Annex I of the Australian application of May 9, 1973, instituting proceedings in the International Court of Justice against the French Republic.

[On July 21, 1973, France conducted a nuclear weapon test in the atmosphere over Mururoa. Protests followed and some of the notes were circulated as official U.N. General Assembly documents under the agenda item of the twenty-eighth session entitled "urgent need for suspension of nuclear and thermonuclear tests".]

tion, and of the precise measures requested, and copies of the Application and the request were at the same time transmitted to it by express mail;

3. Whereas, pursuant to Article 40, paragraph 3, of the Statute and Article 37, paragraph 2, of the Rules of Court, copies of the Application were transmitted to Members of the United Nations through the Secretary-General and to other States entitled to appear before the Court;

4. Whereas pursuant to Article 31, paragraph 2, of the Statute, the Government of Australia chose the Right Honourable Sir Garfield Barwick, Chief Justice of Australia, to sit as judge *ad hoc* in the case;

5. Whereas the Governments of Australia and France were informed by communications of 14 May 1973 that the President proposed to convene the Court for a public hearing on 21 May 1973 to afford them the opportunity of presenting their observations on the Australian request for the indication of interim measures of protection, and by further communications of 17 May 1973 the date and time for such hearing were confirmed;

6. Whereas by a letter dated 16 May 1973 from the Ambassador of France to the Netherlands, handed by him to the Registrar the same day, the French Government stated that it considered that the Court was manifestly not competent in the case and that it could not accept the Court's jurisdiction, and that accordingly the French Government did not intend to appoint an agent, and requested the Court to remove the case from its list;

7. Whereas at the opening of the public hearings, which were held on 21, 22, 23 and 25 may 1973, there were present in court the Agent, Co-Agent, counsel and other advisers of the Government of Australia;

8. Having heard the observations on the request for interim measures on behalf of the Government of Australia, and the replies on behalf of that Government to questions put by Members of the Court, submitted by Mr. P. Brazil, Senator the Honourable Lionel Murphy, Mr. R.J. Ellicott, Q.C., Mr. M.H. Byers, Q.C., Mr. E. Lauterpacht, Q.C., and Professor D.P. O'Connell;

9. Having taken note of the final submission of the Government of Australia made at the hearing of 23 May 1973, and filed in the Registry the same day, which reads as follows:

> "The final submission of the Government of Australia is that the Court, acting under Article 33 of the General Act and Article 41 of the Statute of the Court, should lay down provisional measures which require the French Government to desist from carrying out further atmospheric nuclear tests in the South Pacific pending the judgement in this case".

10. Having taken note of the written reply give by the Agent of the Government of Australia on 31 May 1973 to two questions put to him by a Member of the Court;

11. Noting that the French Government was not represented at the hearings; and whereas the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures;

12. Whereas the Governments of Australia and France have been afforded an opportunity of presenting their observations on the request for the indication of provisional measures;

13. Whereas on a request for provisional measures the Court need not, before indicating them, finally satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded;

14. Whereas in its Application and oral observation the Government of Australia claims to found the jurisdiction of the Court on the following provisions:

(i) Article 17 of the above-mentioned General Act of 1928, read together with Articles 36, paragraph 1, and 37 of the Statute of the Court;

(ii) Alternatively, Article 36, paragraph 2, of the Statute of the Court and the respective declarations of Australia and France made thereunder;

15. Whereas, according to the letter of 16 May 1973 handed to the Registrar by the French Ambassador to the Netherlands, the French Government considers, *inter alia,* the General Act of 1928 was an integral part of the League of Nations system and, since the demise of the League of Nations, has lost its affectivity and fallen into desuetude; that this view of the matter is confirmed by the conduct of the League of Nations; that, in consequence, the General Act cannot serve as a basis for the competence of the Court to deliberate on the Application of Australia with respect to French nuclear tests; that in any event the General Act of 1928 is now applicable in the relations between France and Australia and cannot prevail over the will clearly and more recently expressed in the declaration of 20 May 1966 made by the French government under Article 36, paragraph 2, of the Statute of the Court; that paragraph 3 of that declaration excepts from the French Government's acceptance of compulsory jurisdiction "disputes concerning activities connected with national defence"; and that the present dispute concerning French nuclear tests in the Pacific

incontestably falls within the exception contained in that paragraph;

16. Whereas in its oral observations the Government of Australia maintains, *inter alia,* that various matters, including certain statements of the French Government, provide indications which should lead the Court to conclude that the General Act furnishes a basis for the Court's jurisdiction in the present dispute which is altogether independent of the acceptances of compulsory jurisdiction by Australia and by France under Article 36, paragraph 2, of the Statute; that France's obligations under the General Act with respect to the acceptance of the Court's jurisdiction cannot be considered as having been modified by any subsequent declaration made by her unilaterally under Article 36, paragraph 2, of the Statute; that if the reservation in paragraph 3 of the French declaration of 20 May 1966 relating to "disputes concerning activities connected with national defence" is to be regarded as one having an objective content, it is questionable whether nuclear weapon development falls within the concept of national defence; that if this reservation is to be regarded as a self-judging reservation, it is invalid, and in consequence France is bound by the terms of that declaration unqualified by the reservation in question;

17. Whereas the material submitted to the Court leads it to the conclusion, at the present stage of the proceedings, that the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded; and whereas the Court will accordingly proceed to examine the Applicant's request for the indication of interim measures of protection;

***17.** Whereas in its oral observations the Government of New Zealand maintains, *inter alia,* that the validity, interpretation and effect in the present situation of the reservation attached to the French declaration of 20 May 1966 are issues which can be the subject of debate, and that it cannot be baldly asserted that there is a manifest absence of jurisdiction under Article 36, paragraph 2, of the Statute; that the General Act was within the meaning of Article 37 of the Statute, a treaty or convention in force on 24 October 1945 when New Zealand and France became parties to the Statute, and that Article 37 of the Statute accordingly conferred on the Court the jurisdiction provided for in Article 17 of the General Act; that such evidence as there is of State practice in more recent years is wholly consistent with the Act's continuity; that since 1946 France has more than once acknowledged that the General Act remains in force; that so far as the General Act is concerned, not only is there no manifest lack of jurisdiction to deal with this matter, but the Court's jurisdiction on the merits on that basis is reasonably probable, and there exist weighty arguments in favour of it;

*

18. Whereas the Government of Australia, in replying to a question put during the oral observations, stated that it bases its request for the indication of provisional measures "first and foremost on Article 41 of the Statute of the Court", and that it bases its request on Article 33 of the above-mentioned General Act of 1928 only subsidiarily in the eventuality that the Court should find itself able, on the material now before it, to reach the conclusion that the General Act is still in force;

19. Whereas the Court is not in a position to reach a final conclusion on this point at the present stage of the proceedings, and will therefore examine the request for the indication of interim measures only in the context of Article 41 of the Statute;

20. Whereas the power of the Court to indicate interim measures under Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgement should not be anticipated by reason of any initiative regarding the matters in issue before the Court;

21. Whereas it follows that the Court in the present case cannot exercise its power to indicate interim measures of protection unless the rights claimed in the Application, prima facie, appear to fall within the purview of the Court's jurisdiction;

22. Whereas the claims formulated by the Government of Australia in its Application are as follows:

(i) The right of Australia and its people, in common with other States and their peoples, to be free from atmospheric nuclear weapon tests by any country is and will be violated;

(ii) The deposit of radioactive fallout on the territory of Australia and its dispersion in Australia's airspace without Australia's consent:

(a) violates Australia sovereignty over its territory;

(b) impairs Australia's independent right to determine what acts shall take place within its territory and in particular whether Australia and its people shall be exposed to radiation from artificial sources;

(iii) the interference with ships and aircraft on the high seas and in the superjacent airspace, and the pollution of the high seas by irradiative fallout, constitute infringements of the freedom of the high seas;

23. Whereas it cannot be assumed *a priori* that such claims fall completely outside the purview of the Court's

jurisdiction, or that the Government of Australia may not be able to establish a legal interest in respect of these Claims entitling the Court to admit the Application;

*23. Whereas it is claimed by the Government of New Zealand in its Application that rules and principles of international law are now violated by nuclear testing undertaken by the French Government in the South Pacific region, and that, *inter alia,*

(a) it violates the rights of all members of the international community including New Zealand, that no nuclear tests that give rise to radioactive fallout be conducted;

(b) it violates the rights of all members of the international community, including New Zealand, to the preservation from unjustified artificial radioactive contamination of the terrestrial, maritime and aerial environment and, in particular, of the environment of the region in which the tests are conducted and in which New Zealand, the Cook Islands, Niue and the Tokelau Islands are situated;

(c) it violates the right of New Zealand that no radioactive material enter the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands, including their air space and territorial waters, as a result of nuclear testing;

(d) it violates the right of New Zealand that no radioactive material, having entered the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands, including their air space and territorial waters, as a result of nuclear testing, cause harm, including apprehension, anxiety and concern, to the people and Government of New Zealand and of the Cook Islands, Niue and the Tokelau Islands;

(e) it violates the right of New Zealand to freedom of the high seas, including freedom of navigation and overflight and the freedom to explore and exploit the resources of the sea and sea-bed, without interference or detriment resulting from nuclear testing;

and whereas New Zealand invokes its moral and legal responsibilities in relation to the Cook Islands, Niue and the Tokelau Islands;

24. Whereas by the terms of Article 41 of the Statute the Court may indicate interim measures of protection only when it considers that circumstances so require in order to preserve the rights of either party;

25. Whereas the Government of Australia alleges, *inter alia,* that a series of atmospheric nuclear tests have been carried out by the French Government in the Pacific during the period from 1966 to 1972, including the explosion of several hydrogen bombs and a number of devices of high and medium power; that during recent months there has been a growing body of reports, not denied by the French Government, to the effect that the French Government is planning to carry out a further series of atmospheric nuclear tests in the Pacific in 1973; that this series of tests may extend to 1975 and even beyond that date; that in diplomatic correspondence and in discussions earlier in the present year the French Government would not agree to cease nuclear testing in the atmosphere in the Pacific and would not supply Australia with any information as to the dates of its proposed tests or the expected size and yield of its expositions; and that in a statement made in the French Parliament on 2 May 1973 the French Government indicated that, regardless of the protests made by Australia and other countries, it did not envisage any cancellation or modification of the programme of nuclear testing as originally planned;

26. Whereas these allegations give substance to the Australian Government's contention that there is an immediate possibility of a further atmospheric nuclear test being carried out by France in the Pacific;

*26. Whereas the Government of New Zealand alleges, *inter alia,* that during the period from 1966 to 1972 the French Government has carried out a series of atmospheric nuclear tests centred on Mururoa in the South Pacific; that the French government has refused to give an assurance that its programme of atmospheric nuclear testing in the South Pacific is at an end, and that on 2 May 1973 the French Government announced that it did not envisage cancelling or modifying the programme originally planned; that from official pronouncements it is clear that some further tests are envisaged with the likelihood of deploying a thermonuclear warhead by 1976; that the French Government has also reserved its options on the development of yet another generation of nuclear weapons after 1976 which would require further tests; that in previous years the nuclear testing series conducted by France have begun on dates between 15 May and 7 July; that on the basis of the pronouncements referred to above and the past practice of the French Government, there are strong grounds for believing that the French Government will carry out further testing of nuclear devices and weapons in the atmosphere at Mururoa Atoll before the Court is able to reach a decision on the Application of New Zealand;

27. Whereas the Government of Australia also alleges that the atmospheric nuclear explosions carried out by France in the Pacific have caused widespread radioactive fallout on Australian territory and elsewhere in the southern hemisphere, have given rise to measurable concentrations of radio-nuclides in foodstuffs and in man, and have resulted in additional radiation doses to persons living in that hemisphere and in Australia in particular, that any radioactive material deposited on Aus-

tralian territory will be potentially dangerous to Australia and its people and any injury caused thereby would be irreparable; that any effects of the French nuclear tests upon the resources of the sea or the conditions of the environment can never be undone and would be irremediable by any payment of damages; and any infringement by France of the rights of Australia and her people to freedom of movement over the high seas and superjacent airspace cannot be undone;

28. Whereas the French Government, in a diplomatic Note dated 7 February 1973 and addressed to the Government of Australia, the text of which was annexed to the Application in the present case, called attention to Reports of the Australian National Radiation Advisory Committee from 1976 to 1972, which all concluded that the fallout from the French tests did not constitute a danger to the health of the Australian population; whereas in the said Note the French Government further expressed its conviction that in the absence of ascertained damage attributable to its nuclear experiments, they did not violate any rule of international law, and that, if the infraction of the law was alleged to consist in a violation of a legal norm concerning the threshold of atomic pollution which should not be crossed, it was hard to see what was the precise rule on which Australia relied;

***28.** Whereas the Government of New Zealand also alleges that each of the series of French nuclear tests has added to the radioactive fallout in New Zealand territory; that the basic principles applied in this field by international authorities are that any exposure to radiation may have irreparable, and harmful, somatic and genetic effects and that any additional exposure to artificial radiation can be justified only by the benefit which results; that, as the New Zealand Government has repeatedly pointed out in its correspondence with the French government, the radioactive fallout which reaches New Zealand as a result of French nuclear tests is inherently harmful, and that there is no compensating benefit to justify New Zealand's exposure to such harm; that the uncertain physical and genetic effects to which contamination exposes the people of New Zealand causes them acute apprehension, anxiety and concern; and that there could be no possibility that the rights eroded by the holding of further tests could be fully restored in the event of a judgement in New Zealand's favour in these proceedings;

29. Whereas for the purpose of the present proceedings it suffices to observe that the information submitted to the Court, including Reports of the United Nations Scientific Committee on the Effects of Atomic Radiation between 1958 and 1972, does not exclude the possibility that damage to Australia might be shown to be caused by the deposit on Australian territory of radioactive fallout resulting from such tests and to be irreparable.

***29.** Whereas the French Government, in a diplomatic Note addressed to the Government of New Zealand and dated 10 June 1966, the text of which was annexed to the Application in this case, emphasized that every precaution would be taken with a view to ensuring the safety and the harmlessness of the French nuclear test, and observed that the French Government, in taking all appropriate steps to ensure the protection of the population close to the test zone, had sought *a fortiori* to guarantee the safety of population considerably further distant, such as New Zealand or the territories for which it is responsible; and whereas in a letter dated 19 February 1973 to the Prime Minister of New Zealand from the French Ambassador to New Zealand, the text of which was also annexed to the Application in this case, the French Government called attention to Reports of the New Zealand National Radiation laboratory, and of the Australian National Radiation Advisory Committee, which reached the conclusion that the fallout from the French tests had never involved any danger to the health of the population of those two countries, and observed that the concern which had been expressed as to the long-terms effects of testing could not be based on anything other than conjecture;

30. Whereas in the light of the foregoing considerations the Court is satisfied that it should indicate interim measures of protection in order to preserve the right claimed by Australia in the present litigation in respect of the deposit of radioactive fallout on her territory;

31. Whereas the circumstances of the case do not appear to require the indication of interim measures of protection in respect of other rights claimed by Australia in the Application;

32. Whereas the foregoing considerations do not permit the Court to accede at the present stage of the proceedings to the request made by the French Government in its letter dated 16 May 1973 that the case be removed from the list;

33. Whereas the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case, or any questions relating to the admissibility of the Application, or relating to the merits themselves, and leaves unaffected the right of the French Government to submit arguments in respect of those questions;

34. Having regard to the position taken by the French Government in its letter dated 16 May 1973 that the Court was manifestly not competent in the case and to the fact that it was not represented at the hearings held between 21 May on the question of the indication of interim measures of protection.

35. Whereas, in these circumstances, it is necessary to resolve as soon as possible the questions of the Court's

jurisdiction and of the admissibility of the Application;

Accordingly,

THE COURT

Indicates, by 8 votes to 6, pending its final decision in the proceedings instituted on 9 May 1973 by Australia against France, the following provisional measures:

The Government of Australia and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radioactive fallout on Australian territory;

Decides that the written proceedings shall first be addressed to the questions of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Application;

Fixes as follows the time-limits for the written proceedings:

21 September 1973 for the Memorial of the Government of Australia;

21 December 1973 for the Counter-memorial of the French Government;

And reserves the subsequent procedure for further decision.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-second day of June one thousand nine hundred and seventy-three, in four copies, one of which will be placed in the archies of the court, and the others transmitted respectively to the French Government, to the Government of Australia, and to the Secretary-General of the United Nations for transmission to the Security Council.

(Signed) F. AMMOUN,
Vice-President.

(Signed) S. AQUARONE,
Registrar.

Judge JIMENEZ DE ARECHAGA makes the following declaration:

I have voted in favour of the Order for the reasons stated therein, but wish to add some brief comments on the relationship between the question of the Court's jurisdiction and the indication of interim measures.

I do not believe the Court should indicate interim measures without paying due regard to the basic question of its jurisdiction to entertain the merits of the Application. A request should not be granted if it is clear, even on a prima facie appreciation, that there is no possible basis on which the Court could be competent as to the merits. The question of jurisdiction is therefore one, and perhaps the most important, among all relevant circumstances to be taken into account by a Member of the Court when voting in favour of or against a request for interim measures.

On the other hand, in view of the urgent character of the decision on provisional matters, it is obvious that the Court cannot make its answer dependent on a previous collective determination by means of a judgement of the question of its jurisdiction on the merits.

This situation places upon each Member of the Court the duty to make, at this stage, an appreciation of whether - in the light of the grounds invoked and of the other materials before him - the Court will possess jurisdiction to entertain the merits of the dispute. From a subjective point of view, such an appreciation or estimation cannot be fairly described as a mere preliminary or even cursory examination of the jurisdiction issue: on the contrary, one must be satisfied that this basic question of the Court's jurisdiction has received the fullest possible attention which one is able to give to it within the limits of time and of materials available for the purpose.

When, as in this case, the Court decides in favour of interim measures, and does not, as requested by the French Government, remove the case from the list, the parties will have the opportunity at a later stage to plead more fully on the jurisdictional question. It follows that question cannot be prejudged now; it is not possible to exclude *a priori,* that the further pleadings and other relevant information may change views or convictions presently held.

*

* *

The question described in the Order as that of the existence of "a legal interest in respect of these claims entitling the Court to admit the Application" (para. 23) is characterized in the operative part as one relating to the admissibility of the Application. The issue has been raised of whether Australia has a right of its own - as distinct from a general community interest - or has suffered, or is threatened by, real damage. As far as the power of the Court to adjudicate on the merits is concerned, the issue is whether the dispute before the Court is one "with regard to which the parties are in conflict as to their respective rights" as required by the jurisdictional clause invoked by Australia. The question thus appears

to be a limited one linked to jurisdiction rather than to admissibility. The distinction between those two categories of questions is indicated by Sir Gerald Fitzmaurice in *I.C.J. Reports 1963*, pages 102-103, as follows:

> "...the real distinction and test would seem to be whether or not the objection is based on, or arises from, the jurisdictional clause or clauses under which the jurisdiction of the tribunal is said to exist. If so, the objection is basically one of jurisdiction."

Article 17 of the General Act provides that the disputes therein referred to shall include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice. Among the classes of legal disputes there enumerated is that concerning "the existence of any fact which, *if established,* would constitute a breach of an international obligation" (Emphasis added). At the preliminary stage it would seem therefore sufficient to determine whether the parties are in conflict as to their respective rights. It would not appear necessary to enter at that stage into questions which really pertain to the merits and constitute the heart of the eventual substantive decision such as for instance the establishment of the rights of the parties or the extent of the damage resulting form radioactive fallout.

Judge Sir Humphrey WALDOCK makes the following declaration:

I concur in the Order. I wish only to add that, in my view, the principles set out in Article 67, paragraph 7, of the Rules of Court should guide the Court in giving its decision on the next phase of the proceedings which is provided for by the present Order.

Judge NAGENDRA SINGH makes the following declaration:

While fully supporting the reasoning leading to the verdict of the Court, and therefore voting with the majority for the grant of interim measures of protection in this case, I wish to lend emphasis, by this declaration, to the requirement that the Court must be satisfied of its own competence, even though prima facie, before taking action under Article 41 of the Statute and Rule 61 (New Rule 66) of the Rules of Court.

It is true that neither of the aforesaid provisions spell out the test of competence of the Court or of the admissibility of the Application and the request, which nevertheless have to be gone into by each Member of the Court in order to see that a *possible* valid base for the Court's competence exists and that the Application is, prima facie, entertainable. I am, therefore, in entire agreement with the Court in laying down a positive test regarding its own competence, prima facie established, which was enunciated in the *Fisheries Jurisdiction*[2] case and having been reiterated in this case may be said to lay down not only the latest but also the settled jurisprudence of the Court on the subject.

It is indeed a *sine qua non* of the exercise of judicial function that a court can be moved only if it has competence. If therefore in the exercise of its inherent powers (enshrined in Art. 41 of its Statute) the Court grants interim relief, its sole justification to do so is that if it did not, the rights of the parties would get so prejudiced that the judgement of the Court when it came could be rendered meaningless. Thus the possibility of the Court being ultimately able to give a judgment on merits should always be present when interim measures are contemplated. If, however, the Court were to shed its legal base of competence when acting under the Court were to shed its legal base of competence when acting under Article 41 of its Statute, it would immediately expose itself to the danger of being accused of discouraging governments from:

> "...undertaking, or continuing to undertake, the obligations of judicial settlement as the result of any justifiable apprehension that by accepting them they may become exposed to the embarrassment, vexation and loss, possibly following upon interim measures, in cases in which there is no reasonable possibility, prima facie ascertained by the Court, of jurisdiction on the merits. Accordingly, the Court cannot, in relation to a request for indication of interim measures, disregard altogether the question of its competence on the merits. The correct principle which emerges from these apparently conflicting considerations and which has been uniformly adopted in international arbitral and judicial practice is as follows: The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which prima facie confers jurisdiction upon the court and which incorporates no reservations obviously excluding its jurisdiction". (Separate opinion of Sir Herscht Lauterpacht in *Interhandel* case, *I.C.J. Reports 1957,* p. 118)

It needs to be mentioned, therefore, that even at this preliminary stage of prima facie testing the Court has to examine the reservations and declarations made to the treaty which is cited by a party to furnish the base for the jurisdiction of the Court and to consider also the validity of the treaty if the same is challenged in relation to the parties to the dispute. As a result of this prima facie examination the Court could either find:

(a) that there is no possible base for the Court's jurisdiction in which event no matter what emphasis is placed on Article 41 of its Statute, the Court cannot

[2] *Fisheries Jurisdiction (United Kingdom v. Iceland), I.C.J. Reports 1972,* Order of 17 August 1972, paras. 15 to 17, pp. 15 to 16.

proceed to grant interim relief; or

(b) that a possible base exists, but needs further investigating to come to any definite conclusion in which event the Court is inevitably left no option but to proceed to the substance of the jurisdiction of the case to complete its process of adjudication which, in turn, is time consuming and therefore comes into conflict with the urgency of the matter coupled with the prospect of irreparable damage to the rights of the parties. It is this situation which furnishes the "raison d'être" of interim relief.

If, therefore, the Court, in this case, has granted interim measures of protection it is without prejudice to the substance whether jurisdictional or otherwise which cannot be prejudged at this stage and will have to be gone into further in the next phase.

Judge *ad hoc* Sir Garfield BARWICK makes the following declaration:

I have voted for the indication of interim measures and the Order of the Court as to the further procedure in the case because the very thorough discussions in which the Court has engaged over the past weeks and my own researches have convinced me that the General Act of 1928 and the French Government's declaration to the compulsory jurisdiction of the Court with reservations each provide, prima facie, a basis on which the Court might have jurisdiction to entertain and decide the claims made by Australia in its Application of 9 May 1973. Further, the exchange of diplomatic notes between the Governments of Australia and France in 1973 afford, in my opinion, at least prima facie evidence of the existence of a dispute between those Governments as to matters of international law affecting their respective rights.

Lastly, the material before the Court, particularly that appearing in the UNSCEAR reports provides reasonable grounds for concluding that further deposit in the Australian territorial environment of radioactive particles of matter is likely to do harm for which no adequate compensatory measures could be provided.

These conclusions are sufficient to warrant the indication of interim measures.

I agree with the form of the provisional measures indicated, understanding that the action prescribed is action on the part of governments and that the measures are indicated in respect only of the Australian Government's claim to the inviolability of its territory.

Judges FORSTER, GROS, PETREN and IGNACIO-PINTO append dissenting opinions to the Order of the Court.

(Initialled) F.A.

(Initialled) S.A.

DISSENTING OPINION OF JUDGE FORSTER

[Translation]

I am unable to add my vote to those of the majority advocating the cessation of French nuclear tests in the Pacific for the duration of the present proceedings, which will end on a date which neither the Court nor anyone can possibly foretell.

I have voted against the Order of today's date indicating a provisional measure in that sense.

My refusal was dictated by the following considerations:

The indication of provisional measures is essentially governed by Article 41 (1) of the Statute of the International Court of Justice, which provides as follows:

"The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".

To exercise this power conferred by Article 41, the Court must have jurisdiction. Even when it considers that circumstances require the indication of provisional measures, the Court, before proceeding to indicate them, must satisfy itself that it has jurisdiction. Neither the provisional character of the measures nor the urgency of the requirement that they be indicated can dispense the judge from the necessity of ascertaining his jurisdiction *in limine litis;* especially when it is seriously and categorically contested by the State proceeded against, which is the case at present.

I am aware of the existence of certain past decisions from which it has been deduced that this ascertainment of our jurisdiction does not need to be more than summary at the stage of provisional measures. But this practice in the jurisprudence of the Court cannot in my view be made into a rule. For my part I consider that, however illustrious their reputations, our predecessors on the Bench cannot now take our place, nor can their decisions take the place of the one we have to render in an exceptionally difficult affair whose case-file they never held in their hands.

In my view the Court does not have two distinct kinds of jurisdiction: one to be exercised in respect of provisional

measures and another to deal with the merits of the case. The truth of the matter is that there are some cases in which our jurisdiction is so very probable as rapidly to decide us to indicate the provisional measures, whereas in other cases, like the present one, it is only after a thorough examination that our jurisdiction, or lack of jurisdiction, can become apparent.

I feel that the Court ought to have gone further in the examination of its jurisdiction before finding upon the Australian request for the indication of provisional measures.

The reason is that the central pillar upon which the Australian contentions rest is the General Act of 1928, to which France was a party and which conferred jurisdiction upon the Permanent Court of International Justice.

The 1928 General Act was revised on 28 April 1949, but France did not accede to that revised General Act. And it is precisely in this revised General Act of 1949 that the International Court of Justice, our tribunal, takes the place of the defunct Permanent Court of International Justice.

From a letter addressed to the Registrar of the Court on 16 May 1973 and its annex it transpires that France, in reply to the notifications made to it, considers that the 1928 General Act, an integral part of the defunct League of Nations system, has fallen into desuetude, is devoid of any efficacy and has been a subject of indifference for virtually all the signatory States, both before and after the dissolution of the League of Nations which gave it birth.

Against this moribund, if not well and truly dead General Act of 1928 France, while not appearing before the Court, firmly sets up its Declaration of 16 May 1966, which in conformity with Article 36, paragraph 2, of the Statute recognizes the jurisdiction of the Court as compulsory *ipso facto* on condition of reciprocity, except in relation to disputes concerning activities connected with national defence (third reservation to the Declaration of 16 May 1966)

This express reservation, which in terms that are crystal clear categorically excludes our jurisdiction when the dispute concerns activities connected with national defence, is no small matter, and the French nuclear tests in the Pacific do concern French national defence, or so it seems to me. I would have liked the Court to consider at greater length the problem of jurisdiction raised by the confrontation of the 1928 General Act with the third reservation to the French Declaration of 16 May 1966. That problem should have been solved before making an order which disregards the French reservation and oversteps the limits placed on our jurisdiction on 16 May 1966. I am very much afraid that the Order made today may leave in the minds of many the impression that the International court of Justice henceforth considers the French reservation concerning its national defence, hence its security, the vital interest of the national, to be null and void.

In my view it was imperatively necessary to solve certain important problems as a matter of priority before making any Order:

- the problem of the survival of the 1928 General Act;
- the problem raised by the confrontation of two undertakings in regard to international jurisdiction, one a treaty obligation binding several States and dating from 1928, the other a unilateral and later commitment which dates form 16 May 1966 and, by its reservations, restricts the jurisdiction of the International Court of Justice in comparison with the first;

the problem of the incompatibility of the undertakings under consideration.

These problems, moreover, should have been considered without ever losing sight of the fact that consent is an indispensable prerequisite to our judging any State.

The Order made this day is an incursion into a French sector of activity placed strictly out of bounds by the third reservation of 16 May 1966. To cross the line into that sector, the Court required no mere probability but the absolute certainty of possessing jurisdiction. As I personally have been unable to attain that degree of certainty, I have declined to accompany the majority.

Furthermore, an additional consideration leads me to differ form the majority of my colleagues. The interim measures requested by Australia are so close to the actual subject-matter of the case that they are practically indistinguishable therefrom. Ultimately the only alternatives are the continuance or the cessation of the French nuclear tests in the Pacific. This is the substance of the case, upon which, in my opinion, it was not proper to pass by means of a provisional Order, but only by a final judgment.

In addition, the Order, by recommending the cessation, even the temporary cessation, of the French nuclear tests in the Pacific, may suggest that the Court has already formed a definite opinion on the lawfulness, or rather the unlawfulness, of the said tests. This, it seems to me, is what the Applicant was counting on; this is what it said, through the Solicitor-General of Australia, at the hearing of 22 May 1973:

> "May I conclude, Mr. President, by saying that few Orders of the Court would me more closely scrutinized than the one which the Court will make upon this application. Governments and people all over the world will look behind the contents of that Order to detect what they may presume to be the Court's attitude towards the fundamental question of the le-

> gality of further testing of nuclear weapons in the atmosphere".

Thus this provisional Order is to permit of the detection of the Court's attitude towards the fundamental question of the legality of further testing of nuclear weapons in the atmosphere!

To my mind this warning by Australia, made in open court, reveals that the intention of the Applicant is to obtain, by means of a request for the indication of interim measures of protection, an actual judgment on the legality, or rather the illegality, of further nuclear tests.

I cannot lend myself to this, which is not what interim measures were intended for.

The purpose of an Order indicating interim measures of protection is clearly laid down in Article 41 of the Statute, quoted above: to preserve the respective rights of either party, and not judgment on the legality or illegality of the matters complained of.

At the public hearing of 21 May 1973, Australia defined the rights to be protected as follows:

"Australia's rights under international law and the Charter of the United Nations to be safeguarded from further atmospheric nuclear weapon tests and their consequences, including:

> (i) the right of Australia and its people to be free from atmospheric nuclear weapon tests by any country;
>
> (ii) the inviolability of Australia's territorial sovereignty;
>
> (iii) its independent right to determine what acts shall take place within its territory, and, in particular, whether Australia and its people shall be exposed to ionizing radiation from artificial sources;
>
> (iv) the right of Australia and her people fully to enjoy the freedom of the high seas;
>
> (v) the right of Australia to the performance by the French Republic of its undertaking contained in Article 33(3) of the General Act for the Pacific Settlement of International Disputes to abstain from all measures likely to react prejudicially upon the execution of any ultimate judicial decision given in these proceedings and to abstain from any sort of action whatsoever which may aggravate or extend the present dispute between Australia and the French Republic".

France is absent from these proceedings; but I conceive that the right which it has and which is to be protected is that of every State, namely the right to undertake in full sovereignty on its own territory any action appropriate for ensuring its immediate or future national security and national defence. Of course, in the exercise of this right each State remains responsible for any consequent injury to third parties.

Does the Order recommending the temporary cessation of French nuclear tests protect or "preserve" the respective rights of either party - the rights of France as well as those of Australia?

Such are the considerations which have led me to append this dissenting opinion.

(Signed) I. FORSTER.

DISSENTING OPINION OF JUDGE FORSTER

[Translation]

* The Order made today in the case between New Zealand and France is related to the one made also today in the case of *Australia v. France.*

The two Orders are alike as twins. They indicate the same measures of protection; the only difference lies in the mention of different territories in the case of each Applicant.

There exists, moreover, such a close connection between the questions of law raised respectively by the Australian and New Zealand claims that a joinder of the two cases would have been perfectly justified from the very first day of the proceedings.

For the same reasons are set forth in my preceding dissenting opinion *(Australia v. France),* I must decline to side with the majority in the present case *(New Zealand v. France).*

I remain convinced that in these exceptional cases the International Court of Justice should have forsaken the beaten paths traditionally followed in proceedings on interim measures. The Court should above all have *satisfied itself* that it really had jurisdiction, and not have contented itself with a *mere probability.*

It is not a question of approving or condemning the French nuclear tests in the Pacific; the real problem is to find out whether we have jurisdiction to say or do anything whatever in this case.

It was that problem of jurisdiction which it was necessary for us to solve as a matter of absolute priority, before pronouncing upon the interim measures.

Since that was not done, I express, here too, my dissenting opinion.

(Signed) I. FORSTER

DISSENTING OPINION OF JUDGE GROS

[Translation]

The declaration of acceptance of the Court's jurisdiction made by the French Government on 20 May 1966 excludes from that jurisdiction: "...disputes concerning activities connected with national defence." In a communication made to the Court on 16 May 1973 by the French Government that reservation was formally invoked. The bounds placed by that Government on its acceptance have been deemed by the Order not to create an impediment to the exercise of the Court's power to grant provisional measures in application of Article 41 of the Statute, since the Court considered that the title invoked by the Applicant to found the jurisdiction of the Court, namely the General Act of 1928, seemed sufficient, prima facie, both to justify its competence provisionally and to rule out the application of the 1966 reservation in the interim measures phase, without prejudging its later decision on these questions. I have therefore nothing to say on the substance of the problems of jurisdiction and admissibility, since every question, without exception, concerning the Court's power to take jurisdiction in the case as presented in the Application of Australia, has been deferred to the next phase of the proceedings, instituted in the operative part of the Order.

But the decision of the Court indicating provisional measures constitutes an application which I cannot approve of two Articles of the Statute of the Court, Articles 53 and 41, and it is therefore proper that I should give the reasons for my dissent, successively on these two points which relate to the one phase of provisional measures.

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* *

When the Court was seised on 9 May 1973 of the Application instituting proceedings and indicating the French Republic as respondent, the fact was signified on the same day to the Government of the French Republic, which replied on 16 May 1973 by a document formally contesting the jurisdiction of the Court and submitting that the case should be removed from the list. This was a document of 20 pages which constitutes a reply to the communications of the Court. The Court, before the first hearing, examined as in every case the question of the communication to the public of the documents in the proceedings, in accordance with Article 48 of the Rules of Court; in a letter to the Court dated 19 May 1973 the Agent of the Applicant made express reservations to the communication of the French document of 16 May 1973 and "any further documents from the Government of France that do not accord with the regular procedures of the Court". On 21 May 1973, at the first hearing, counsel for the Government of Australia stated:

> "Neither the Court not Australia should have to deal with the contentions advanced by a party if not made in Court but irregularly or outside the Court. We submit that strict adherence should be had to the requirements that parties must put their case regularly before the Court and that, if they fail to appear, then the Court should not take notice of any statement they may make outside the framework of the Court's established process. This rule has been a fundamental one throughout the ages for maintaining the integrity of the judicial process at every level. We trust that the Court will make clear that it will not take such statements into account".

And still, on the date of the present Order, the French document has not been communicated to the public, whereas the Australian Application and the records of the oral arguments of Australia were made public as from 21 May 1973.

The foundation for such an attitude can only be found in a certain interpretation of Article 53 of the Statute or of the procedure of the Court in preliminary matters.

Article 53 of the Statute of the Court deals with the situation of States which contest the jurisdiction of the Court by failing to appear or to present submissions. Such deliberate non-participation is an act recognized in the procedure of the Court, being dealt with by an Article which is contained in Chapter III of the Statute, entitled "Procedure", and nowhere in the intentions of the authors of the Statute would one be able to find any will to penalize the State which does not appear. The contrary proposition has been pleaded without the support of any authority and should be dismissed. Certainly, the absence of a State ought not to prejudice the action instituted by another State, and may not be allowed to interrupt the course of justice. But non-appearance is regulated by Article 53, which lays down what its consequences must be and, when non-appearance is noted, that Article must be applied. But that is what the Court did not do; the Order notes failure to appear, in paragraph 11, but takes into account the submissions of the document addressed to the Court by the French Government for the purpose of requesting that the case be removed from the list. Now, if there exist submissions of the Government cited as respondent in the case, there is no default for want of submissions. By pronouncing neither in one sense nor in the other, and by deferring to a later date its decision on the submissions of the French Government, the Court is giving an interpretation of Article 53 which I find erroneous.

That is not a minor problem and I regret that the Court should have deferred it to a later phase. By indicating at the opening of the first hearing that the French Government's request for the removal of the case from the list, which had "been duly noted", would be dealt with "in due course", the President was only settling an immediate problem, but the Order has postponed the moment of decision still further. And that postponement implies that the Court considers it possible to treat the French Government both as a party to the main proceedings (cf. paras. 32 and 33 of the Order and the fixing of a time-limit for a French Counter-Memorial) and as being in default in the present phase, because its failure to appear is noted in paragraphs 11 and 34. But if the French Government has failed to appear and formally indicated its intention to remain outside the main proceedings, in a way which leaves no room for doubt, it was necessary to apply Article 53, which lays down the effects of default, and to apply it immediately.

It does not seem to me to be in accordance with the rules of procedure to suspend the application of Article 53 provisionally in the present case on the ground that this is an interim measures phase. Thus right from the outset an error in interpretation has been made with regard to Article 53. I need not recall the consistent jurisprudence of the Court as to the interpretation of its Statute: "The Court itself, and not the parties, must be the guardian of the Court's judicial integrity" (*Northern Cameroons, Judgment, I.C.J. Reports 1963,* p.29). It was therefore for the Court to decide, on the basis of its own reasons, whether its Statute and Rules lay down formalities which are indispensable, so that submissions made in any other way are to be treated as inadmissible, and whether, on that hypothesis, Article 53 should be applied to a two-fold default, absence from the proceedings and failure to make submissions. Nothing of the kind was done, and the status of the French document remains uncertain. Objection to it, on the level of its very existence, has been taken by the Applicant, the decision on the submissions made in it has been postponed; it is impossible to deduce from the Order whether this document is or is not a pleading in the case which should have been taken into account on a footing of equality with the observations of the Applicant. For if the Statute and Rules of Court do not forbid the making of "submissions" in the way which was selected in this case, the French document should have been admitted as the observations of the respondent; and on the opposite assumption, it should have been rejected, and Article 53 applied as it was in the Judgment of 2 February 1973 (*Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973,* para. 12).

The Court's postponement of the application of the effects of Article 53 until the later stages of the case is thus an implicit decision to refuse to apply Article 53 to an interim measures phase. This is a position which merits examination. Shortly expressed, the argument is that default does not necessarily have the same consequences in all phases of a case, and that while Article 53 does, in paragraph 2 , lay down certain effects, those effects may be set aside when dealing with a request for interim measures of protection, despite the manifest intention of the State which is absent from the proceedings.

It could also be maintained that while Article 53 provides the party interested in note being taken of default with the right to have that done, it does not do more, and the Court cannot take note of it *proprio motu.* It will be sufficient to observe in this respect that even if this were so, which in my view it is not, the Applicant has in the present case implicitly invoked Article 53 in the circumstances mentioned above, by making reference to the applicable provisions of the Statute and Rules of Court. But the French Government has indicated in a letter of 21 May 1937 that it is "not a party to this case"; it would appear difficult not to see in its statements of 16 and 21 May a formal intention to fail to appear. The Court surely could not overlook both the position taken up by the Applicant and that of the absent State, when they were at one in seeking that it take note of a failure to appear.

It should be added that it would be a sort of abuse of procedure to seek to make use of a failure to appear as a breach of the rules of procedure incurring the loss of the right to be heard by the Court, and thus create a penalty which the Statute itself formally forbids in Article 53, the main effect of which is that, when a failure to appear has been noted, the Court "must... 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". It is not usual to advance at one and the same time an argument and its opposite; faced with a failure to appear, the Court, by postponing any decision on the effects of the failure to appear, has allowed some infringement of the equality which States must enjoy before a court.

The jurisdiction of the Court is limited on the one hand to the States which have accepted it, and on the other to commitments freely entered into. As a court of specific jurisdiction, the Court must above all take care not to exceed the competence it derives from its Statute and from the voluntary acceptance of its jurisdiction by States, each of which freely determines the scope of the jurisdiction it confers upon the Court.

A State either is or is not subject to a tribunal. If it is not, it cannot be treated as a "party" to a dispute, which would be non-justifiable. The position which the Court has taken is that a State which regards itself as not concerned in a case, which fails to appear, and affirms its refusal to accept the jurisdiction of the Court, cannot obtain from the Court anything more than a postponement of the consideration of its rights. This is not what Article 53 says.

Failure to appear is a means of denying jurisdiction which is recognized in the procedure of the Court, and to oblige a State to defend its position otherwise than by failure to appear would be to create an obligation not provided for in the Statute. It has been argued that the only way of challenging the jurisdiction of the Court is to imply a preliminary objection. The way in which States challenge the Court's jurisdiction is not imposed upon them by a formalism which is unknown in the procedure of the Court; when they consider that such jurisdiction does not exist, they may choose to keep out of what, for them, is an unreal dispute. Article 53 is the proof of this, and the Court must then satisfy itself of its own jurisdiction, and of the reality of the dispute brought before it. A State which fails to appear does of course run a risk, that of not supplying the Court with all possible material for the consideration of its application for dismissal of the case. But that is a risk which the State, and it alone, is free to choose to take, and to compare with the risk which it would run as the result of a long drawn-out procedure in which it does not wish to participate, with regard to a matter which it considers to be wholly outside the Court's jurisdiction. Certain indications given in connection with the Order of 22 June 1973 show that the possibility of successive deferments is not ruled out.

The Permanent Court of International Justice gave a warning against the notion that an Application is sufficient to create a justiciable dispute: "... the Court's jurisdiction cannot depend solely on the wording of the Application". (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment NO. 6, 1925, P.C.I.J., Series A, No. 6,* p. 15).

If, as I think, failure to appear as provided for in Article 53 is not in itself subject to any sanction, it becomes evident that the reasons for such failure to appear, when they have been clearly stated, must be examined fully by the Court, and above all they must be formally accepted or rejected, and that without delay. The idea that a failure to appear is not opposable to the Court and to the Applicant because it is a case of a request for interim measures of protection is therefore, in my view, beside the point.

In the first place, no-one disputes "the connection which must exist under Article 61, paragraph 1, [now Art. 66, para. 1] of the Rules between a request for interim measures of protection and the original Application filed with the Court" (*Fisheries Jurisdiction (United Kingdom v. Iceland), Interim Protection, Order of 17 August 1972, 1972, I.C.J. Reports 1972,* para 12). A request for interim measures of protection is thus a particular phase, but one which is not independent of the original Application; there is no margin in words, and it is impossible to believe that problems of jurisdiction, admissibility and reality of the principal Application can be conjured away simply by stating that these points, which are essential for a court of specific jurisdiction like this Court, are just being taken for granted provisionally, prima facie, without their being prejudged. It is in each individual case by reference to the jurisdictional problems in the widest sense, to the circumstances, and to the *"respective rights of either party"* (Art. 41, emphasis added) that a decision should be taken as to whether it is possible to indicate interim measures, and the forms of words used must correspond to reality.

Such was not the analysis of the power instituted in Article 41 of the Statute which was carried out in the present instance. The Court, by putting off the decision on the effects of non-appearance, embraced the proposition that a request for provisional measures is utterly independent in relation to the case which is the subject of the Application.

It is no use referring to certain domestic systems of law which feature such independence, because the Court has its own rules of procedure and must apply them in its jurisdictional system, which, as a corollary of a certain kind of internal society, has been established on the basis of the voluntary acceptance of jurisdiction. It is a fact of international life that recourse to adjudication is not compulsory; the Court has to take care lest, by the indirect method of requests for provisional measures, such compulsion be introduced vis-à-vis States whose patent and proclaimed conviction is that they have not accepted any bond with the court, whether in a general way or with regard to a specified subject matter.

If it were a question of a State whose non-appearance was due to the total absence of the Court's jurisdiction, whether for want of a valid jurisdictional clause or by reason of the inadmissible character of the principal claim, the immediate decision of lack of jurisdiction in regard to the Application instituting proceedings itself would be taken without delay; the decision of the Court in the present case is that, despite the affirmation that a certain subject-matter has been formally excluded from the jurisdiction of the Court, and the fact that the State which made that affirmation considers itself to be outside the jurisdiction of the Court in regard to everything connected with that subject-mater, it is possible to indicate provisional measures without prejudging the rights of that State.

In the decision which the Court has to take on any request for provisional measures, urgency is not a dominant and exclusive consideration; one has to seek, between the two notions of jurisdiction and urgency, a balance which varies with the facts of each case. If the jurisdiction is evident and the urgency also, then there is no difficulty, but that is an exceptional hypothesis. When the jurisdiction is not evident, whether there is urgency or not, the Court must take the time needed for such an examination of the problems arising as will enable it to

decide one way or the other, and that is something which it could have done without undue delay in the present instance with regard to various objections to its power to judge the case as described in the principal Application.

There is no presumption of the Court's jurisdiction in favour of the applicant, nor any presumption of its lack of jurisdiction in favour of the respondent; there is only the right of each of them to a proper and serious examination of its position.

A State does not have to wait two years or more for the Court to vindicate its claim that no justiciable dispute exists, for if that is the case there is nothing to be argued over; the other State, which has submitted the claim whose reality is contests, evidently has an equal right to have the Court acknowledge the existence of the dispute it invokes. But the equality between these claims is upset if, by the indirect means of the allegedly urgent necessity for the indication of provisional measures, a presumption operates in favour of the applicant without the Court's carrying out any serious appraisal of the objection. On behalf of the Applicant it has been pleaded that argument on all these problems will be presented later; that in itself is a negation of the claim of the other State to be immediately relieved of a dispute which it alleges not to exist. Thus, to maintain equality between the parties, in a case where objections relating to the very stuff of the dispute are raised, the priority treatment of these objections is a necessity. In their joint dissenting opinion Judges McNair, Basdevant, Klaestad and Read wrote, with reference to the question of the obligation to submit to arbitration:

> "Since there is nothing in the Declaration of 1926 to indicate an intention that prima facie considerations should be regarded as sufficient, it is our opinion, based on the principle referred to above and the way in which this principle has been invariably applied, that the United Kingdom can only be held to be under an obligation to accept the arbitral procedure by application of the Declaration of 1926 if it can be established to the satisfaction of the Court that the difference as to the validity of the Ambatielos claims falls within the category of differences in respect of which the United Kingdom consented to arbitration in the Declaration of 1926". (*(Ambatielos, Merits, I.C.J. Reports 1953, p. 29)*

President Winiarski also expressed himself in favour of the priority of certain questions of admissibility over questions of jurisdiction *(Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), I.C.J. Reports 1962, p. 449).* Sir Gerald Fitzmaurice likewise, in a separate opinion, said:

> "There are however other objections, not in the nature of objections to the competence of the Court, which can and strictly should be taken in *advance* of any question of competence. Thus a plea that the application did not disclose the existence, properly speaking, of any legal dispute between the parties, must precede competence, for if there is no dispute, there is nothing in relation to which the Court can consider whether it is competent or not. It is for this reason that such a plea would be rather one of admissibility or receivability than of competence".
>
> "In the general international legal field there is nothing corresponding to the procedures found under most national systems of law, for eliminating at a relatively early stage, before they reach the court which would otherwise hear and decide them, claims that are considered to be objectionable or not entertainable on some *a priori* ground. The absence of any corresponding "filter" procedures in the Court's jurisdictional field makes it necessary to regard a right to take similar action, on similar grounds, as being part of the inherent powers or jurisdiction of the Court as an international tribunal". *(Northern Cameroons, I.C.J. Reports 1963, pp. 105 and 106 f.)*

It is this nexus of questions of jurisdiction and of admissibility which has been deferred by the Court to the next phase; it will then be for the Court, and then alone, to decide the fate of these questions in its judgment.

A certain tendency has arisen to consider that the Orders of 17 August 1972 in the *Fisheries Jurisdiction* cases have, as it were, consolidated the law concerning provisional measures. But each case must be examined according to its own merits and, as Article 41 says, according to "the circumstances". The court had developed an awareness of the existence of its own jurisdiction, the urgency was admitted, the reality and the precise definition of the dispute were not contested; finally, the right of the applicant States which was protected by the Orders was recognized as being a right currently exercised, whereas the claim of Iceland constituted a modification of existing law. It suffices to enumerate these points to show that the situation is entirely different today; so far as the last point is concerned, the situation is now even the reverse, since the Applicants stand upon a claim to the modification of existing positive law when they ask the Court to recognize the existence of a rule forbidding the overstepping of a threshold of atomic pollution.

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Such was the situation with which the Court found itself confronted when the application of Article 41 of the Statute in the present case was to be considered. The objections which were made or could be made to the jurisdiction of the court and the admissibility of the claim have a character of absolute priority. Article 41 does not give the Court a discretionary power but a competence bound by the conditions laid down in that text; it is necessary that "circumstances so require" and that the measures should be necessary to preserve "the respective rights of either party", which covers the same examination of fact and of law that Article 53, paragraph 2, imposes on the Court, in addition to the general obligation upon every

judge, including a judge of urgent cases, to satisfy himself that he has jurisdiction; that is what Article 36, paragraph 6, recalls. Now, the examination of fact and of law which is the condition of any decision on provisional measures cannot be systematically put off until later with the indication that the Court's power under Article 41 of the Statute "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgement should not be anticipated by reason of any initiative regarding the matters in issue before the Court" (Order, para. 20). That is to solve by a mere assertion the problem of the existence of the "circumstances" to which Article 41 refers. Article 41 obliges the Court to see whether the circumstances so require, it can only exercise that power if its decision will be able to preserve the respective rights of either party. But if the State cited as respondent invokes the Court's total absence of power, and if the subject of the claim is really non-existent, what rights would there be to preserve?

What has been said above with regard to the character of absolute priority attaching to certain objections shows that it is impossible to escape from the necessity of settling such objections before indicating measures of protection; if there are no rights, there is nothing to protect. If the claim has no subject, the principal application falls to the ground, and with it the request for provisional measures. The objection is of so fundamental a nature in regard to the very bases of the Court's jurisdiction that it seems to me to be a misuse of language to say that a *jus standi* to act in such circumstances could exist prima facie.

When the Court declares on the basis of Article 41 that a decision indicating provisional measures prejudges neither the jurisdiction nor the merits, that is not a finding which is likely to reassure States as to the temporary and circumstantial nature of that decision; it is an assertion that the examination of the case by the Court in accordance with the criteria of Article 41 of the Statute enables it, in the circumstances of this case, to consider that its decision cannot in fact prejudge either its jurisdiction or the question of *jus standi*. It is not just a kind of ritual formula, but a warranty that the Court is satisfied that Article 41 has been correctly interpreted and applied to a certain case. But if in reality an indication of provisional measures prejudges the jurisdiction or the existence of *jus standi*, the Court does not have the power to grant these measures, because the condition laid down by Article 41 of the Statute will not have been respected. These conditions not having been fulfilled in the present case, the application of Article 41 in the Order of 22 June 1973 indicating provisional measures constitutes an action *ultra vires*.

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In the present case, on a point of great importance, the Court has ignored one of the conditions for the acceptance of a request for provisional measures. In the case concerning the *Factory at Chorzów,* the Permanent Court of International Justice refused to indicate provisional measures because the request could be regarded as designed to obtain an interim judgement in favour of a part of the claim formulated in the Application and that, consequently, "the request [was] not covered by the terms of the provisions of the Statute and Rules" (P.C.I.J., *Series A, No. 12, p. 10).* Here we have a condition of general scope for the interpretation of Article 41 of the Statute of the Permanent Court of International Justice, which was identical to the present Article 41, and the recognition of a procedural requirement operating in regard to inter-locutory jurisdiction. For it would indeed, by definition, be contrary to the nature of interlocutory proceedings if they enabled the dispute of which they were only an accessory element to be disposed of.

Comparison between the principal claim (Application, para. 50, submissions of the Applicant) and of the request for provisional measures (Request, paras. 3f. and 74) shows that the latter was indeed designed to obtain an interim judgement. The request for provisional measures ought therefore to have been rejected on that ground also.

(Signed) André GROS

DISSENTING OPINION OF JUDGE GROS

[Translation]

* In my view, the documents by which New Zealand and Australia instituted proceedings in the *Nuclear Tests* cases are drawn up in similar terms, the same considerations of fact and law are relied on therein, and the submissions are directed to an identical object. In this opening address on 24 May 1973, counsel for New Zealand stated that:

> "New Zealand's case arises out of the same set of circumstances as that of Australia, and has comparable objectives".

The claims by these two Governments should have been jointed, from the outset of the proceedings, their object being the same. It is artificial to keep up the appearance of there being two cases, and while a joinder might raise drafting problems for subsequent decisions of the Court, this could not constitute a serious obstacle to a joinder. In the *South West Africa* cases, the Court joined the two claims at the time when the two Applicants nominated the same judge *ad hoc,* which is what New Zealand and Australia have also done in the present cases. Since the

Court has decided not to effect a joinder of the two claims from the outset of the cases, and to reserve its decision on the question, I have nothing further to say at present on the problem of joinder. But since the request made by New Zealand for interim measures of protection has been made the subject of a separate Order, I should state the reasons which have led me to dissent from that order. In the circumstances referred to above, these reasons are the same as those set out in my dissenting opinion appended to the Order of the same date concerning the request made by Australia.

DISSENTING OPINION OF JUDGE PETRÉN

[Translation]

As, to my regret, I am unable to concur in the opinion of the majority either with regard to the deferment, to a later stage in the proceedings, of the questions of the Court's jurisdiction and the admissibility of the Application, or with regard to the indication of provisional measures, I have to append to the Order a dissenting opinion.

In my view, the questions of the Court's jurisdiction and of the admissibility of the Application, and also the question of the indication of provisional measures, fall into a common framework as follows:

Before undertaking the examination of the merits of the case, the International Court of Justice, like any other court, has the duty of making sure as far as possible that it possesses jurisdiction and that the application is admissible. The absence of the State against which application is made does not alter this requirement in any way. On the contrary, Article 53 of the Statute lays an obligation on the Court to satisfy itself as to its possession of jurisdiction and the admissibility of the application on the basis of the elements at its disposal. Among the latter in the present case are the arguments put forward by France in the letter handed in by its Ambassador, and by Australia in its Application and in its oral pleadings of 21-25 May 1973. It is, however, the Court's duty also to consider any other elements that it may find relevant. The fact that Australia has requested provisional measures does not dispense the Court from the obligation of beginning by an examination of the questions of its jurisdiction and of the admissibility of the Application; indeed, it makes that examination, if anything, more urgent.

For it to be possible for the Court to consider that it has jurisdiction on the merits of the case, it would, as I see it, be necessary for it to approve at least one of the three propositions put forward in turn by the Australian government:

1. The reservation expressed by France when in 1966 it renewed its acceptance of the Court's jurisdiction, a reservation referring to activities connected with French national defence, is not valid;

2. The nuclear tests referred to in the Australian Application are not connected with French national defence;

3. The General Act of 1928 has remained in force as between States parties to that Act in 1944, the consequence of which is that reservations made by such States in accepting after 1945 the jurisdiction of the International Court of Justice are without effect in their relations among themselves.

The questions thus raised for the Court do not concern the merits of the case. They occur in a general framework of international law and, in my view, the Court would not have needed any further explanations from the Australian Government in order to resolve them, and it could and should have settled them on the basis of the elements at its disposal.

In this connection, it should be pointed out that the question of jurisdiction raises the issue of the extent to which the 1928 General Act can have survived the disappearance of the League of Nations and its organs, as also of the effect, if any, of such survival on the reservations made by States parties to that Act when accepting the jurisdiction of the present Court. Now Article 63 of the Statute required that these States should be notified without delay that such questions were submitted to the Court in the present case. If they had been so notified, they would already have had the opportunity to manifesting their astonishment, their satisfaction or their indifference in regard to the contention of the Australian Government mentioned under 3 above. But the fact that the required notification has not yet been made does not justify the Court in today inviting the Australian Government to present, at a later stage in the proceedings, further argument on the question of jurisdiction.

I am therefore of the opinion that the Court should not have opened a new phase of the case for that purpose but, on the contrary, should have requested the Australian Government to complete its argument on that issue in the present stage of the case.

As the Court has now deferred its decision on the question of jurisdiction, I am unable to indicate here and now my own assessment of the various factors entering into the consideration of that question.

Nevertheless, the Australian Government's request for the indication of provisional measures obliges me to examine whether the preconditions for the Court's ability to indicate such measures have been fulfilled.

Among those preconditions, certain relate to the question of jurisdiction. In that connection the Australian Government has referred *inter alia* to the Orders made by the Court on 17 August 1972 in the two *Fisheries Jurisdiction* cases. In both of these Orders the Court considered that on a request for provisional measures it need not, before indicating them, finally satisfy itself that it had jurisdiction on the merits of the case, but that it ought not to act under Article 41 of the Statute if the absence of jurisdiction was manifest.

The Australian Government sought to draw from this considerandum the conclusion that it only when the absence of the Court's jurisdiction is manifest that it ought not to act under Article 41 of the Statute. It is not possible to accept such an interpretation. The paragraph in question simply alludes to two extreme situations: one in which the jurisdiction of the Court is finally established and another in which the absence of jurisdiction is manifest. It says that the existence of the first situation is not a necessary precondition for the indication of provisional measures and that, in the second situation, the Court should not indicate such measures, which is a self-evident observation that does not lend itself to broader conclusions. The paragraph does not say in accordance with what criteria, within the area lying between finally established jurisdiction and manifest absence of jurisdiction, the line must be drawn between the situations which permit the application of Article 41 and those which do not permit it. It is only in a later paragraph, which the two Orders also have in common, that a reply is found to that question. There the Court indicates that it considers that a provision in an instrument emanating from the Parties appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded.

In the present case, it appears from paragraph 13 of the Order that the Court has been guided by that precedent, for it there expresses the opinion that it ought not to indicate interim measures unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded. I can agree to this formula, which in my view signifies that for Article 41 of the Statute to be applicable it is not sufficient for a mere adumbration of proof, considered in isolation, to indicate the possibility of the Court's possessing jurisdiction; that there must also be a probability transpiring from an examination of the whole of the elements at the Court's disposal.

I have therefore been impelled to carry out such an examination. In the event, however, I do not find it probable that the three propositions of the Australian Government, or any one of them, may afford a basis on which to found the jurisdiction of the Court. For the reason already mentioned, I find myself, at the present stage of the proceedings, prevented from setting forth the considerations which have led me to that conclusion and preclude me from voting for the indication of provisional measures.

Alongside the question of the Court's jurisdiction, there arises that of the admissibility of Australia's Application. As I understand that term, it includes the examination of every question that arises in connection with the ascertainment of whether the Court has been validly seised of the case. But what is first and foremost necessary from that point of view is to ask oneself whether atmospheric tests of nuclear weapons are, generally speaking, already governed by norms of international laws, or whether they do not still belong to a highly political domain where the norms concerning their international legality or illegality are still at the gestation stage.

Certainly, the existence of nuclear weapons and the tests serving to perfect and multiply them, are among the foremost subjects of dread for mankind today. To exorcise their spectre is, however, primarily a matter for statesmen. One must hope that they will one day succeed in establishing a state of affairs, both political and legal, which will shield the whole of mankind from the anxiety created by nuclear arms. Meanwhile there is the question whether the moment has already come when an international tribunal is the appropriate recipient of an application like that directed in the present case against but one of the present nuclear Powers.

The Order defers the question of the admissibility of the Application, like that of the Court's jurisdiction, to a later stage in the proceedings. I am unable to concur in this decision, because I consider that the Court could and should have settled in its present session the whole of the preliminary and urgent questions which arise in the case and concerning which it is incumbent upon the Court to take up a position *proprio motu*.

To avoid anticipating such vote as I may cast in the new phase of the proceedings, I must, I feel, refrain from saying anything more on the question of the admissibility of the Application. I do not, moreover, find it necessary to answer the question whether it appears probable that the Application is admissible, which constitutes one of the conditions enabling the Court to cross the threshold of Article 41 of its Statute and indicate provisional measures. Having already found Article 41 inapplicable in this instance owing to the improbability that France, despite the reservation it has attached to its acceptance of the Court's jurisdiction, could be held subject thereto in the present case, I have no need to pronounce upon any other aspects of the question of the applicability of Article 41.

(Signed) S. PETRÉN

DISSENTING OPINION OF JUDGE PETRÉN

[Translation]

*Having voted against the adoption of the Order, I append a dissenting opinion.

Considering the identity of claims and submissions between this case and the *Nuclear Tests* case *(Australia v. France),* as well as the coincident circumstances of fact and law, I was of the opinion that the two cases should have been joined even at the present stage of the proceedings. The Court having rejected that proposal, it only remains for me to express the same opinion here as in the other case.

DISSENTING OPINION OF JUDGE IGNACIO-PINTO

[Translation]

To my regret, I am unable to support the Order of the Court, upholding Australia's request for the indication of interim measures of protection pending the settlement on the merits of the dispute between that State and France with regard to the nuclear tests which the French Government wishes to carry out in the South Pacific.

I voted against the grant of those interim measures because I find this decision legally unjust, or in any event without sufficient basis. But I wish to emphasize that my negative vote does not mean that I am in favour of nuclear tests, - on the contrary, I am strongly opposed to all such tests, and align myself with those who wish to see the prohibition of all these experiments which are dangerous for our planet, and of which the least one can say is that we do not yet fully know what harmful consequences they may have, and how long the effects of atomic tests last in the atmosphere.

In the dispute brought before the Court by Australia, however, we must not be swayed by sentiment, and still less must we permit ourselves to be affected by the feelings - which in fact are very understandable - prompted by the decision of the French Government to carry out nuclear tests, just as other States, in exercise of their rights to sovereignty, have carried out such tests, and a further State, and no minor one at that, still continues to do so, using devices which produce explosions which give rise to still greater pollution. It is therefore important that I should examine calmly and lucidly the question of the Court's jurisdiction, confining myself strictly to existing rules of international law.

It is to be observed that the case of which the Court is seised is *sui generis,* and is not on all fours with any other case in which, up to the present, the Court has had to examine in order to determine the question of its jurisdiction. It is in vain that reliance has been placed upon the *Fisheries Jurisdiction* case, the legal basis of the request for the indication of interim measures is clear and definite, and is to be found clearly set out in the Exchange of Notes of 11 March 1961 between Iceland and the United Kingdom, the penultimate paragraph of which reads as follows:

> "The Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such extension and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice".

There is no possible doubt as to the consent of the parties; the recourse had to this precedent in order to justify Australia's request must therefore be rejected.

In the case now before the Court, there is nothing comparable to the legal situation created by the penultimate paragraph of the Exchange of Notes of 11 March 1961 between Iceland and the United Kingdom.

Australia does of course rely on the General Act of 26 September 1928, to which it and France were parties, but there is still doubt as to the validity thereof, and the controversy on the point is such that in my opinion the Act cannot possibly be a sufficient ground to turn the scale of the Court's decision, and result in the award to Australia of the interim measures asked for. Nor is there any more validity in the argument which has been based on another decision of the Court, the Judgment of 6 July 1957 on the *Certain Norwegian Loans* case, in which proceedings the Agent of the French Government relied on the validity of the General Act. The Court in fact did not accept this point, despite the contrary opinion expressed by Judge Basdevant.

Of what is it a question in the present case?

The request amply answers this question, adducing:

> "(i) The right of Australia and its people, in common with other States and their peoples, to be free from atmospheric nuclear weapon tests by any country is and will be violated;
>
> (ii)The deposit of radioactive fallout on the territory of Australia and its dispersion in Australia's airspace without Australia's consent:
>
> *(a)* violates Australian sovereignty over its territory;

> *(b)* impairs Australia's independent right to determine what acts shall take place within its territory and in particular whether Australia and its people shall be exposed to radiation from artificial sources;
>
> (iii) The interference with ships and aircraft on the high seas and in the superjacent airspace, and the pollution of the high seas by radioactive fallout, constitutes infringements of the freedom of the high seas".

The majority of the Court finds that these submissions are sufficient to enable it to say that this request appears to fall within the purview of international jurisdiction.

But the French Government, with full right, has from 1996 onward excluded from the Court's jurisdiction all "disputes concerning activities connected with national defence", and its assent under Article 36, paragraph 2, of the Statute is therefore limited by the categorical expression of its will. In my view, this limitation has its raison d'être, moreover, in Article 2, paragraph 7, of the Charter, which provides:

> "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.".

The arguments put forward by Australia, in particular with regard to the validity of the 1928 General Act, are not relevant, for it is admitted in international law that a special rule overrides the general rule. In the present case, events after the war of 1939-1945 having completely overturned conceptions of national security through the introduction of the nuclear bomb, it is difficult not to accept that the reservation of the French Government overrides the General Act dating from before the Second World War, an era in which no State possessed the atomic bomb.

Moreover, whereas the General Act of 1928 is the subject of serious controversy and appears at all events never to have been invoked as a basis of the Court's jurisdiction by any State ever since its entry into force, the declaration of the French Government constitutes the fundamental element of its acceptance of compulsory jurisdiction under Article 36, paragraph 2, in so far as it is based on its formal and unequivocal consent.

There is another important point which does not seem to have been sufficiently taken into account in the arguments put forward by the French Government. I refer to its reiterated request to the Australian Government, expressed in its Ambassador's letter of 7 February 1973 to the Australian Prime Minister and Foreign Minister (Application, Annex 10, p. 57), that it be given some indication of the precise rules of international law which France is said to violate:

> "But the French Government finds it hard to see what is the precise rule on whose existence Australia relies. Perhaps Australia could enlighten it on this point.
>
> In reality, it seems to the French Government that this complaint of the violation of international law on account of atomic pollution amounts to a claim that atmospheric nuclear experiments are automatically unlawful. This, in its view, is not the case. But here again the French Government would appreciate having its attention drawn to any points lending colour to the opposite opinion".

This request for specific enlightenment has received no reply, and Australia has confined itself to presuming the existence of a right which in my view does not really exist, alleging moreover more or less hypothetical damage, the assessment of which is difficult in the extreme. Nevertheless the majority of the Court has seen fit to recognize that such damage, however uncertain or imprecise it may be, is sufficient to justify acceding to the request for the indication of provisional measures without any clear statement of the nature of the rights which have to be protected or preserved.

Of course, Australia can invoke its sovereignty over its territory and its right to prevent pollution caused by another State. But when the French Government also claims to exercise its right of territorial sovereignty, by proceeding to carry out tests in its territory, is it possible legally to deprive it of that right, on account of the mere expression of the will of Australia?

In my opinion, international law is now, and will be for some time to come, a law in process of formation, and one which contains only a concept of responsibility after the fact, unlike municipal law, in which the possible range of responsibility can be determined with precision *a priori*. Whatever those who hold the opposite view may think, each State is free to act as it thinks fit within the limits of its sovereignty, and in the event of genuine damage or injury, if the said damage is clearly established, it owes reparation of the State having suffered that damage.

There is, so far as I am aware, in international law no hierarchy in the exercise of the right of sovereignty, and the Order issued by the Court has - at least, for the moment - no legal ground for preventing the French Government from making use of its right of sovereignty and exploding an atomic device, as other States have done before it, and as one other State is still doing at the present time, in order to obtain the means of ensuring their own security.

Is Australia's right, in the exercise of its sovereignty, to be regarded as superior to the identical right possessed by France, which would thus rank second when it came

to exercise of its own right?

By directing the French Government *"avoid nuclear tests causing the deposit of radioactive fallout in Australian territory"* (operative clause of the Order emphasis added), the Court certainly oversteps the limits of its powers, and appears thereby to be innovating in declaring unlawful the exercise of a right which up to now has been regarded as falling within the sovereignty of a State. The Court is not yet a supreme courts in municipal law, nor does it have legislative powers, and it has no right to hand down a decision against a State which by a formal declaration excludes its jurisdiction over disputes concerning activities connected with national defence.

I entirely agree with Australia that that country runs considerable risk by seeing atomic fallout descent upon its territory and seeing its people suffer the harmful effects thereof, and for my own part, I would like to see that risk finally exorcised, but I see no existing legal means in the present state of the law which would authorize a State to come before the Court asking it to prohibit another State from carrying out on its own territory such activities, which involve risks to its neighbours.

This is so pertinent that I find it expressed even in the Moscow Treaty of 5 June 1963, the object of which is in fact the prohibition of atmospheric nuclear tests - the French Government, incidentally, is not a party to this Treaty - for Article IV thereof embodies a reservation which is so substantial, probably in order to satisfy the major States which hold the greatest stocks of nuclear weapons, that the prohibition becomes practically ineffective. Article IV provides that:

"This Treaty shall be of unlimited duration.

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that *extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.* It shall give notice of such withdrawal to all other Parties to the Treaty three months in advance". (Emphasis added).

Is it admissible that the reservation effected by these States should remain valid, so as to authorize them to recommence their nuclear experiments if extraordinary events should have jeopardized the supreme interests of their countries, while the Court's Order forbids France to exercise its right to carry out its tests at the present time, when no valid treaty obligation now exists to prevent it from doing so?

Does not the existence of such a treaty, containing such a reservation, demonstrate the lack of legal basis which should have led the Court to dismiss the Australian request for the indication of interim measures?

The point is that if the Court were to adopt the contention of the Australian request it would be near to endorsing a novel conception in international law whereby States would be forbidden to engage in any risk-producing activity within the area of their own territorial sovereignty; but that would amount to granting any State the right to intervene preventively in the national affairs of other States. Yet Article 2, paragraph 7, of the Charter is categorical on that point.

In the present state of international law, the "apprehension" of a State, or "anxiety", "the risk of atomic radiation", do not in my view suffice to substantiate some higher law imposed on all States and limiting their sovereignty as regards atmospheric nuclear tests.

Those who hold the opposite view may perhaps represent the figureheads or vanguard of a system of gradual development of international law, but it is not admissible to take their wishes into account in order to modify the present state of the law.

To conclude, there is one consideration which, or so it seems to me, has not sufficiently been taken into account and which it is important not to overlook. I refer to the fact that Australia had itself accepted the conducting by the United Kingdom of nuclear tests above its own territory, more particularly at Maralinga in South Australia, with devices notably more powerful than those to be used in the French tests, which are located in an area over 6,000 kilometres distant from Australia.

If Australia thus allowed the United Kingdom, with its consent, to proceed to such actions directly above an area subject to its own national sovereignty, it ought to be declared without title to request that the French Government be prohibited from acting in the same manner above an area under French sovereignty.

Consequently, in my opinion, there is no reason to accede to the request for the indication of provisional measures. The question of the illegality of nuclear tests exceeds the competence of the Court and becomes, as I see it, a political problem. No further proof is in my view needed than the statements of the Prime Minister and Foreign Minister himself in his Note to the Minister for Foreign Affairs of the French Government, dated 13 February 1973 (Application, Annex 11, p. 62), in which we find the following words:

> "In my discussion with your Ambassador on 8 February 1973, I referred to the strength of public opinion in Australia about the effects of French tests in the Pacific. I explained that the strength of public opinion was such that, whichever political party was in office, it would be under great pressure to take action. The Australian public would consider it intolerable if the nuclear tests proceeded during discussions to which the Australian Government had agreed".

By way of conclusion, I am inclined to think that the decidedly political character of the case ought, or so it seems to me, to have prompted the Court to exercise greater circumspection and to have caused it to take the decision of purely and simply rejecting the request of Australia for the indication of provisional measures. It is not for the Court to declare unlawful the act of a State exercising its sovereignty within its own territorial limits, or at least to lend credence by its decision to the proposition that the act in question is unlawful. It was therefore wrong for Australia to have secured the benefit of the provisional measures which it sought, and a violation of Article 2, paragraph 7, of the Charter.

(Signed) L. IGNACIO-PINTO.

DISSENTING OPINION OF JUDGE IGNACIO-PINTO

[Translation]

*I am opposed to the Order made this day by the Court, granting New Zealand the same interim measures of protection as were granted Australia a few hours before on this same date, in the latter's case against France.

My opposition to the present Order is based on the same considerations as I have already expounded at length in my dissenting opinion in the first *Nuclear Tests* case *(Australia v. France)*. I am therefore voting against it as I voted against the first Order, in the case of *Australia v. France.*

But before going farther, I venture to observe that the Court ought from the beginning to have pronounced a joinder of the two cases, as some judges had moreover requested.

For in fact, in the two requests for interim measures presented by the two States, Australia and New Zealand, there is more than a mere analogy between the two claims. They have indeed the same object, namely *to secure from the Court an indication that "the French Government should avoid nuclear tests causing the deposit of radioactive fallout" on the territory* (emphasis added):

(1) of Australia;

(2) of New Zealand, the Cook Islands, Niue or the Tokelau Islands.

There is therefore identity as to the object of the claim; the litigant cited as respondent, France, is also identical; finally there is, as nearly as makes no difference, an identity in the terms employed in the requests.

That being so, I think that there was every reason to order a joinder and to pronounce upon the two States' requests for the indication of interim measures in one and the same Order.

For that reason I am also voting against the Order made today by the Court in respect of the New Zealand request, and for the rest of the arguments I would adduce in support of my dissenting opinion in the present case, I will confine myself to referring to those I have already put forward in the case of *Australia v. France.*

But I wish to take this opportunity of modifying somewhat, in regard to New Zealand, what I said about the nuclear tests carried out by the United Kingdom at Marlinga in Australia in the years 1952-1957.

The same reasoning that I followed in order to deny that Australia was entitled to put forward its claims is likewise valid where New Zealand is concerned. It is also necessary to refer in this connection to the tests carried out by the United Kingdom at Christmas Island - thermonuclear explosions, what is more - at a distance of 1,200 miles from the Tokelau Islands, under New Zealand administration.

If therefore New Zealand considered that the United Kingdom was acting acceptably in carrying out tests at Christmas Island, it is not entitled to request that the French Government be prevented from exploding nuclear devices at a site some 1,400 miles from New Zealand.

And so far as the effects of radioactivity are concerned - a subject on which there is such eagerness to sensitize public opinion -, it is interesting to note the following passage, taken from page 18 of *New Zealand and Nuclear Testing in the Pacific* by Nigel S. Roberts, Lecturer in Political Science, University of Canterbury, a work published at Wellington in 1972 by the Institute of International Affairs, of which Mr. Allan Martyn Finlay, Attorney-General of New Zealand and counsel for his country in the present case, is the Vice-President:

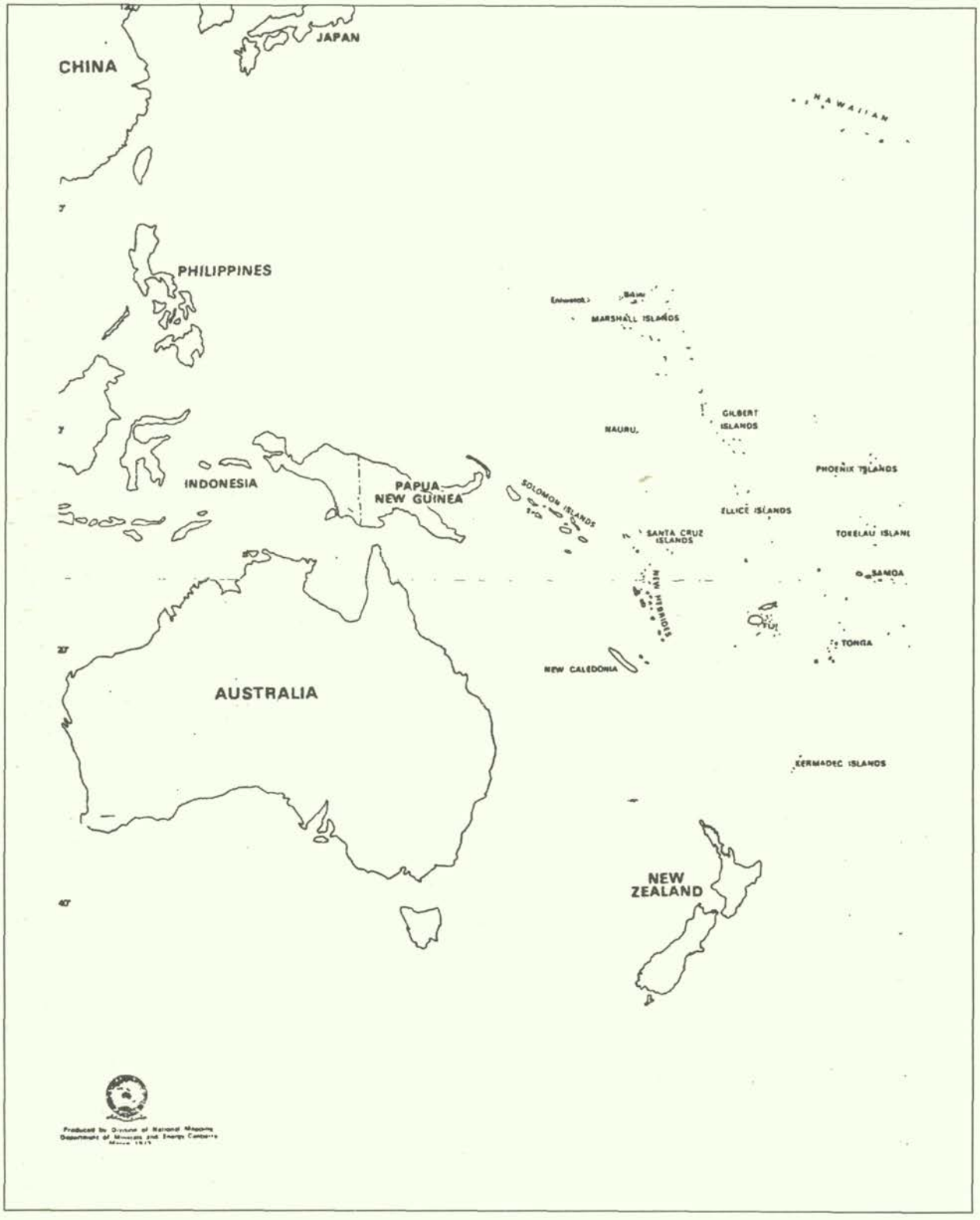
"Before French testing began, a special report was presented to the Prime Minister and then to the House of Representatives in an attempt to assess the health hazards to New Zealand, as well as to other Pacific areas, from the proposed French tests of nuclear weapons. The report concluded that:

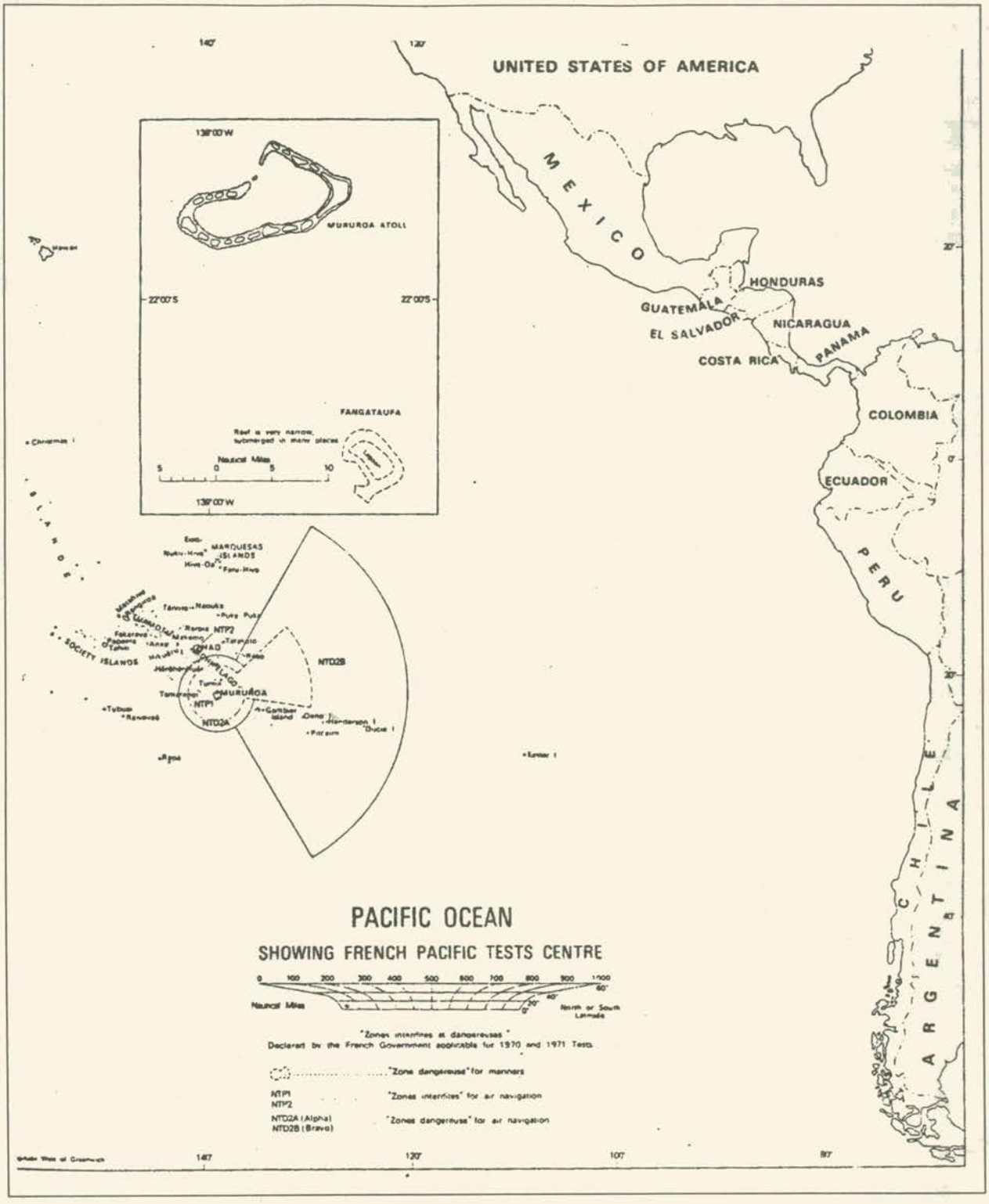
> "Testing of nuclear weapons up to the present time does not and will not present a significant health hazard to the people of New Zealand or the Pacific Territories with which it is associated. The proposed French tests will add *fractionally but not significantly* to the long-lived fallout in these areas. The general levels of such radioactive contamination in the Southern hemisphere will remain *below those* already existing in the Northern hemisphere. ... For New Zea-

> land the chance of significant levels of contamination being reached is *even more unlikely* than for the islands in the Pacific' " (Emphasis added.)

If that could be the unequivocal opinion of the experts in an undisputed official report addressed to the New Zealand Prime Minister and House of Representatives, that confirms my conviction that this second *Nuclear Tests* is also political in character. Hence I remain strongly opposed to the Order indicating the interim measures requested by New Zealand. In making it, the Court has exceeded its competence and it should have rejected that request.

(Signed) L. IGNACIO-PINTO




UNITED STATES OF AMERICA
MEXICO
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SOCIETY ISLANDS
TUAMOTU
MURUROA
NTP1
NTP2
NTD2A
NTD2B
PACIFIC OCEAN
SHOWING FRENCH PACIFIC TESTS CENTRE
Nautical Miles
"Zones interdites et dangereuses"
Declared by the French Government applicable for 1970 and 1971 Tests
"Zone dangereuse" for mariners
"Zones interdites" for air navigation
"Zones dangereuse" for air navigation

20 December 1974

1974
20 December
General List
No.58

NUCLEAR TESTS CASE (AUSTRALIA v. FRANCE)

Questions of jurisdiction and admissibility. Prior examination required of question of existence of dispute as essentially preliminary matter. Exercise of inherent jurisdiction of the Court.

Analysis of claim on the basis of the Application and determination of object of claim. Significance of submissions and of statements of the Applicant for definition of the claim. Power of Court to interpret submissions. Public statements made on behalf of Respondent before and after oral proceedings. Unilateral acts creative of legal obligations. Principle of good faith.

Resolution of dispute by unilateral declaration giving rise to legal obligation. Applicant's non-exercise of right of discontinuance of proceedings no bar to independent finding by Court. Disappearance of dispute resulting in claim no longer having any object. Jurisdiction only to be exercised when dispute genuinely exists between the Parties.

JUDGEMENT

Present: President LACHS; Judges FORSTER, GROS, BENGZON, PETREN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMENEZ DE ARECHAGA, Sir Humphrey WALDOCK, NAGENDRA SINGH, RUDA; Judge ad hoc Sir Garfield BARWICK; Registrar AQUARONE.

In the Nuclear Tests case,

between

Australia,

represented by

Mr. P. Brazil, of the Australian Bar, Officer of the Australian Attorney-General's Department,

as agent,

assisted by

H.E. Mr. F.J. Blakeney, C.B.E., Ambassador of Australia, as Co-Agent,

Senator the Honourable Lionel Murphy, Q.C., Attorney-General of Australia,

Mr. M.H. Byers, Q.C., Solicitor-General of Australia,

Mr. E. Lauterpacht, Q.C., of the English Bar, Lecturer in the University of Cambridge,

Professor D.P. O'Connell, of the English, Australian and New Zealand Bars, Chichele Professor of Public International Law in the University of Oxford, as Counsel,

and by

Professor H. Messel, Head of School of Physics, University of Sydney,

Mr. D.J. Stevens, Director, Australian Radiation Laboratory,

Mr. H. Burmester, of the Australian Bar, Officer of the Attorney-General's Department,

Mr. F.M. Douglas, of the Australian Bar, Officer of the Attorney-General's Department,

Mr. J.F. Browne, of the Australian Bar, Officer of the Department of Foreign Affairs,

Mr. C.D. Mackenzie, of the Australian Bar, Third Secretary, Australian Embassy, The Hague,

as advisers,

and

the French Republic,

THE COURT,

composed as above,

delivers the following Judgement:

1. By a letter of 9 May 1973, received by the Registry of the Court the same day, the Ambassador of Australia to the Netherlands transmitted to the Registrar an Application instituting proceedings against France in respect of a dispute concerning the holding of atmospheric tests of nuclear weapons by the French Government in the Pacific Ocean. In order to found to the jurisdiction of the Court, the Application relied on Article 17 of the General Act for the Pacific Settlement of International Disputes done at Geneva on 26 September 1928, read together with Articles 36, paragraph 1, and 37 of the Statute of the Court, and alternatively on Article 36, paragraph 2, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the French Government. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Pursuant to Article 31 Paragraph 2 of the Statute, the Government of Australia chose the Right Honourable Sir Garfield Barwick, Chief Justice of Australia, to sit as judge ad hoc in the case.

4. By a letter dated 16 May 1973 from the Ambassador of France to the Netherlands, handed by him to the Registrar the same day, the French Government stated that, for reasons set out in the letter and an Annex thereto, it considered that the Court was manifestly not competent in the case, and that it could not accept the Court's jurisdiction; and that accordingly the French Government did not intend to appoint an agent, and requested the Court to remove the case from its list. Nor has an agent been appointed by the French Government.

5. On 9 May 1973, the date of filing of the Application instituting proceedings, the Agent of Australia also filed in the Registry of the Court a request for the indication of interim measures of protection under Article 33 of the 1928 General Act for the Pacific Settlement of International Disputes and Article 41 of the Statute and Article 66 of the Rules of Court. By an Order dated 22 June 1973 the Court indicated, on the basis of Article 41 of the Statute, certain interim measures of protection in the case.

6. By the same Order of 22 June 1973, the Court, considering that it was necessary to resolve as soon as possible the questions of the Court's jurisdiction and of the admissibility of the Application, decided that the written proceedings should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application, and fixed 21 September 1973 as the time-limit for the filing of a Memorial by the Government of Australia and 21 December 1973 as the time-limit for a Counter-Memorial by the French Government. The Co-Agent of Australia having requested an extension to 23 November 1973 of the time-limit fixed for the filing of the Memorial, the time-limits fixed by the Order of 22 June 1973 were extended, by an Order dated 28 August 1973, to 23 November 1973 for the Memorial and 19 April 1974 for the Counter-Memorial. The Memorial of the Government of Australia was filed within the extended time-limit fixed therefor, and was communicated to the French Government. No Counter-Memorial was filed by the French Government and, the written proceedings being thus closed, the case was ready for hearing on 20 April 1974, the day following the expiration of the time-limit fixed for the Counter-Memorial of the French Government.

7. On 16 May 1973 the Government of Fiji filed in the Registry of the Court a request under Article 62 of the Statute to be permitted to intervene in these proceedings. By an Order of 12 July 1973 the Court, having regard to its Order of 22 June 1973 by which the written proceedings were first to be addressed to the questions of the jurisdiction of the Court and of the admissibility of the Application, decided to defer its consideration of the application of the Government of Fiji for permission to intervene until the Court should have pronounced upon these questions.

8. On 24 July 1973, the Registrar addressed the notification provided for in Article 63 of the Statute to the States, other than the Parties to the case, which were still in existence and were listed in the relevant documents of the League of Nations as parties to the General Act for the Pacific Settlement of International Disputes, done at Geneva on 26 September 1928, which was invoked in the Application as a basis of jurisdiction.

9. The Governments of Argentina, Fiji, New Zealand and Peru requested that the pleadings and annexed documents should be made available to them in accordance with Article 48, paragraph 2, of the Rules of Court. The Parties were consulted on each occasion, and the French Government having maintained the position stated in the letter of 16 May 1973, and thus declined to express an opinion, the Court or the President decided to accede to these requests.

10. On 4-6, 8-9 and 11 July 1974, after due notice to the Parties, public hearings were held, in the course of which

the Court heard the oral argument, on the questions of the Court's jurisdiction and of the admissibility of the Application, advanced by Mr. P. Brazil, Agent of Australia and Senator the Honourable Lionel Murphy, Q.C., Mr. M.H. Byers, Q.C., Mr. E. Lauterpacht, Q.C., and Professor D.P. O'Connell, counsel, on behalf of the Government of Australia. The French Government was not represented at the hearings.

11. In the course of the written proceedings, the following submissions were presented on behalf of the Government of Australia:

in the Application:

> "The Government of Australia asks the Court to adjudge and declare that, for the above-mentioned reasons or any of them or for any other reason that the Court deems to be relevant, the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law.
>
> **And to Order**
>
> that the French Republic shall not carry out any further such tests."

in the Memorial:

> "The Government of Australia submits to the Court that it is entitled to a declaration and judgement that:
>
> (a) the Court has jurisdiction to entertain the dispute, the subject of the Application filed by the Government of Australia on 9 May 1973; and
>
> (b) the Application is admissible."

12. During the oral proceedings, the following written submissions were filed in the Registry of the Court on behalf of the Government of Australia:

> "The final submissions of the Government of Australia are that:
>
> (a) the Court has jurisdiction to entertain the dispute the subject of the Application filed by the Government of Australia on 9 May 1973; and
>
> (b) the Application is admissible
>
> and that accordingly the Government of Australia is entitled to a declaration and judgement that the Court has full competence to proceed to entertain the Application by Australia on the Merits of the dispute."

13. No pleadings were filed by the French Government, and it was not represented at the oral proceedings; no formal submissions were therefor made by that Government. The attitude of the French Government with regard to the question of the Court's jurisdiction was however defined in the above-mentioned letter of 16 May 1973 from the French Ambassador to the Netherlands, and the document annexed thereto. The said letter stated in particular that:

> "...the Government of the [French] Republic, as it has notified the Australian Government, considers that the Court is manifestly not competent in this case and that it cannot accept its jurisdiction".

14. As indicated above (paragraph 4), the letter from the French Ambassador of 16 May 1973 also stated that the French Government "respectfully requests the Court to be so good as to order that the case be removed from the list". At the opening of the public hearing concerning the request for interim measures of protection, held on 21 May 1973, the President announced that "this request ... has been duly noted, and the Court will deal with it in due course, in application of Article 36, paragraph 6, of the Statute of the Court". In its Order of 22 June 1973, the Court stated that the considerations therein set out did not "permit the Court to accede at the present stage of the proceedings" to that request. Having now had the opportunity of examining the request in the light of the subsequent proceedings, the Court finds that the present case is not one in which the procedure of summary removal from the list would be appropriate.

15. It is to be regretted that the French Government has failed to appear in order to put forward its arguments on the issues arising in the present phase of the proceedings, and the Court has thus not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. The Court nevertheless has to proceed and reach a conclusion, and in doing so must have regard not only to the evidence brought before it and the arguments addressed to it by the Applicant, but also to any documentary or other evidence which may be relevant. It must on this basis satisfy itself, first that there exists no bar to the exercise of its judicial function, and secondly, if no such bar exists, that the Application is well founded in fact and in law.

16. The present case relates to a dispute between the Government of Australia and the French Government concerning the holding of atmospheric tests of nuclear weapons by the latter Government in the South Pacific Ocean. Since in the present phase of the proceedings the Court has to deal only with preliminary matters, it is appropriate to recall that its approach to a phase of this kind must be, as it was expressed in the Fisheries Jurisdiction cases, as follows:

> "The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudge or appear to prejudge any eventual decision on the merits." (I.C.J. Reports 1973, pp.7 and 54.)

It will however be necessary to give a summary of the principal facts underlying the case.

17. Prior to the filing of the Application instituting proceedings in this case, the French Government had carried out atmospheric tests of nuclear devices at its Centre d'expérimentations du Pacifique, in the territory of French Polynesia, in the years 1966, 1967, 1968, 1970, 1971 and 1972. The main firing site used has been Mururoa atoll some 6,000 kilometres to the east of the Australian mainland. The French Government has created "Prohibited Zones" for aircraft and "Dangerous Zones" for aircraft and shipping, in order to exclude aircraft and shipping from the area of the tests centre; these "zones" have been put into effect during the period of testing in each year in which tests have been carried out.

18. As the United Nations Scientific Committee on the Effects of Atomic Radiation has recorded in its successive reports to the General Assembly, the testing of nuclear devices in the atmosphere has entailed the release into the atmosphere, and the consequent dissipation in varying degrees throughout the world, of measurable quantities of radio-active matter. It is asserted by Australia that the French atmospheric tests have caused some fall-out of this kind to be deposited on Australian territory; France has maintained in particular that the radioactive matter produced by its tests has been so infinitesimal that it may be regarded as negligible, and that such fall-out on Australian territory does not constitute a danger to the health of the Australian population. These disputed points are clearly matters going to the merits of the case, and the Court must therefore refrain, for the reasons given above, from expressing any view on them,

19. By letters of 19 September 1973, 29 August and 11 November 1974, the Government of Australia informed the Court that subsequent to the Court's Order of 22 June 1973 indicating, as interim measures under Article 41 of the Statute (inter alia) that the French Government should avoid nuclear tests causing the deposit of radio-active fall-out in Australian territory, two further series of atmospheric tests, in the months of July and August 1973 and June to September 1974, had been carried out at the Centre d'expérimentations du Pacifique. The letters also stated that fall-out had been recorded on Australian territory which, according to the Australian Government, was clearly attributable to these tests, and that "in the opinion of the Government of Australia the conduct of the French Government constitutes a clear and deliberate breach of the Order of the Court of 22 June 1973".

20. Recently a number of authoritative statements have been made on behalf of the French Government concerning its intentions as to future nuclear testing in the South Pacific Ocean. The significance of these statements, and their effect for the purposes of the present proceedings, will be examined in detail later in the present Judgement.21. The Application founds the jurisdiction of the Court on the following basis:

> "(i) Article 17 of the General Act for the Pacific Settlement of International Disputes, 1928, read together with Article 36(1) and 37 of the Statute of the Court. Australia and the French Republic both acceded to the General Act on 21 May 1931.....
>
> (ii) Alternatively, Article 36 (2) of the Statute of the Court, Australia and the French Republic have both made declarations thereunder."

22. The scope for the present phase of the proceedings was defined by the Court's Order of 22 June 1973, by which the Parties were called upon to argue, in the first instance, questions of the jurisdiction of the Court and the admissibility of the Application. For this reason, as already indicated, not only the Parties but also the Court itself must refrain from entering into the merits of the claim. However, while examining these questions of a preliminary character, the Court is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters.

23. In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" (Northern Cameroons, Judgement, I.C.J. Reports 1963, at p.29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

24. With these considerations in mind, the Court has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings. It will therefore be necessary to make a detailed analysis of the claim submitted to the Court by the Application of Australia. The present phase of the proceedings having been devoted solely to preliminary questions, the Applicant has not had the opportunity of fully expounding its contentions on the merits. However the Application, which is required by Article 40 of the Statute of the Court to indicate "the subject of the dispute", must be the point

of reference for the consideration by the Court of the nature and existence of the dispute brought before it.

25. The Court would recall that the submission made in the Application (paragraph 11 above) is that the Court should adjudge and declare that "the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law" - the Application having specified in what respect further tests were alleged to be in violation of international law - and should order "that the French Republic shall not carry out any further such tests".

26. The diplomatic correspondence of recent years between Australia and France reveals Australia's preoccupation with French nuclear atmospheric tests in the South Pacific region, and indicates that its objective has been to bring about their termination. Thus in a Note dated 3 January 1973 the Australian Government made it clear that it was inviting the French Government "to refrain from any further atmospheric nuclear tests in the Pacific area and formally to assure the Australian Government that no more such tests will be held in the Pacific area". In the Application, the Government of Australia observed in connection with this Note (and the French reply of 7 February 1973) that:

> "It is at these Notes, of 3 January and 7 February 1973, that the Court is respectfully invited to look most closely; for it is in them that the shape and dimensions of the dispute which now so sadly divides the parties appear so clearly. The Government of Australia claimed that the continuance of testing by France is illegal and called for the cessation of tests. The Government of France asserted the legality of its conduct and gave no indication that the tests would stop". (Para.15 of the Application.)

That this was the object of the claim also clearly emerges from the request for the indication of interim measures of protection, submitted to the Court by the Applicant on 9 May 1973, in which it was observed:

> "As is stated in the Application, Australia has sought to obtain from the French Republic a permanent undertaking to refrain from further atmospheric nuclear tests in the Pacific. However, the French Republic has expressly refused to give any such undertaking. It was made clear in a statement in the French Parliament on 2 May 1973 by the French Secretary of State for the Armies that the French Government, regardless of the protests made by Australia and other countries, does not envisage any cancellation or modification of the programme of nuclear testing as originally planned." (Para.69.)

27. Further light is thrown on the nature of the Australian claim by the reaction of Australia, through its Attorney-General, to statements, referred to in paragraph 20 above, made on behalf of France and relating to nuclear tests in the South Pacific Ocean: In the course of the oral proceedings, the Attorney-General of Australia outlined the history of the dispute subsequent to the Order of 22 June 1973, and included in this review mention of a communiqué issued by the Office of the President of the French Republic on 8 June 1974. The Attorney-General's comments on this document indicated that it merited analysis as possible evidence of a certain development in the controversy between the Parties, though at the same time he made it clear that this development was not, in his Government's view, of such a nature as to resolve the dispute to its satisfaction. More particularly he reminded the Court that "Australia has consistently stated that it would welcome a French statement to the effect that no further atmospheric nuclear tests would be conducted ... but no such assurance was given". The Attorney-General continued, with reference to the communiqué of 8 June:

> "The concern of the Australian Government is to exclude completely atmospheric testing. It has repeatedly sought assurances that atmospheric tests will end. It has not received those assurances. The recent French Presidential statement cannot be read as a firm, explicit and binding undertaking to refrain from further atmospheric tests. It follows that the Government of France is still reserving to itself the right to carry out atmospheric nuclear tests." (Hearing of 4 July 1974.)

It is clear from these statements that if the French Government had given what could have been construed by Australia as "a firm, explicit and binding undertaking to refrain from further atmospheric tests", the applicant Government would have regarded its objective as having been achieved.

28. Subsequently, on 26 September 1974, the Attorney-General of Australia, replying to a question put in the Australian Senate with regard to reports that France had announced that it had finished atmospheric nuclear testing, said:

> "From the reports I have received it appears that what the French Foreign Minister actually said was 'We have now reached a stage in our nuclear technology that makes it possible for us to continue our program by underground testing, and we have taken steps to do so as early as next year' ... this statement falls far short of a commitment or undertaking that there will be no more atmospheric tests conducted by the French Government at its Pacific Tests Centre .... There is a basis distinction between an assertion that steps are being taken to continue the testing program by underground testing as early as next year and an assurance that no further atmospheric tests will take place. It seems that the Government of France, while apparently taking a step in the right direction, is still reserving to itself the right to carry out atmospheric nuclear tests. In legal terms, Australia has nothing from the French Government which protects it against

> any further atmospheric tests should the French Government subsequently decide to hold them."

Without commenting for the moment on the Attorney-General's interpretation of the French statements brought to his notice, the Court would observe that the Australian Government contemplated the possibility of "an assurance that no further atmospheric tests will take place" being sufficient to protect Australia.

29. In the light of these statements, it is essential to consider whether the Government of Australia requests a judgement by the Court which would only state the legal relationship between the Applicant and the Respondent with regard to the matters in issue, or a judgement of a type which in terms requires one or both of the Parties to take, or refrain from taking, some action. Thus it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions. It is true that, when the claim is not properly formulated because the submissions of the parties are inadequate, the Court has no power to "substitute itself from them and formulate new submissions simply on the basis of arguments and facts advanced." *(P.C.I.J., Series A, No.7*, p.35), but that is not the case here, nor is it a case of the reformulation of submissions by the Court. The Court has on the other hand repeatedly exercised the power to exclude, when necessary, certain contentions or arguments which were advanced by a party as part of the submissions, but which were regarded by the Court, not as indications of what the party was asking the Court to decide, but as reasons advanced why the Court should decide in the sense contended for by that party. Thus in the Fisheries case, the Court said of nine of the thirteen points in the Applicant's submissions: "These are elements which might furnish reasons in support of the Judgement, but cannot constitute the decision."

> "The Submissions reproduced above and presented by the United Kingdom Government consist of three paragraphs, the last two being reasons underlying the first, which must be regarded as the final Submission of that Government. The Submissions of the French Government consist of ten paragraphs, the first nine being reasons leading up to the last, which must be regarded as the final Submission of that Government." (*I.C.J. Reports 1953*, p.52; see also *Nottebohm, Second Phase, Judgement, I.C.J. Reports 1955*, p.16.)

30. In the circumstances of the present case, although the Applicant has in its Application used the traditional formula of asking the Court "to adjudge and declare" (a formula similar to those used in the cases quoted in the previous paragraph), the Court must ascertain the true object and purpose of the claim and in doing so it cannot confine itself to the ordinary meaning of the words used; it must take into account the Application as a whole, the arguments of the Applicant before the Court, the diplomatic exchanges brought to the Court's attention, and public statements made on behalf of the applicant Government. If these clearly circumscribe the object of the claim, the interpretation of the submissions must necessarily be affected. In the present case, it is evident that the fons et origo of the case was the atmospheric nuclear tests conducted by France in the South Pacific region, and that the original ultimate objective of the Applicant was and has remained to obtain a termination of those tests; thus its claim cannot be regarded as being a claim for a declaratory judgement. While the judgement of the Court which Australia seeks to obtain would in its view have been based on a finding by the Court in questions of law, such findings would be only a means to an end, and not an end in itself. The Court is of course aware of the role of declaratory judgements, but the present case is not one in which such a judgement is requested.

31. In view of the object of the Applicant's claim, namely to prevent further tests, the Court has to take account of any developments, since the filing of the Application, bearing upon the conduct of the Respondent. Moreover, as already mentioned, the Applicant itself impliedly recognized the possible relevance of events subsequent to the Application, by drawing the Court's attention to the communiqué of 8 June 1974, and making observations thereon. In these circumstances the Court is bound to take note of further developments, both prior to and subsequent to the close of the oral proceedings. In view of the non-appearance of the Respondent, it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts.

32. At the hearing of 4 July 1974, in the course of a review of developments in relation to the proceedings since counsel for Australia had previously addressed the Court in May 1973, the Attorney-General of Australia made the following statement:

> "You will recall that Australia has consistently stated it would welcome a French statement to the effect that no further atmospheric nuclear tests would be conducted. Indeed as the Court will remember such an assurance was sought of the French Government by the Australian Government by note dated 3 January 1973, but no such assurance was given.

I should remind the Court that in paragraph 427 of its Memorial the Australian Government made a statement, then completely accurate, to the effect that the French Government had given no indication of any intention of departing from the programme of testing planned for 1974 and 1975. That statement will need now to be read in light of the matters to which I now turn and which deal with the official communications by the French Government of its present plans."

He devoted considerable attention to a communiqué dated 8 June 1974 from the Office of the President of the French Republic, and submitted to the Court the Australian Government's interpretation of that document. Since that time, certain French authorities have made a number of consistent public statements concerning future tests, which provide material facilitating the Court's task of assessing the Applicant's interpretation of the earlier documents, and which indeed require to be examined in order to discern whether they embody any modification of intention as to France's future conduct. It is true that these statements have not been made before the Court, but they are in the public domain, and are known to the Australian Government, and one of them was commented on by the Attorney-General in the Australian Senate on 26 September 1974. It will clearly be necessary to consider all these statements, both that drawn to the Court's attention in July 1974 and those subsequently made.

33. It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings. Such a course however would have been fully justified only if the matter dealt with in those statements had been completely new, had not been raised during the proceedings, or was unknown to the Parties. This is manifestly not the case. The essential material which the Court must examine was introduced into the proceedings by the Applicant itself, by no means incidentally, during the course of the hearings, when it drew the Court's attention to a statement by the French authorities made prior to that date, submitted the documents containing it and presented an interpretation of its character, touching particularly upon the question whether it contained a firm assurance. Thus both the statement and the Australian interpretation of it are before the Court pursuant to action by the Applicant. Moreover, the Applicant subsequently publicly expressed its comments (see paragraph 28 above) on statements made by the French authorities since the closure of the oral proceedings. The Court is therefore in possession not only of the statements made by French authorities concerning the cessation of atmospheric nuclear testing, but also of the views of the Applicant on them. Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim audi alteram partem, it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings, and which merely supplement and reinforce matters already discussed in the course of the proceedings, statements with which the Applicant must be familiar. Thus the Applicant, having commented on the statements of the French authorities, both that made prior to the oral proceedings and those made subsequently, could reasonably expect that the Court would deal with the matter and come to its own conclusion on the meaning and effect of those statements. The Court, having taken note of the Applicant's comments, and feeling no obligation to consult the Parties on the basis for its decision finds that the reopening of the oral proceedings would serve no useful purpose.

34. It will be convenient to take the statements referred to above in chronological order. The first statement is contained in the communiqué issued by the Office of the President of the French Republic on 8 June 1974, shortly before the commencement of the 1974 series of French nuclear tests:

> The Decree reintroducing security measures in the South Pacific nuclear test zone has been published in the Official Journal of 8 June 1974.
>
> The Office of the President of the Republic takes this opportunity of stating that in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed."

A copy of the communiqué was transmitted with a Note dated 11 June 1974 from the French Embassy in Canberra to the Australian Department of Foreign Affairs, and as already mentioned, the text of the communiqué was brought to the attention of the Court in the course of the oral proceedings.

35. In addition to this, the Court cannot fail to take note of a reference to a document made by counsel at a public hearing in the proceedings, parallel to this case, instituted by New Zealand against France on 9 May 1973. At the hearing of 10 July 1974 in that case, the Attorney-General of New Zealand, after referring to the communiqué of 8 June 1974, mentioned above, stated that on 10 June 1974 the French Embassy in Wellington sent a Note to the New Zealand Ministry of Foreign Affairs, containing a passage which the Attorney General read out, and which, in the translation used by New Zealand, runs as follows:

> "France, at the point which has been reached in the execution of its programme of defence by nuclear means, will be in a position to move to the stage of underground tests, as soon as the last series planned for this summer is completed.
>
> Thus the atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type."

36. The Court will also have to consider the relevant statements made by the French authorities subsequently to the oral proceedings: on 25 July 1974 by the President of the Republic; on 16 August 1974 by the Minister of Defence; on 25 September 1974 by the Minister for Foreign Affairs in the United Nations General Assembly; and on 11 October 1974 by the Minister of Defence.

37. The next statement to be considered, therefore, will be that made on 25 July at a press conference given by the President of the Republic, when he said:

> ".... on this question of nuclear tests, you know that the Prime Minister had publicly expressed himself in the National Assembly in his speech introducing the Government's programme. He had indicated that French nuclear testing would continue. I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect..."

38. On 16 August 1974, in the course of an interview on French television, the Minister of Defence said that the French Government had done its best to ensure that the 1974 nuclear tests would be the last atmospheric tests.

39. On 25 September 1974, the French Minister for Foreign Affairs, addressing the United Nations General Assembly, said:

> "We have now reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing, and we have taken steps to do so as early as next year."

40. On 11 October 1974, the Minister of Defence held a press conference during which he stated twice, in almost identical terms, that there would not be any atmospheric tests in 1975 and that France was ready to proceed to underground tests. When the comment was made that he had not added "in the normal course of events", he agreed that he had not. This latter point is relevant in view of the passage from the Note of 10 June 1974 from the French Embassy in Wellington to the Ministry of Foreign Affairs of New Zealand, quoted in paragraph 35 above, to the effect that the atmospheric tests contemplated "will, in the normal course of events, be the last of this type". The Minister also mentioned that, whether or not other governments had been officially advised of the decision, they could become aware of it through the press and by reading the communiqués issued by the Office of the President of the Republic.

41. In view of the foregoing, the Court finds that France made public its intention to cease the conduct of atmospheric nuclear tests following the conclusion of the 1974 series of tests. The Court must in particular take into consideration the President's statement of 25 July 1974 (paragraph 37 above) followed by the Defence Minister's statement on 11 October 1974 (paragraph 40). These reveal that the official statements made on behalf of France concerning future nuclear testing are not subject to whatever proviso, if any, was implied by the expression "in the normal course of events [normalement]".

42. Before considering whether the declarations made by the French authorities meet the object of the claim by the Applicant that no further atmospheric nuclear tests should be carried out in the South Pacific, it is first necessary to determine the status and scope on the international plane of these declarations.

43. It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

44. Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound — the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.

45. With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive. As the Court said in its Judgement on the preliminary objections in the case concerning the *Temple of Preah Vihear*:

> "Where ... as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it." (I.C.J. Reports 1961, p.31.)

The Court further stated in the same case:"... the sole relevant question is whether the language employed in any given declaration does reveal a clear intention ...." (ibid., p.32).

46. One of the basic principles governing the creation and performance of legal obligations, whatever their

source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

47. Having examined the legal principles involved, the Court will now turn to the particular statements made by the French Government. The Government of Australia has made known to the Court at the oral proceedings its own interpretation of the first such statement (paragraph 27 above). As to subsequent statements, reference may be made to what was said in the Australian Senate by the Attorney-General on 26 September 1974 (paragraph 28 above). In reply to a question concerning reports that France had announced that it had finished atmospheric nuclear testing, he said that the statement of the French Foreign Minister on 25 September (paragraph 39 above) "falls far short of an undertaking that there will be no more atmospheric tests conducted by the French Government at its Pacific Tests Centre" and that France was "still reserving to itself the right to carry out atmospheric nuclear tests" so that "In legal terms, Australia has nothing from the French Government which protects it against any further atmospheric tests".

48. It will be observed that Australia has recognized the possibility of the dispute being resolved by a unilateral declaration, of the kind specified above, on the part of France, and its conclusion that in fact no "commitment" or "firm, explicit and binding undertaking" had been given is based on the view that the assurance is not absolute in its terms, that there is a "distinction between an assertion that tests will go underground and an assurance that no further atmospheric tests will take place", that "the possibility of further atmospheric testing taking place after the commencement of underground tests cannot be excluded" and that thus "the Government of France is still reserving to itself the right to carry out atmospheric nuclear tests". The Court must however form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation, and cannot in this respect be bound by the view expressed by another State which is in no way a party to the text.

49. Of the statements by the French Government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State. His statements, and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute a whole. Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.

50. The unilateral statements of the French authorities were made outside the Court, publicly and erga omnes, even though the first of them was communicated to the Government of Australia. As was observed above, to have legal effect, there was no need for these statements to be addressed to a particular State, nor was acceptance by any other State required. The general nature and characteristics of these statements are decisive for the evaluation of the legal implications, and it is to the interpretation of the statements that the Court must now proceed. The Court is entitled to presume, at the outset, that these statements were not made in vacuo, but in relation to the tests which constitute the very object of the present proceedings, although France has not appeared in the case.

51. In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect. The Court considers that the President of the Republic, in deciding upon the effective cessation of atmospheric tests, gave an undertaking to the international community to which his words were addressed. It is true that the French Government has consistently maintained, for example in a Note dated 7 February 1973 from the French Ambassador in Canberra to the Prime Minister and Minister for Foreign Affairs of Australia, that it "has the conviction that its nuclear experiments have not violated any rule of international law", nor did France recognize that it was bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements examined above. The Court finds that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration. The Court finds further that the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which

they have been publicly expressed.

52. Thus the Court faces a situation in which the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific.

53. The Court finds that no question of damages arises in the present case, since no such claim has been raised by the Applicant either prior to or during the proceedings, and the original and ultimate objective of Applicant has been to seek protection "against any further atmospheric test" (see paragraph 28 above).

54. It would of course have been open to Australia, if it had considered that the case had in effect been concluded, to discontinue the proceedings in accordance with the Rules of Court. If it has not done so, this does not prevent the Court from making its own independent finding on the subject. It is true that "the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement" (*Factory at Chorzow (Merits), P.C.I.J., Series A,* No.17, p.51). However, in the present case, that is not the situation before the Court. The Applicant has clearly indicated what would satisfy its claim, and the Respondent has independently taken action; the question for the Court is thus one of interpretation of the conduct of each of the Parties. The conclusion at which the Court has arrived as a result of such interpretation does not mean that it is itself effecting a compromise of the claim; the Court is merely ascertaining the object of the claim and the effect of the Respondent's action, and this is it is obliged to do. Any suggestion that the dispute would not be capable of being terminated by statements made on behalf of France would run counter to the unequivocally expressed views of the Applicant both before the Court and elsewhere.

55. The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since "whether there exists an international dispute is a matter for objective determination" by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950,* p.74). The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the object of the claim has been achieved by other means. If the declarations of France concerning the effective cessation of the nuclear tests have the significance described by the Court, that is to say if they have caused the dispute to disappear, all the necessary consequences must be drawn from this finding.

56. It may be argued that although France may have undertaken such an obligation, by a unilateral declaration, not to carry out atmospheric nuclear tests in the South Pacific Ocean, a judgement of the Court on this subject might still be of value because, if the judgement upheld the applicant's contentions, it would reinforce the position of the Applicant by affirming the obligation of the Respondent. However, the Court having found that the Respondent has assumed an obligation as to conduct, concerning the effective cessation of nuclear tests, no further judicial action is required. The Applicant has repeatedly sought from the Respondent an assurance that the tests would cease, and the Respondent has, on its own initiative, made a series of statements to the effect that they will cease. Thus the Court concludes that, the dispute having disappeared, the claim advanced by Australia no longer has any object. It follows that any further finding would have no raison d'être.

57. This is not to say that the Court may select from the cases submitted to it those it feels suitable for judgement while refusing to give judgement in others. Article 38 of the Court's Statute provides that its function is "to decide in accordance with international law such disputes as are submitted to it"; but not only Article 38 itself but other provisions of the Statute and Rules also make it clear that the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties. In refraining from further action in this case the Court is therefore merely acting in accordance with the proper interpretation of its judicial function.58. The Court has in the past indicated considerations which would lead it to decline to give judgement. The present case is one in which "circumstances that have .... arisen render any adjudication devoid of purpose." (Northern Cameroons, Judgement, I.C.J. Reports 1963, p.38). The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.

59. Thus the Court finds that no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues in abstracto, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgement.

60. Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the

basis of this Judgement were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot by itself constitute an obstacle to the presentation of such a request.

61. In its above-mentioned Order of 22 June 1973, the Court stated that the provisional measures therein set out were indicated "pending its final decision in the proceedings instituted on 9 May 1973 by Australia against France". It follows that such Order ceases to be operative upon the delivery of the present Judgement, and that the provisional measures lapse at the same time.

62. For these reasons,

THE COURT,

by nine votes to six,

finds that the claim of Australia no longer has any object and that the Court is therefore not called upon to give a decision thereon.

Done in English and in French, the English text being authoritative, at the Peace Place, The Hague, this twentieth day of December, one thousand nine hundred and seventy-four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Australia and the Government of the French Republic, respectively.

(Signed) Manfred LACHS,

President.

(Signed) S. AQUARONE,

Registrar.

President LACHS makes the following declaration:

Good administration of justice and respect for the Court require that the outcome of its deliberations be kept in strict secrecy and nothing of its decision be published until it is officially rendered. It was therefore regrettable that in the present case, prior to the public reading of the Court's Order of 22 June 1973, a statement was made and press reports appeared which exceeded what is legally admissible in relation to a case sub judice.

The Court was seriously concerned with the matter and an enquiry was ordered in the course of which all possible avenues accessible to the Court were explored.

The Court concluded, by a resolution of 21 March 1974, that its investigations had not enabled it to identify any specific source of the statements and reports published.

I remain satisfied that the Court had done everything possible in this respect and that it dealt with the matter with all the seriousness for which it called.

Judges BENGZON, ONYEAMA, DILLARD, JIMENEZ DE ARECHAGA and Sir Humphrey WALDOCK make the following joint declaration:

Certain criticisms have been made of the Court's handling of the matter to which the President alludes in the preceding declaration. We wish by our declaration to make it clear that we do not consider those criticisms to be in any way justified.

The Court undertook a lengthy examination of the matter by the several means at its disposal: through its services, by convoking the Agent for Australia and having him questioned, and by its own investigations and enquiries. Any suggestion that the Court failed to treat the matter with all the seriousness and care which it required is, in our opinion, without foundation. The seriousness with which the Court regarded the matter is indeed reflected and emphasized in the communiqués which it issued, first on 8 August 1973 and subsequently on 26 March 1974.

The examination of the matter carried out by the Court did not enable it to identify any specific source of the information on which were based the statements and press reports to which the President has referred. When the Court, by eleven votes to three, decided to conclude its examination it did so for the solid reason that to pursue its investigations and inquiries would in its view, be very unlikely to produce further useful information.

Judges FORSTER, GROS, PETREN and IGNACIO-PINTO append separate opinions to the Judgement of the Court.

Judges ONYEAMA, DILLARD, JIMENEZ DE ARECHAGA and Sir Humphrey WALDOCK append a joint dissenting opinion, and Judge DE CASTRO and Judge ad hoc Sir Garfield BARWICK append dissenting opinions to the Judgement of the Court.

(Initialled) M.L

(Initialled) S.A.

SEPARATE OPINION OF JUDGE FORSTER

[Translation]

I voted in favour of the Judgement of 20 December 1974 whereby the International Court of Justice has brought to an end the proceedings instituted against France by Australia on account of the French nuclear tests carried out at Mururoa, a French possession in the Pacific.

The Court finds in this Judgement that the Australian claim "no longer has any object and that" it "is therefore not called upon to give a decision thereon".

Thus end the proceedings.

I wish, however, to make the following clear:

That the Australian claim was without object was apparent to me from the very first, and not merely subsequent to the recent French statements: in my view it lacked object ab initio, and radically.

The recent French statements adduced in the reasoning of the Judgement do not more than supplement (to useful purpose, I admit) what I conceived to be the legal arguments for removal of the case from the Court's list. But there would be no point in rehearsing these arguments now that the proceedings are over.

I wish, finally, to state in terms that I personally have noted nothing in the French statements which could be interpreted as an admission of any breach of positive international law; neither have I observed in them anything whatever bearing any resemblance to a concession wrested from France by means of the judicial proceedings and implying the least abandonment of that absolute sovereignty which France, like any other State, possesses in the domain of its national defence.

As for the transition from atmospheric to underground tests, I see it simply as a technical step forward which was due to occur; that, and no more.

(Signed) I. FORSTER.

SEPARATE OPINION OF JUDGE GROS

[Translation]

Although my opinion on this case is not based on the Court's reasoning as set out in the grounds of the Judgement, I voted in favour of the operative clause because the Judgement puts an end to the action commenced by the Applicant, and this coincides with the views of those who took the view, as long ago as the first phase of the Court's study of the case in June 1973, that there was no legal dispute. By finding that, today at least, the case between the two States no longer has any object, the Court puts an end to it by other means.

The Court has taken as legal basis of its Judgement the need to settle this question of the existence of the object of the dispute as absolutely preliminary, even in relation to questions concerning its jurisdiction and other questions relating to admissibility. The Judgement only deals with the disappearance of the object of the claim, and no decision has been taken on the questions concerning the Court's lack of jurisdiction or the inadmissibility of the claim; it is thus inappropriate to deal with these questions. But there remains the problem of the non-existence, from the outset of the case submitted to the Court, of any justiciable dispute, and on this point I find it necessary to make some observations.

1. In order to ascertain whether the proceedings were without foundation at the outset, the Application instituting proceedings, dated 9 May 1973, which defines the object of the claim, must clearly be taken as point of departure. The Applicant asked the Court to "order that the French Republic shall not carry out any further such tests" [sc., atmospheric tests of nuclear weapons in the South Pacific]. This request is based on 22 lines of legal argument which makes up for its brevity by observing finally that, for these reasons "or for any other reason that the Court deems to be relevant, the carrying out of further .... tests is not consistent with applicable rules of international law". I have had occasion in another case to recall that submissions, in the strict sense, have frequently been confused with reasons in support, a practice which has been criticized by Judge Basdevant (I.C.J. Reports 1974, pp.137 ff.); such confusion still occurs however, and is particularly apparent in this case. In order to have these nuclear tests prohibited for the future, the Applicant had to base its contention, however elliptically, on rules of law which were opposable to the Respondent, rules which in its Application it left to the Court to discover and select. But it is not apparent how it is possible to find in these few lines which precede the formulation of the claim, and which are both formally and logically distinct from it, a request for a declaratory judgement by the Court as to the unlawfulness of the tests. The question raised is that of prohibition of French tests in the South Pacific region inasmuch as all nuclear tests, wherever and by whoever conducted, are according to the Applicant, unlawful. Legal grounds, i.e., the unlawfulness of the tests, therefore had to be shown in order to achieve the object of the claim, namely a judicial prohibition. The submission, in the strict sense, was the prayer for prohibition, and the unlawfulness was the

reasoning justifying it.

2. The rule is that the Court is seised of the precise object of the claim in the way in which this has been formulated. The present case consisted in a claim for prohibition of atmospheric tests on the ground that they were unlawful. This is a procedure for establishing legality *(contentieux de légalité)*, not a procedure for establishing responsibility (*contentieux de responsabilité*), with which the Application does not concern itself. In order to succeed the Applicant had to show that its claim for prohibition of French atmospheric tests was based on conduct by the French Government which was contrary to rules of international law which were opposable to that Government.

But it is not sufficient to put a question to the Court, even one which as presented is apparently a legal question, for there to be, objectively, a dispute. The situation is well described by the words of Judge Morelli: "The mere assertion of the existence of a dispute by one of the parties does not prove that such a dispute really exists" (I.C.J. Reports 1962, p.565; see also pp.564 and 566-568), and even at the time of the Order of 22 June 1973 I had raised this question, when I referred to "an unreal dispute" (I.C.J. Reports 1973, p.118) and "a dispute which [a State] alleges not to exist" (ibid., p.120). I then emphasized the preliminary nature, particularly in a case of failure to appear, of examination of the question of the real existence of the dispute before a case can be dealt with by the Court in the regular exercise of its judicial function. By deciding to effect such preliminary examination, after many delays, and without any reference to the voluntary absence of one of the Parties, the Court is endorsing the principle that examination of the question of the reality of the dispute is necessarily a matter which takes priority. This point is thus settled. There was nothing in the Court's procedure to prevent examination in June 1973 of the question whether the dispute described to the Court by the Applicant was, and had been from the outset, lacking in any real existence.

3. When several reasons are invoked before the Court in support of the contention that a case may not be judged on the merits — whether these reasons concern lack of jurisdiction or inadmissibility — the Court has always taken the greatest possible care not to commit itself either to any sort of classification of these various grounds, any of which may lead to dismissal of the claim, or to any sort of ranking of them in order. In the *Northern Cameroons* case, the Court refused to establish any system for these problems, or to define admissibility and interest, while analyzing in detail the facts of the case which enabled it to arrive at its decision *(cf. I.C.J. Reports 1963*, p.28);

> "The arguments of the Parties have at times been at cross-purposes because of the absence of a common meaning ascribed to such terms as "interest" and "admissibility". The Court recognizes that these words in differing contexts may have varying computations but it does not find it necessary in the present case to explore the meaning of these terms. For the purposes of the present case, a factual analysis undertaken in the light of certain guiding principles may suffice to conduce to the resolution of the issues to which the Court directs its attention."

And further on, at page 30: "... it is always a matter for the determination of the Court whether its judicial functions are involved."

Thus the principle which the Court applies is a commonsense one: if a finding is sufficient in itself to settle the question of the Court's competence, in the widest sense of the word, that is to say to lead to the conclusion that it is impossible to give judgement in a case, there is no need to proceed to examine other grounds. For there to be any proceedings on the merits, the litigation must have an object capable of being the subject of a judgement consistently with the role attributed to the Court by its Statute; in the present case, where numerous objections as to lack of jurisdiction and inadmissibility were raised, the question of the absence of any object of the proceedings was that which had to be settled first for this very reason, namely that if it were held to be well founded, the case would disappear without further discussion. The concept of a merits phase has no meaning in an unreal case, any more than has the concept of a jurisdiction/admissibility phase, still less that of an interim measures phase, on the fallacious pretext that such measures in no way prejudge the final decision (on this point, see dissenting opinion appended to the Order of 22 June 1973, p.123). In a case in which everything depends on recognizing that an Application is unfounded and has no raison d'être, and that there was no legal dispute of which the Court could be seised, a marked taste for formalism is required to rely on the inviolability of the usual categories of phases. To do so would be to erect the succession of phases in examination of cases by the Court into a sort of ritual, totally unjustified in the general conception of international law, which is not formalistic. These are procedural practices of the Court, which organizes its procedure according to the requirements of the interests of justice. Article 48 of the Statute, by entrusting the "conduct of the case" to the Court, did not impose any limitation on the exercise of this right by subjecting it to formalistic rules, and the institution of phases does not necessarily require successive stages in the examination of every case, either for the parties or for the Court.

4. To wait several years — more than a year and a half has already elapsed — in order to reach the unhurried conclusion that a Tribunal is competent merely because the two States are formally bound by a jurisdictional clause, without examining the scope of that clause, then to join the questions of admissibility to the merits and

subsequently to arrive (perhaps) at the conclusion on the merits that there were no merits, would not be a good way of administering justice.

The observation that, on this view of the matter, a State which declined to appear would more rapidly be rid of proceedings than a State which replied by raising preliminary objections, is irrelevant; apart from the problem of non-appearance (on this point cf. paras. 23 to 29 below), when the hypothesis arises that the case is an unreal one, with the possible implication that there was a misuse of the right of seizing the Court, there is no obvious reason why a decision should be delayed unless from force of habit or routine.

In the Judgement of 21 December 1962 in the South West Africa cases, (I.C.J. Reports 1962, p.328), the Court, before examining the preliminary objections to jurisdiction and admissibility raised by the Respondent, itself raised proprio motu the problem of the existence of a genuine dispute between the Applicants and the Respondent (see also the opinion of Judge Morelli on this point, I.C.J. Reports 1962, pp.564-568).

5. The facts of the case leave no room for doubt, in my opinion, that there was no dispute even at the time of the filing of the Application.

In the series of diplomatic Notes addressed to the French Government by the Australian Government between 1963 and the end of 1972 (Application, pp.34-48), at no time was the argument of the unlawfulness of the French tests advanced to justify a claim for cessation of such tests, based on rules of international law opposable to the French Government. The form of protests used expresses "regrets" that the French Government should carry out such tests, and mention is made of the "deep concern" aroused among the peoples of the area (Application, pp.42, 44 and 46). So little was it thought on the Australian side that there was a rule which could be invoked against France's tests that it is said that the Government of Australia would like "to see universally applied and accepted" the 1963 test ban treaty (Note of 2 April 1970, Application, p.44; in the same terms exactly, Note of 20 April 1971, Application, p.46 and Note of 29 March 1972, Application, p.48). There is no question of unlawfulness, nor of injury caused by the tests and international responsibility, but merely of opposition in principle to all nuclear tests by all States, with complete consistency up to the Note of 3 January 1973, in which for the first time the Australian Government invites the French Government "to refrain from any further .... tests", which it regards as unlawful (Application, Ann.9, p.51); this, then, was the Note which, by a complete change of attitude, paved the way to the lawsuit.

The reason for the change was given by the Australian Government in paragraph 14 of its Application:

> "In its Note [of 3 January 1973], the Australian Government indicated explicitly that in its view the French tests were unlawful and unless the French Government could give full assurances that no further tests would be carried out, the only course open to the Australian Government would be the pursuit of appropriate international legal remedies. In thus expressing more forcefully the point of view previously expounded on behalf of Australia, the Government was reflecting very directly the conviction of the Australian people who had shortly before elected a Labour Administration, pledged to a platform which contained the following statement: 'Labour opposes the development, proliferation, possession and use of nuclear, chemical and bacteriological weapons'." (Application, pp.8-10.)

In the proceeding paragraph 15 the following will also be noticed: "The Government of Australia claimed [in its Notes of 3 January and 7 February 1973] that the continuance of testing by France is illegal and called for the cessation of tests."

6. Thus the basis of the discussion is no longer the same; it is "claimed" that the tests are unlawful, and France is "invited" to stop them because the Labour Party is opposed to the development, possession and use of nuclear weapons, and the Government is bound by its electoral programme. This reason, the change of government, is totally irrelevant: a State remains bound by its conduct in international relations, whatever electoral promises may have been made. If for ten years Australian governments have treated tests in the Pacific as unwelcome but not unlawful subject to certain protests on principle and demonstrations of concern, an electoral programme is not sufficient argument to do away with this explicit appreciation of the legal aspects of the situation.

The Applicant, as it happens, perceived in advance that its change of attitude gave rise to a serious problem, and it endeavoured in the Application to cover it up by saying that it had done no more than express "more forcefully the point of view previously expounded on behalf of Australia". It can easily be shown that the previous viewpoint was totally different. Apart from the diplomatic Notes of the ten years prior to 1973, which are decisive, and which show that the Government of Australia did not invoke any legal grounds to oppose the decision of the French Government to conduct tests in the South Pacific region, it will be sufficient to recall that Australia has associated itself with various atmospheric explosions above or in the vicinity of its own territory, and that by its conduct it has expressed an unequivocal view on the lawfulness of those tests and those carried out by other States in the Pacific.

7. The first atmospheric nuclear explosion effected by the United Kingdom occurred on 3 October 1952 in the Montebello Islands, which are situated near the north-west coast of Australia. It was the Australian 'Minister

of Defence who announced that the test had been successful, and the Prime Minister of Australia described it as "one further proof or the very important fact that scientific development in the British Commonwealth is at an extremely high level" (*Keesing's Contemporary Archives*, 11-18 October 1952, p.12497). The Prime Minister of the United Kingdom sent a message of congratulation to the Prime Minister of Australia. The Navy and Air Force authorities and other Australian Government Departments were associated with the preparation and carrying out of the test: three safety-zones were forbidden for overnight and navigation on pain of imprisonment and fines.

On 15 October 1953 a further British test was carried out at Woomera in Australia, with a new forbidden zone of 80,000 square miles. The British Minister of Supply, addressing the House of Commons on 24 June 1953, announced the new series of tests, which had been prepared in collaboration with the Australian Government and with the assistance of the Australian Navy and Air Force (*Keesing's Contemporary Archives 1953*, p.13222).

Two further series of British tests took place in 1956, one in the Montebello Islands (on 16 May and 19 June), the other at Maralinga in South Australia (27 September, 4, 11 and 21 October). The acting Prime Minister of Australia, commenting on fall-out, stated that no danger to health could arise therefrom. Australian military personnel were present as observers during the second series of tests (Keesing's Contemporary Archives, 1956, p.14940). The British Government stated on 7 August 1956 that the Australian Government had given full co-operation, and that various Australian government departments had contributed valuable assistance under the co-ordinating direction of the Australian Minister for Supply. The second test of this series was observed by that Minister and members of the Australian Parliament (Keesing's Contemporary Archives, 1956, p.15248).

The British Prime Minister stated on 7 June 1956:

"Her Majesty's Governments in Australia and New Zealand have agreed to make available to the task force various forms of aid and ancillary support from Australian and New Zealand territory. We are most grateful for this." (Hansard, House of Commons, 1956, Col.1283.)

8. Active participation in repeated atmospheric tests over several years in itself constitutes admission that such tests were in accordance with the rules of international law. In order to show that the present tests are not lawful, an effort has been made to argue, first, that what is laudable on the part of some States is execrable on the part of others and, secondly, that atmospheric tests have become unlawful since the time when Australia itself was making its contribution to nuclear fall-out.

9. On 3 March 1962, after the Government of the United States had decided to carry out nuclear tests in the South Pacific, the Australian Minister for External Affairs said that:

> "... the Australian Government ... has already made clear its views that if the United States should decide it was necessary for the security of the free world to carry out nuclear tests in the atmosphere then the United States must be free to do so." (Application, Ann. p.36).

A few days after this statement, on 16 March 1962, the Australian Government gave the United States its permission to make use of Christmas Island (where more than 20 tests were carried out between 24 April and 30 June, while tests at very high altitude were carried out at Johnston Island from 9 July to 4 November 1962).

In an aide-mémoire of 9 September 1963 the Australian Government likewise stated:

> "Following the signature of the Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and Under Water, the Australian Government also recognizes that the United States must take such precautions as may be necessary to provide for the possibility that tests could be carried out in the event, either of a breach of the Treaty, or of some other States exercising their right to withdraw from the Treaty." (Ibid., p.38.)

In contrast, five years later, with solely the French and Chinese tests in mind, the Australian Government wrote:

> "On 5 April 1968, in Wellington, New Zealand, the Australia-New Zealand-United States (ANZUS) Council, included the following statement in the communiqué issued after the meeting:
>
> 'Noting the continued atmospheric testing of nuclear weapons by Communist China and France, the Ministers reaffirmed their opposition to all atmospheric testing of nuclear weapons in disregard of world opinion as expressed in the Nuclear Test Ban Treaty'." (Ibid., Ann.5, p.42.)

10. On another occasion the Australian Government had already evinced the same sense of discrimination. In 1954, in the Trusteeship Council, when certain damage caused the Marshall Islands by the nuclear tests of the administering authority was under consideration, the Australian delegate could not go along with the views of any of the delegations who objected to the tests in principle.

11. It is not unjust to conclude that, in the eyes of the Australian Government, what should be applauded in the allies who might protect it is to be frowned upon in others: Quod licet Jove non licet bovi. It is at the time when the delegate of the United States has been revealing to

the United Nations that his Government possesses the equivalent of 615,385 times the original Hiroshima bomb (First Committee, 21 October 1974) that the Australian Government seeks to require the French Government to give up the development of atomic weapons.

It remains for me briefly to show how this constant attitude of the Australian Government, from 1963 to the end of 1972, i.e. up to the change described in paragraph 5 above, forms a legal bar to the applicant's appearing before the Court to claim that, among nuclear tests certain can be selected to be declared unlawful and they alone prohibited. Indeed the Court, in June 1973, already had a choice among numerous impediments on which it might have grounded a finding that the case was without object. For simplicity's sake let us take the major reason: the principle of the equality of States.

12. The Applicant's claim to impose a certain national defence policy on another State is an intervention in that State's internal affairs in a domain where such intervention is particularly inadmissible. The United Kingdom Government stated on this point on 2 July 1973 as follows:

> "... we are not concerned ... with the question of whether France should or should not develop her nuclear power. That is a decision entirely for France ..." (Hansard, col.60).

In *The Function of Law in the International Community* (Oxford 1993, p.188) Mr. (later Sir) Hersch Lauterpacht wrote:

> "... it means stretching judicial activity to the breaking-point to entrust it with the determination of the question whether a dispute is political in the meaning that it involves the independence, or the vital interests, or the honour of the State. It is therefore doubtful whether any tribunal acting judicially can override the assertion of a State that a dispute affects its security or vital interests. As we have seen, the interests involved are of a nature so subjective as to exclude the possibility of applying an objective standard not only in regard to general arbitration treaties, but also in regard to each individual dispute."

The draft law which the French Government laid before its Parliament in 1929 to enable its accession to the General Act of Geneva of 26 September 1928 has been drawn to the Court's attention; this draft embodied a formal reservation excluding "disputes connected with claims likely to impair the organization of the national defence". On 11 July 1929 the rapporteur of the parliamentary Committee on Foreign Affairs explained that the reservation was unnecessary:

> "Moreover the very terms in which the exposé des motifs presents it show how unnecessary it is. 'In the absence of contractual provisions arising out of existing treaties or such treaties as may be concluded at the instigation of the League of Nations in the sphere of armaments limitation,' says the text: 'disputes connected with claims likely to impair the organization of the national defence.' But precisely because these provisions do not exist, how could an arbitration tribunal rule upon a conflict of this kind otherwise than by recognizing that each State is at present wholly free to organize its own national defence as it thinks fit? Is it imagined that the action of some praetorian arbitral case-law might oust or at any rate range beyond that of Geneva? That would seem to be a somewhat of chimaerical danger." (Documents parlementaires: Chambre des deputés, 1929, Ann. 1368, pp.407 f.; Ann.2031, p.1143.)

The exposé des motifs of the draft law of accession, lays strong emphasis on the indispensability of the competence of the Council of the League of Nations for the "appraisal of the political or moral factors likely to be relevant to the settlement of certain conflicts not strictly legal in character", disputes "which are potentially of such political gravity as to render recourse to the Council indispensable" (ibid., p.407). Such was the official position of the French Government upon which the rapporteur of the Foreign Affairs Committee likewise sheds light here when he stresses the combination of resort to the Council and judicial settlement (ibid., p.1142).

13. It is not unreasonable to believe that the present-day world is still persuaded of the good sense of the observations quoted in the preceding paragraph (cf. the Luxembourg arrangement of 29 January 1966, between the member States of the European Economic Community, on "very important interests"). But there is more than one negative aspect to the want of object of the Australian claim. The principle of equality before the law is constantly invoked, reaffirmed and enshrined in the most solemn texts. This principle would become meaningless if the attitude of "to each his rule" were to be tolerated in the practice of States and in courts. The proper approach to this matter has been exemplified in Sir Gerald Fitzmaurice's special report to the Institute of International Law: "The Future of Public International Law" (1973, pp.35-41).

In the present case the Applicant has endeavoured to present to the Court, as the object of a legal dispute, a request for the prohibition of acts in which the Applicant has itself engaged, or with which it has associated itself, which maintaining that such acts were not only lawful but to be encouraged for the defence of a certain category of States. However, the Applicant has overlooked part of the statement made by the Prime Minister of the United Kingdom in the House of Commons on 7 June 1956, when he expressed his thanks to Australia for its collaboration in the British tests (para.7 above). The Prime Minister also said:

> "Certainly, I do not see any reason why this country should not make experiments similar to those that have been carried out by both the United States and

> Soviet Russia. That is all that we are doing. I have said that we are prepared to work out systems of limitation. Personally, I think it desirable and I think it possible." (Hansard, col.1285.)

On 2 July 1973, the position of the British Government was thus analyzed by the Attorney-General:

> "... even if France is in breach of an international obligation, that obligation is not owed substantially to the United Kingdom as there is no substantive legal right of the United Kingdom which would seem to be infringed." (Hansard, col.99).

And that despite the geographical position in the Pacific of Pitcairn Island.

The Applicant has disqualified itself by its conduct and may not submit a claim based on a double standard of conduct and of law. What was good for Australia along with the United Kingdom and the United States cannot be unlawful for other States. The Permanent Court of International Justice applied the principle "elegance contraaria non audi endus est" in the case of *Diversion of Water from the Meuse*, Judgement, 1937, P.C.I.J., Series A/B, No.70, page 25.

14. In the arguments devised in 1973 for the purposes of the present case, it was also claimed that the difference in the Australian Government's attitude vis-à-vis the French Government was to be explained by the fact that, at the time of the explosions with which the Australian Government had associated itself and which it declared to be intrinsically worthy of approval, awareness of the danger of fall-out had not yet reached the acute stage. One has only to read the reports of the United Nations Scientific Committee on the Effects of Atomic Radiation, a committee set up by the General Assembly in 1955, to see that such was not the case. While it is true to say that more abundant and accurate information has become available over the years, the reports of this committee have constantly recalled that: "Those [tests of nuclear weapons] carried out before 1963 still represent by far the largest series of events leading to global radio-active contamination." (UNSCEAR Report 1972, Chap.1, p.3.)

As for awareness of particular risks to Australia, the National Radiation Advisory Committee was set up by the Australian Government in May 1957 for the purpose of advising on all questions concerning the effects of radiation on the Australian population. The Court has had cognizance of the reports of 1967 (two reports), 1969, 1971 and 1972; the report of March 1967 indicates that the previous report dated from 1965, and that it dealt in detail with the question of fall-out over the Australian environment and the effects upon man:

> "The Committee at that time was satisfied that the proposed French nuclear weapons tests in the South Pacific Ocean were unlikely to lead to a significant hazard to the health of the Australian population." (Report to the Prime Minister, March 1967, para.3.)

This same form of words is repeated in paragraph 11 of the March 1967 report, in reference to the first series of French tests, which took place in the period July-October 1966, and also in paragraph 11 of the report for December 1967, issued following a study of the effects of the second series of tests (June-July 1967) and taking radiation doses from both series into account. The report which the Australian NRAC addressed to the Prime Minister in March 1969 concerned the French tests of July-September 1968 and repeated in its paragraph 12 the conclusion cited above from paragraph 3 of the March 1967 report. The Committee's March 1971 report recalls in its paragraph 3 that fall-out from all the French tests, in 1966, 1967 and 1968, did not constitute a hazard to the health of the Australian population. The form of words used in paragraph 12 of that report comes to the traditional conclusions as to the tests held in 1970. The absence of risk is again recognized in the report issued by the NRAC in July 1972 (paras. 8, 9 and 11). When, however, the new administration took office in Australia, this scientific committee was dissolved. On 12 February 1973 the Prime Minister requested a report of the Australian Academy of Science, the Council of which appointed a committee to report on the biological effects of fall-out; the conclusions of this report were considered at a joint meeting with French scientists in May 1973 shortly before the filing of the Application instituting proceedings. It appears that the debate over this last-mentioned report is continuing even between Australian scientists.

15. For the similar experiments of the French Government to be the subject of a dispute with which the Court can deal, it would at all events be necessary that what used to be lawful should have become unlawful at a certain moment in the history of the development of nuclear weapons. What is needed to remove from the Applicant the disqualification arising out of its conduct is proof that this change has taken place: what Australia presented between 1963 and the end of 1972 as a conflict of interests, a clash of political views on the problems of the preparation, development, possession and utilization of atomic weapons, i.e., as a challenge to France's assertion of the right to the independent development of nuclear weapons, cannot have undergone a change of legal nature solely as a result of the alteration by a new government of the formal presentation of the contention previously advanced. It would have to be proved that between the pre-1963 and subsequent explosions the international community effected a passage from non-law to law.

16. The Court's examination of this point could have taken place as early as June 1973, because it amounts to no more than the preliminary investigation of problems entirely separate from the merits, whatever views one

may hold on the sacrosanctity of the distinction between the different phases of the same proceedings (cf. para.3 above). The point is that if the Treaty of 5 August 1963 Banning Nuclear Tests in the Atmosphere, in Outer Space and Under Water is not opposable to France, there is no dispute which Australia can submit to the Court, and dismissal would not require any consideration of the contents of the Treaty.

17. The multilateral form given to the Treaty of 5 August 1963 is of course only one of several elements where the legal analysis of the extent of its opposability to States not parties to it is concerned. One need only say that the preparation and drafting of the text, the unequal régime as between the parties for the ratification of amendments and the regime of supervision have enabled the Treaty to be classified as constructively as bi-polar statute, accepted by a large number of States but not binding on those remaining outside the Treaty. There is in fact no necessity to linger on the subject in view of the subsequent conduct of the States assuming the principal responsibility for the Treaty. None of the three nuclear Powers described as the "Original Parties" in Article II of the Treaty has ever informed the other nuclear Powers, not parties thereto, that this text imposed any obligation whatever upon them; on the contrary, the three Original Parties, even today, call upon the Powers not parties to accede to the Treaty. The Soviet delegate to the Disarmament Conference declared at the opening of the session on 20 February 1974 that the negotiations for the termination of nuclear tests "required the participation of all nuclear States". On 21 October 1974, in the First Committee of the General Assembly, the delegate of the United States said that one of the aims was to call for the co-operation of States which had not yet ratified the 1963 Treaty. Statements to the same effect have been made on behalf of the Government of the United Kingdom; on 2 July 1973 the Minister of State for Foreign and Commonwealth Affairs stated during a parliamentary debate:

> "As far back as 1960, however, the French and the Chinese declined to subscribe to any international agreement on testing. They are not bound, therefore, by the obligations of the test ban treaty of 1963....
>
> In 1963 Her Majesty's Government, as well as the United States Government, urged the French Government to sign the partial test ban treaty.
>
> As initiators and signatories of the treaty, we are seriously concerned at the continuation of nuclear tests in the atmosphere, and we urge that all Governments which have not yet done so should adhere to it. This view is well known to the French and Chinese Governments. It has been stated publicly by successive Governments." (Hansard, cols.58 and 59.)

18. The conduct of the Original Parties which laid down the rules of the present nuclear statute by mutual agreement shows that those nuclear States which have refused to accede to this statute cannot be considered as subjected thereto by virtue of a doctrinal construction contrary to the formally expressed intentions of the sponsors and guardians of Statute. The French Government, for its part, has always refused to recognize the existence of a rule opposable to it, as many statements made by it show.

19. The Treaty which the United States and the Union of Soviet Socialist Republics singed in Moscow on 3 July 1974, on the limitation of underground nuclear testing (United Nations, *General Assembly Official Records*, A/9698, 9 August 1974, Ann.I) contains the following preambular paragraph:

> "Recalling the determination expressed by the Parties to the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water in its preamble to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time, and to continue negotiations to this end." (Cf. the second preambular paragraph of the 1963 Treaty.)

20. To determine whether a rule of international law applicable to France did or did not exist was surely an operation on the same level as the ascertainment of the non-existence of a justiciable dispute. To find that the Treaty of 1963 cannot be relied on against France requires merely the determination of a legal fact established by the text and by the consistent conduct of the authors of the legal statute in question. Similarly, to find that no custom has come into being which is opposable to those States which steadfastly declined to accept that statute, when moreover (as we have seen in the foregoing paragraphs) the existence of such customary rule is disproved by the positions adopted subsequent to the treaty supposed to give it expression, would merely be to verify the existence of a source of obligation.

By not proceeding, as a preliminary, to verification of the existence of any source of obligation opposable to the French Government, the Court refused to render justice to a State which, from the very outset, manifested its categorical opposition to proceedings which it declared to be without object and which it requested the Court to remove from the list; an action which the Court was not to take until 20 months elapsed.

21. The character of the quarrel between the Australian Government and the French Government is that of a conflict of political interests concerning a question, nuclear tests, which is only one inseparable element in the whole range of the problems to which the existence of nuclear weapons gives rise and which at present can be approached and settled only by means of negotiations.

As the Court said in 1963, "it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved." (Northern Cameroons, I.C.J. Reports 1963, p.37).

In the absence of any rule which can be opposed to the French Government for the purpose of obtaining from the Court a declaration prohibiting the French tests and those alone, the whole case must collapse. I shall therefore say nothing as to the other grounds on which the claim can be dismissed at the outset on account of the Applicant's want of standing, such as the inadmissibility either of an actio popularis or of an action erga omnes disguised as an action against a single State. The accumulation of fall-out is a world-wide problem; it is not merely the last straw which breaks the camel's back (cf. the refusal of United States Courts to admit the proceedings brought by Professor Linus Pauhne Pauling claimed that American nuclear tests in the Pacific should stop[1]).

22. I have still certain brief observations to make as to the conduct, from the very outset, of these proceedings before the Court, in relation to certain general principles of the regular functioning of international adjudication, for the conduct of the proceedings gave rise to various problems, concerning Articles 53 and 54 of the Statute of the Court, whose existence will not be evident to the reader of the Judgement, given the adopted grounds of decision.

23. What happened, in sum, was that a misunderstanding arose when the questions of jurisdiction and admissibility were written into the Order of 22 June 1973 as the prescribed subject-matter of the phase which had been decided upon "to resolve [them] as soon as possible"; for the separate and dissenting opinions of June 1973 reveal on the one hand that, for certain Members of the Court, the problem of the existence of the object of the dispute should be settled in the new phase, whereas a majority of judges, on the other hand, had made up their minds to deal in that phase solely with the questions of the jurisdiction of the Court stricto sensu, and of the legal interest of the Applicant, and to join all other questions to the merits, including the question whether the proceedings had any object. At best, therefore, the jurisdiction/admissibility phase could only result in a decision on jurisdiction and the legal interest of the Applicant, and if that decision were positive, all the rest being joined to the merits, the real decision would have been deferred to an extremely remote phase. A settlement would therefore have been possible "sooner" if jurisdiction/admissibility and merits had not been separated. The reason for this refusal in 1973 to decide on the "preliminary" character of the question concerning the existence of a justiciable dispute is to be found in an interpretation of Article 53 consisting of the application to a default situation of Article 67 of the Rules of Court, governing preliminary objections in adversary proceedings, the analogy thus provoking a veritable breach of Article 53 of the Statute.

24. The misunderstanding on the scope of the phase decided on by the Order of 22 June 1973 was not without effect before the Court; the apparent contradiction between paragraph 23 and paragraph 35 of the Order enabled the Applicant to say to the Court, at the hearing of 6 July 1974, that the only question of admissibility was that of "legal interest", subject to any indication to the contrary from the Court. That indication was given by the President on 9 July: "The Court will of course appreciate the question of admissibility in all the aspects which it considers relevant."

This process of covert and contradictory allusions, in which the conflicts of views expressed in the opinions sometimes reappear, is not without its dangers. This is evident both as regards this Order of 22 June 1973 and as regards the attempts to make use of paragraphs 33 and 34 of the Judgement in the Barcelona Traction case without taking account of the existence of paragraphs inconsistent with these, i.e. paragraphs 89 to 91, which were in fact intended to qualify and limit the scope of the earlier pronouncement. That pronouncement was in fact not directly relevant to the subject of the judgement, and was inserted as a sort of bench-mark for subsequent use; but all bench-marks must be observed.

25. Article 53 of the Statute has had the Court's attention from the outset of the proceedings, i.e., ever since the receipt of 16 May 1973 of a letter from the French Government declaring its intention not to appear and setting forth its reasons; but, in my view, it has been wrongly applied. A further general examination of the interpretation of the rule embodied in Article 53 is required.

To speak of two parties in proceedings in which one has failed to appear, and has on every occasion re-affirmed that it will not have anything to do with the proceedings is to refuse to look facts in the face. The fact is that when voluntary absence is asserted and openly acknowledged there is no longer more than one party in the proceedings. There is no justification for the fiction that, so long as the Court has not recognized its lack of jurisdiction, a State which is absent is nevertheless a party in the proceedings. The truth of the matter is that, in a case of default, three distinct interests are affected: that of the Court, that of the applicant and that of the respondent; the system of wholly ignoring the respondent's decision not to appear and of depriving it of effect is neither just nor reasonable. In the present case, by its reasoned refusal to appear the Respondent has declared that, so far as it is concerned, there are no proceedings, and this it has repeated each time the Court has consulted it. Even if the Court refrains for a time from recording that default, the

[1] District Court for the District of Columbia, 31 July 1958, 164 Federal Supplement, p.390; Court of Appeals, 12 April 1960, 278 Federal Reporter, Second Series, pp.252-255.

fact remains that the Respondent has performed an act of default from which certain legal consequences flow. Moreover, the applicant is entitled under Article 53 to request immediately that judicial note be taken thereof and the consequences deduced. That is what the Applicant did, in the present instance, when it said in 1973 that the Court was under an obligation to apply its rules of procedure, without indicating which, and to refuse to take account of views and documents alleged by the Applicant to have been irregularly presented by the Respondent. And the Court partially accepted this point of view, in not effecting all communications to the Respondent which were possible.

The result of not taking account of the Respondent's default has been the granting of time-limits for pleadings which it was known would not be forthcoming, in order to maintain theoretical equality between the parties, whereas in fact the party which appeared was favoured. There was nothing to prevent the Court from fining a shorttime limit for the presumptive Respondent - one month for example, the theoretical possibility being left open of a statement by the State in default during that time, to the effect that it had changed its mind and requested a normal time-limit for the production of a Memorial.

26. When it came to receiving or calling in the Agent of the Applicant in the course of the proceedings in 1973, there was a veritable breach of the equality of the Parties in so far as some of these actions or approaches made by the Applicant were unknown to the presumptive Respondent. (On this point, cf. paras. 31 and 33 below.)

On this question of time-limit the Court has doubtless strayed into paths already traced, but precedents should not be confused with mandatory rules; each case has its own particular features and it is mere mechanical justice which contents itself with reproducing the decisions of previous proceedings. In the present case the Court was never, as in the Fisheries Jurisdiction cases, informed of negotiations between the Parties after the filing of the Application, and the double time-limits accorded did not even have the justification, which they might have had in the above-mentioned cases, of enabling progress to be made in such negotiations; and there was never the slightest doubt, from the outset, on the question of the existence of a genuine legal dispute.

27. It is not my impression that the authors of Article 53 of the Statute intended it to be interpreted as if it had no effect of its own. It is not its purpose to enable proceedings to be continued at leisure without regard to the positions adopted by the absent respondent; it is true that the applicant is entitled to see the proceedings continue, but not simply as it wishes, with the Court reliant on unilateral indications of fact and law; the text of Article 53 was designed to avoid such an imbalance in favour of the applicant. When the latter calls upon the Court to decide in favour of its claim, which the present Applicant did not do explicitly on the basis of Article 53 but which resulted from its observations and submissions both in June 1973, at the time of the request for interim measures of protection, and in the phase which the Judgement brings to a close today, it would be formalistic to maintain that the absence of any explicit reference to Article 53 changes the situation. It must needs be realized that the examination of fact and law provided for in Article 53 has never begun, since the Court held in 1973 that the consequences of the non-appearance could be joined to the questions of jurisdiction and admissibility, and that, in the end, the question of the effects of non-appearance will not have been dealt with. Thus this case has come and gone as if Article 53 had no individual significance.

28. If we return to the sources, we note that the rapporteur of the Advisory Committee of Jurists (PV, p.590) stated that the Committee had been guided by the examples of English and American jurisproducence in drafting what was then Article 52 of the Statute on default. Lord Phillimore, a member of the Committee, had inserted the sentence which in large measure has survived: "The Court must, before [deciding in favour of the claim], satisfy itself that the claim is supported by conclusive evidence and well founded in fact and law." The words which disappeared in the course of the consideration of the text by the Assembly of the League of Nations were regarded as unnecessary and as merely over-lapping the effect of the formula retained. The matter "as clarified in only one respect by the Court's 1922 discussion, on account of the personality of the judges who expressed their views on a draft article proposed for the Rules of Court by Judge Anzilotti.

> "If the response to an application is confined to an objection to the jurisdiction of the Court, or if the State affected fails to reply within the period fixed by the Court, the latter shall give a special decision on the question of jurisdiction before proceeding further with the case." (P.C.I.J., Series D, No.2, p.522.)

Judge Huber supported the text. Lord Finlay did not feel that the article was necessary, because,

> "... even if there was no rule on the subject, the Court would always consider the question of its jurisdiction before proceeding further with the case. It would have to be decided in each particular case whether the judgement with regard to the jurisdiction should be delivered separately or should be included in the final judgement." (ibid., p.214).

Judge Anzilotti's text was rejected by 7 votes to 5. The general impression given by the influence English jurisprudence was recognized to possess, and by the observations first of Lord Phillimore and then of Lord Finlay, is that the Court intended to apply Articles 53 in a spirit

of conscientious verification of all the points submitted by the applicant when the respondent was absent from the proceedings, and that it would have regard to the circumstances of each case. As is well known, in the British system important precautions are taken at a wholly preliminary stage of a case to make sure that the application stands upon a genuinely legal claim, and the task of ascertaining whether this is so is sometimes entrusted to judges other than those who would adjudicate (cf. Sir Gerald Fitzmaurice's opinion in the *Northern Cameroons* case (I.C.J. Reports 1963, pp.106 f.), regarding "filter" procedures whereby, as "part of the inherent powers or jurisdiction of the Court as an international tribunal", cases warranting removal can be eliminated at a preliminary stage).

Between this interpretation and that which the Court has given of Article 53 in the present case, there is all the difference that lies between a pragmatic concern to hold a genuine balance between the rights of two States and a procedural formalism that treats the absent State as if it were a party in adversary proceedings, which it is not, by definition.

29. On 22nd June 1973 before the Court's decision had been pronounced at the public sitting, a public statement which had been made by the Prime Minister of Australia on 21st June at Melbourne, and which had been widely reported by the Australian press[2], reached Europe: in it the Prime Minister stated that the Court had acceded by 8 votes to 6 to Australia's request.

30. It must first be explained that, whether by inadvertence or for some other reason, the Court was not aware of that disclosure until after its decision had been read out at the public sitting of 22 June; it can be imagined that the Court would otherwise have postponed the reading of the Order on 22 June. As the aftermath of this incident has only been dealt with in two communiqués, one issued on 8 August 1973 and the other on 26 March 1974, it would be difficult to describe it if the Court had not finally decided on 13 December 1974 that certain documents would be published in the volume of Pleadings, Oral Arguments, Documents to be devoted to this case[3]. Taking into account certain press items, and these public documents or communiqués, I find it necessary to explain why I voted on 21 March 1974 against the Court's decision, by 11 votes to 3, to close its investigations on the scope and origins of the public disclosure by the Prime Minister of Australia of the decision of 22 June 1973. The Court's vote was on a resolution reproduced in the press communiqué of 26 March 1974.

It is to be hoped that no one will dispute the view that, if the head of government of a State party to a case discloses a decision of the Court before it is made public, there has been a breach of the prescriptions of Article 54, paragraph 3, of the Statute: "The deliberations of the Court shall take place in private and remain secret." At the moment of the disclosure, on 21 June, the decision was as yet no more than a text which had been deliberated and adopted by the Court and was covered by rule of secrecy embodied in Article 54. In a letter of 27 June 1973[4], the Prime Minister of Australia referred to the explanations furnished on that same date by a letter from the Co-Agent of Australia and expressed his regret "at any embarrassment which the Court may have suffered as a result of my remarks". According to the Co-Agent, the Prime Minister's statement of 21 June had been no more than a speculative comment, inasmuch as a view had been current among Australian advisers to the effect that the decision could be in Australia's favour, but by a small majority, while press comment preceding the Prime Minister's remarks had speculated in some instances that Australia would win by a narrow margin.

31. But whatever endeavours may have been made to explain the Prime Minister's statement, whether at the time or, subsequently, by the Agent and Co-Agent of Australia on various occasions, the facts speak for themselves. The enquiry opened at the request of certain Members of the Court on the very afternoon of 22 June 1973 was closed nine months later without the Court's having given any precise indication, in its resolution of 21 March 1974, as to the conclusions that might have been reached in consequence. The only elements so far published, or communicated to the Government which was constantly regarded by the Court as the Respondent and had therefore the right to be fully informed, which was by no means the case, are: the Australian Prime Minister's let-

[2] A Melbourne newspaper printed on 22 June the following article:

"The Prime Minister: We've won N-test case. The Prime Minister (Mr. Whitlam) said last night that Australia would win its appeal to the International Court of Justice by a majority of eight votes to six. Mr. Whitlam said he had been told the Court would make a decision within 22 hours. The Prime Minister made the prediction while addressing the annual dinner of the Victorian Law Institute, He said: 'On the matter of the High Court, I am told a decision will be given in about 22 hours from now. The majority in our favour is going to be eight to six.' When asked to elaborate on his comments after the dinner, Mr. Whitlam refused to comment, and said his remarks were off the record. The dinner was attended by several hundred members of the Law Institute, including several prominent judges. While making the prediction that the Court would vote eight to six, Mr. Whitlam placed his hand over a microphone. The microphone was being monitored by an ABC reporter."

[3] Four documents are to be published in this way. Two (see para.31 below) have already been communicated to the French Government; the others are reports to the Court.

[4] Communicated to the French Government, by decision of the Court, on 29 March 1974.

ter of 27 June 1973 and the Co-Agent's letter of the same date[5]; the text of a statement made by the Attorney-General of Australia on 21-22 June 1973; the communiqué of 8 August 1973; the reply by the Prime Minister to a question put in the Australian House of Representatives on the circumstances in which he had been apprised of the details of the Court's decision (Australian Hansard, 12 September 1973); a resolution by which the Court on 24 January 1974 decided to interrogate the Agent of Australia (the minutes of these conversations were not communicated to the Respondent and will not be published); the communiqué of 26 March 1974[6].

I found it contrary to the interests of the Court, in the case of so grave an incident, one which lays its 1973 deliberation open to suspicion, to leave that suspicion intact and not to do what is necessary to remove it. I will merely observe that the crystal-gazing explanation relied on by the Prime Minister and the Agent's statements enlarging thereon, with the attribution of an oracular role to the Australian advisers, brought the Court no positive enlightenment in its enquiry and should be left to the sole responsibility of their authors.

32. Were it maintained that the head of Government did not have to justify to the Court any statement made out of Court and that anyway even if his statement was regrettable the harm was done and could not affect the case before the Court, I would find these propositions incorrect. The statement in question concerned a decision of the Court and could lead to a belief that persons privy to its deliberations had violated their obligation to keep it secret, with all the consequences that supposition would have entailed if confirmed.

33. In concluding on 21 March 1974 that it could not pursue the matter further, and in making this publicly known, the Court stigmatized the incident and indirectly signified that it could not accept the excuse that its decisions had been divined, but it recognized that, according to its own assessment, it was not possible to uncover anything further as to the origins of the disclosure.

I voted against this declaration and the closure of the enquiry because I consider that the investigation should have been pursued, that the initial results were not inconsequential and could be used as a basis for further enquiry, especially when not all the means of investigation available to the Court had been made use of (Statute, Arts.48, 49 and 50). Such was not the opinion of the Court, which decided to treat its investigations as belonging to an internal enquiry. My understanding, on the contrary, was that the incident of the disclosure was an element in the proceedings before the Court — which is why the absent Respondent was kept partly informed by the Court, in particular by a letter of 31 January 1974 — and that the Court was fully competent to resolve such an incident by judicial means, using any procedure it might decide to set up (cf. the Court's decision on "the competence required to enable [the] functions [of the United Nations] to be effectively discharged." (*I.C.J. Reports 1949*, p.179). How could one suppose a priori that pursuit of the enquiry would have been ineffectual without having attempted to organize such an enquiry? Even if circumstances suggested that refusals to explain or evasions could be expected, to note those refusals or evasions would not have been ineffectual and would have been a form of censure in itself.

34. Symptomatic of the hesitation to get to the bottom of the incident was the time taken to begin looking into the disclosure: six weeks, from 22 June to 8 August 1973, were to elapse before the issue of the mildest of communiqués, palliative in effect and not representing the unanimous views of the Court. For more than six months, all that was produced was a single paper embodying a documented analysis of the successive press disclosures on the progress of the proceedings before the Court up to the dramatic public disclosure of the result and of the Court's vote by the Prime Minister on 21 June in Melbourne[7]. This analysis of facts publicly known demonstrates how the case was accompanied by a succession of rumours whose disseminators are known but whose source remains unmasked. On 21 March 1974 the investigation was stopped, and the various paths of enquiry and deduction opened up by this analysis as also by the second report will not be pursued.

I consider that the indications and admissions that had already come to light opened the path of enquiry instead of closing it. A succession of mistakes, forgettings, tolerations, failures to react against uncalled for overtures or actions, each one of which taken in isolation could have been considered devoid of particular significance, but which assume such significance by their accumulation and impunity; unwise conversations at improper moments, of which no minutes exist; all this combines to create a sense of vagueness and embarrassment, as if a refusal to acknowledge and seek to unravel the facts could efface their reality, as if a saddened silence were the only remedy and the sole solution.

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[5] Documents communicated to the French Government with a letter of 29 March 1974.

[6] A letter of 28 February 1974 from the Agent of Australia to the Registrar is to be reproduced in the Pleadings, Oral Arguments, Documents volume; it is connected with the interrogation.

[7] This is one of the documents which the Court, on 13 December 1974, decided to publish in the Pleadings, Oral Arguments, Documents volume.

The harm was done, and has been noted (report of the Court to the United Nations 1973-1974, para.23; debate in the Sixth Committee of the General Assembly, 1 October 1974, A/C.6/SR.1466, p.6; parliamentary answers by the French Minister for Foreign Affairs on 26 January 1974, Journal Officiel No.7980, and 20 July 1974, *Journal Officiel No.11260*). Even if it is not, at the present moment, possible to discover more concerning the origin and development of the process of disclosure, as the Court has stated in its resolution of 21 March 1974, I remain convinced that a judicially conducted enquiry could have elucidated the channels followed by the multiple disclosures noted in this case, the continuity and accuracy of which suggests that the truth of the matter was not beyond the Court's reach. Such is the meaning of my refusal of the resolution of 21 March 1974 terminating an investigation which was begun with reluctance, conducted without persistence and concluded without reason.

36. Among the lessons to be learned from this case, in which a conflict of political interests has been clothed in the form of a legal dispute, I would point to one which I feel to merit special attention. Before these proceedings were instituted, the General Act, ever since 1939, had been dwelling in a kind of chiaroscuro, formally in force if one took account only of express denunciation, but somewhat dormant:

> "So far as the General Act is concerned, there prevails, if truth be told, a climate of indifference or obliviousness which casts some doubt on its continuance in force, at least where the Act of 1928 is concerned." (H. Rolin, *L'arbtrage obligatoire: une panacée illusoire, 1959, p.259.*)

After the General Act had, with great elaboration, been presented to the Court as a wide-open basis of possible jurisdiction, the behaviour of the States formally considered as parties thereto is noteworthy. The French Government was the first to denounce the General Act, on 2 January 1974, then on 6 February 1974 the Government of the United Kingdom did likewise. The Government of India, since June 1973 has informed the Court and the United Nations of its opinion as to the General Acts having lapsed (see also the new declaration by which India on 15 September 1974, accepted the jurisdiction of the Court under Article 36, paragraph 2, of the Statute). Thus we see that States with substantial experience of international adjudication and arbitration have only to note that there is some possibility of the General Acts being actually applied, instead of declarations less unreservedly accepting the jurisdiction of the Court, to announce either (in two cases) that they are officially putting an end to it or (in the other) that they consider it to have lapsed. The cause of international adjudication has not been furthered by an attempt to impose the Court's jurisdiction, apparently for a formal reason, on States in whose eyes the General Act was, quite clearly, no longer a true yardstick of their acceptance of international jurisdiction.

Mr. Charles De Visscher had already shown that courts should take care not to substitute doctrinal and systematized views for the indispensable examination of the intentions of States. This is how he defined the obligation upon the international judge to exercise reserve:

> "The man of law, naturally enough, tends to understand the nature both of political tensions and of the conflicts they engender. He is inclined to see in them only 'the object of a dispute', to enclose within the terms of legal dialectic something which is pre-eminently refractory to reasoning, to reduce to order something wholly consisting of unbridled dynamism, in a word, to try to depoliticize something which is political of its essence. Here it is not merely a question, as is all too often repeated, of a deficiency in the mechanism of law-transformation, or of gaps in the legal regulation of things. We are dealing with a sphere into which, a priority is only exceptionally that law penetrates. Law can only intervene in the presence of elements it can assimilate, i.e., facts or imperatives possessing a regulatory and at least minimum correspondence with a given social order that enable them to be subjected to reasoned analysis, classified within some known category, and reduced to an objective value-judgement capable of serving in its turn as a basis for the application of established norms." (Théories et réalités en droit international public, 1970, p.96.)

There is a certain tendency to submit essentially political conflicts to adjudication in the attempt to open a little door to judicial legislation and, if this tendency were to persist, it would result in the institution, on the international plan, of government by judges; such aa notion is so opposed to the realities of the present international community that it would undermine the very foundations of jurisdiction.

(Signed) A. GROS.

SEPARATE OPINION OF JUDGE PETREN

[Translation]

If I have been able to vote for the Judgement, it is because its operative paragraph finds that the claim is without object and that the Court is not called upon to give a decision thereon. As my examination of the case has led me to the same conclusion, but on grounds which do not coincide with the reasoning of the Judgement, I append this separate opinion.

The case which the Judgement brings to an end has not advanced beyond the preliminary stage in which the questions of the jurisdiction of the Court and the admissibility of the Application fall to be resolved. Australia's request for the indication of interim measures of protection could not have had the consequence of suspending the Court's obligation to consider the preliminary questions of jurisdiction and admissibility as soon as possible. On the contrary, that request having been granted, it was particularly urgent that the Court should decide whether it had been validly seized of the case. Any delay in that respect meant the prolongation, embarrassing to the Court and to the Parties, of uncertainty concerning the fulfillment of an absolute condition for the justification of any indication of interim measures of protection.

In this situation, it was highly imperative that the provisions of the Rules of Court which were revised not so long ago for the purpose of accelerating proceedings should be strictly applied. Only recently, moreover, on 22 November 1974, the General Assembly of the United Nations adopted, on the item concerning a review of the Court's role, resolution 3232 (XXIX), of which one preambular paragraph recalls how the Court has amended its Rules in order to facilitate recourse to it for the judicial settlement of disputes, inter alia, by reducing the likelihood of delays. Among the reasons put forward by the Court itself to justify revision of the Rules, there was the necessity of adapting its procedure to the pace of world events (I.C.J. Yearbook 1967-1968, p.87). Now if ever, in this atomic age, there was a case which demanded to be settled in accordance with the pace of world events, it is this one. The Court nevertheless, in its Order of 22 June 1973[8] indicating interim measures of protection, deferred the continuance of its examination of the questions of jurisdiction and admissibility, concerning which it held, in one of the consideranda to the Order, that it was necessary to resolve them as soon as possible.

Despite the firmness of this finding, made in June 1973, it is very nearly 1975 and the preliminary questions referred to have remained unresolved. Having voted against the Order of 22 June 1973 because I considered that the questions of jurisdiction and admissibility could and should have been resolved without postponement to a later session, I have a fortiori been opposed to the delays which have characterized the continuance of the proceedings and the upshot of which is that the Court has concluded that Australia's Application is without object *now*. I must here recall the circumstances in which certain time-limits were fixed, because it is in the light of those circumstances that I have had to take up my position on the suggestion that consideration of the admissibility of the Application should be deferred until some later date.

When, in the Order of 22 June 1973, the Court invited the Parties to produce written pleadings on the questions of its jurisdiction and the admissibility of the Application, it fixed 21 September 1973 as the time-limit for the filing of the Australian Government's Memorial and 21 December 1973 as the time-limit of the filing of a Counter-Memorial by the French Government. This decision was preceded by a conversation between the Acting President and the Agent of Australia, who stated that he could agree to a three-month time-limit for his own Government's pleading. No contact was sought with the French Government at that same time. No reference is to be found in the Order to the application of Article 40 of the Rules of Court or, consequently, to the consultation which had taken place with the Agent of Australia. After the Order had been made, the Co-Agent of Australia, on 25 June 1973, informed the Acting President that his Government felt it would require something in the nature of a three-month extension of time-limit on account of a new element which was bound to have important consequences, namely that the Memorial would now have to deal not only with jurisdiction but also with admissibility. Although the Court remained in session until 13 July 1973, this information was not conveyed to it. On 10 August 1973 the Co-Agent was received by the President and formally requested on behalf of his Government that the time-limit be extended to 21 December 1973, on the ground that questions of admissibility had not been foreseen when the Agent had originally been asked to indicate how much time he would require for the presentation of a Memorial on jurisdiction. Following this conversation the Co-Agent, by a letter of 13 August, requested that the time-limit should be extended to 23 November. Contrary to what had been done in June with regard to the fixing of the original time-limits, the French Government was invited to make known its opinion. Its reply was that, having denied the Court's jurisdiction in the case, it was unable to express any opinion. After he had consulted his colleagues by correspondence on the subject of the time-limits and a majority had expressed a favourable view, the President, by an Order of 28 August, extended the time-limit for the filing of the Australian Government Memorial to 23 November 1973 and the time-limit for the filing of a Counter-Memorial by the French Government to 19 April 1974.

The circumstances in which the written proceedings on the preliminary questions were thus prolonged until 19 April 1974 warrant several of reservations. In the first

[8] Having voted against the resolution whereby the Court, on 24 March 1974, decided to close the enquiry into the premature disclosure of its decision, as also of the voting-figures, before the Order of 22 June 1973 was read at a public sitting, I wish to state my opinion that the enquiry referred to was one of a judicial character and that its continuance on the bases already acquired should have enabled the Court to get closer to the truth. I did not agree with the decision whereby the Court excluded from publication, in the volume of Pleadings, Oral Arguments, Documents to be devoted to the case, certain documents which to my mind are important for the comprehension of the incident and the search for its origins.

place, it would have been more in conformity with the Statute and the Rules of Court not to have consulted the Australian Government until after the Order of 22 June 1973 had been made and to proceed at the same time to consult the French Government. Let us suppose that this new procedure were to be put into general practice and it became normal, before the Court's decision on a preliminary phase, I consult the Agents of the Parties regarding the time-limits for the new phase; any Agent who happened not to be consulted on a particular occasion would not require supernatural perspicacity to realize that the case was not going to continue.

To turn to the present case, there is every reason to think that the French Government, if it had been consulted immediately after the making of the Order of 22 June 1973, would have given the same reply as it did two months later. It would then have been clear at once that the French Government had no intention of participating in the written proceedings and that there would be no necessity to allocate it a three-month period for the production of a Counter-Memorial. In that way the case could have been ready for hearing by the end of the summer of 1973, which would have enabled the Court to give its judgement before that year was out. After having deprived itself of the possibility of holding the oral proceedings during the autumn of 1973, the Court found itself faced with a request for the extension of the time-limit for the filing of the Memorial. It is to be regretted that this request, announced three days after the reading of the Order of 22 June 1973, was not drawn to the Court's attention while it was yet sitting, which would have enabled it to hold a regular deliberation on the question of extension. As it happened, the Order of 28 August not only extended the time-limit fixed for the filing of the Memorial of the Australian Government but also accompanied this time-limit with a complementary time-limit of five months for the filing of a Counter-Memorial which the French Government had no intention of presenting. Those five months merely prolonged the period during which the Australian Government was able to prepare for the oral proceedings, which was another unjustified favour accorded to that Government.

But that is not all: the Order of 28 August 1973 also had the result of reversing the order in which the present case and the *Fisheries Jurisdiction cases* should have become ready for hearing. In the latter cases, the Court after having indicated interim measures of protection by Orders of 1 August 1972, had found, by its Judgements of 2 February 1973, that it possessed jurisdiction and, by Orders of 15 February 1973, had fixed the time-limits for the filing of Memorials and Counter-Memorials at 1 August 1973 and 15 January 1974 respectively. If the Order of 28 August 1973 extending the time limit in the present case had not intervened, this case would have been ready for hearing on 22 December 1973, before the Fisheries Jurisdiction cases and would have had priority on it then by virtue of Article 50, paragraph 1, of the 1972 Rules of Court and Article 46, paragraph 1, of the 1946 Rules of Court which were still applicable to the Fisheries Jurisdiction cases. After the Order of 28 August 1973 had prolonged the written proceedings in the present case until 19 April 1974, it was the Fisheries Jurisdiction cases which became entitled to priority on the basis of the above-mentioned provisions of the Rules of Court in either of their versions. However, the Court could have decided to restore the previous order of priority, a decision which Article 50, paragraph 2, of the 1972 Rules, and Article 46, paragraph 2, of the 1946 Rules, enabled it to take in special circumstances. The unnecessary character of the time-limit fixed for the filing of a Counter-Memorial by the French Government was in itself a special circumstance, but there were others even more weighty. In the Fisheries Jurisdiction cases, there was no longer any uncertainty concerning the justification for the indication of interim measures of protection, inasmuch as the Court had found that it possessed jurisdiction, whereas in the present case this uncertainty had persisted for many months. Yet France had requested the removal of the case from the list and, supposing that attitude were justified, had an interest in seeing the proceedings brought to an end, and with them, the numerous criticisms levelled at it for not applying interim measures presumed to have been indicated by a Court possessing jurisdiction. Moreover, as France might during the summer of 1974 be carrying out a new series of atmospheric nuclear tests, Australia possessed its own interest in having the Court's jurisdiction confirmed before then, inasmuch as that would have conferred greater authority on the indication of interim measures.

For all those reasons, the Court could have been expected to decide to take the present case before the Fisheries Jurisdiction cases. Nevertheless, on 12 March 1974, a proposal in that sense was rejected by 6 votes to 2, with 6 abstentions. In that way the Court deprived itself of the critical period of 1974.

The proceedings having been drawn out until the end of 1974 by this series of delays, the Court has now found that Australia's Application is without object and that it is therefore not called upon to give a decision thereon.

It is not possible to take up any position vis-à-vis this Judgement without being clear as to what it signifies in relation to the preliminary questions which, under the terms of the Order of 22 June 1973, were to be considered by the Court in the present phase of the proceedings, namely the jurisdiction of the Court to entertain the dispute and the admissibility of the Application. As the Court has had frequent occasion to state, these are questions between which it is not easy to distinguish. The admissibility of the Application may even be regarded as a precondition of the Court's jurisdiction. In Article 8 of Resolution concerning the internal Judicial

Practice of the Court, competence and admissibility are placed side by side as conditions to be satisfied before the Court may undertake the consideration of the merits. It is on that basis that the Order of 22 June 1973 was drawn up. It emerges from its consideranda that the aspects of the competence which are to be examined include, on the one hand, the effects of the reservation concerning activities connected with national defence which France inserted when it renewed in 1966 its acceptance of the Court's jurisdiction and, on the other hand, the relations subsisting between France and Australia by virtue of the General Act of 1928 for the Pacific Settlement of International Disputes, supposing that instrument to be still in force. However, the Order is not so precise regarding the aspects of the question of the admissibility of the Application which are to be explored. On the contrary, it specifies none, and it is therefore by a wholly general enquiry that the Court has to determine whether it was validly seised of the case. One of the very first prerequisites is that the dispute should concern a matter governed by international law. If this were not the case, the dispute would have no object falling within the domain of the Court's jurisdiction, inasmuch as the Court is only competent to deal with disputes in international law.

The Judgement alludes in paragraph 24 to the jurisdiction of the Court as viewed therein, i.e. as limited to problems related to the jurisdictional provisions of the Statute of the Court and of the General Act of 1928. In the words of the first sentence of that paragraph, "the Court has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings". In other words, the Judgement, which makes no further reference to the question of jurisdiction, indicates that the Court did not find that there was any necessity to consider or resolve it. Neither - though this it does not make so plain - does it deal with the question of admissibility.

For my part, I do not believe that it is possible thus to set aside consideration of all the preliminary questions indicated in the Order of 22 June 1973. More particularly, the Court ought in my view to have formed an opinion from the outset as to the true character of the dispute which was the subject of the Application; if the Court had found that the dispute did not concern a point of international law, it was for that absolutely primordial reason that it should have removed the case from its list, and not because the non-existence of the subject of the dispute was ascertained after many months of proceedings.

It is from that angle that I believe I should consider the question of the admissibility of Australia's Application. It is still my view that, as I said in the dissenting opinion which I appended to the Order of 22 June 1973, what is first and foremost necessary is to ask oneself whether atmospheric tests of nuclear weapons are, generally speaking, governed by norms of international law or whether they belong to a highly political domain where the international norms of legality or illegality are still at the gestation stage. It is quite true that disputes concerning the interpretation or application of rules of international law may possess great political importance without thereby losing their inherent character of being legal disputes. It is nonetheless necessary to distinguish between disputes revolving on norms of international law and tensions between States caused by measures taken in a domain not yet governed by international law.

In that connection, I feel it may be useful to recall what has happened in the domain of human rights. In the relatively recent past, it was generally considered that the treatment given by a State to its own subjects did not come within the purview of international law. Even the most outrageous violations of human rights committed by a State towards its own nationals could not have formed the subject of an application by another State to an international judicial organ. Any such application would have been declared inadmissible and could not have given rise to any consideration of the truth of the facts alleged by the applicant State. Such would have been the situation even in relations between States having accepted without reservation the optional clause of Article 36 of the Statute of the Permanent Court of International Justice. The mere discovery that the case concerned a matter not governed by international law would have been sufficient to prevent the Permanent Court from adjudicating upon the claim. To use the terminology of the present proceedings, that would have been a question concerning the admissibility of the application and not the jurisdiction of the Court. It is only an evolution subsequent to the Second World War which has made the duty of States to respect the human rights of all, including their own nationals, an obligation under international law towards all States members of the international community. The Court alludes to this in its Judgement in the case concerning the Barcelona Traction, Light and Power Company, Limited (I.C.J. Reports 1970, p.32). It is certainly to be regretted that this universal recognition of human rights should not, up to now, have been accompanied by a corresponding evolution in the jurisdiction of international judicial organs. For want of a watertight system of appropriate jurisdictional clauses, too many international disputes involving the protection of human rights cannot be brought to international adjudication. This the Court also recalled in the above-mentioned Judgement (ibid., p.47), thus somewhat reducing the impact of its reference to human rights and thereby leaving the impression of a self-contradiction which has not escaped the attention of writers.

We can see a similar evolution taking place today in an allied field, that of the protection of the environment.

Atmospheric nuclear tests, envisaged as the bearers of a particularly serious risk of environmental pollution, are a source of acute anxiety for present-day mankind, and it is only natural that efforts should be made on the international place to erect legal barriers against that kind of test. In the present case, the question is whether such barriers existed at the time of the filing of the Australian Application. That Application cannot be considered admissible if, at the moment when it was filed international law had not reached the stage of applicability to the atmospheric testing of nuclear weapons. It has been argued that it is sufficient for two parties to be in dispute over a right for an application from one of them on that subject to be admissible. Such would be the situation in the present case but to my mind the question of the admissibility of an application cannot be reduced to the observance of so simple a formular. It is still necessary that the right claimed by the applicant party should belong to a domain governed by international law. In the present case the application is based upon an allegation that France's nuclear tests in the Pacific have given rise to radioactive fallout on the territory of Australia.

The Australian Government considers that its sovereignty has thereby been infringed in a manner contrary to international law. As there is no treaty link between Australia and France in the matter of nuclear tests, the Application presupposes the existence of a rule of customary international law whereby States are prohibited from causing, through atmospheric nuclear tests, the deposit of radio-active fall-out on the territory of other States. It is therefore the existence or non-existence of such a customary rule which has to be determined.

It was suggested in the course of the proceedings that the question of the admissibility of the Application was not of an exclusively preliminary character and that consideration of it could be deferred until the examination of the merits. This raises a question regarding the application of Article 67 of the 1972 Rules of Court. The main motive for the revision was to avoid the situation in which the Court, having reserved its position with regard to a preliminary question, orders lengthy proceedings on the substantive aspects of a case only to find at the end that the answer to that preliminary question has rendered such proceedings superfluous. It is true that Article 67 refers only to preliminary objections put forward by the respondent, but it is obvious that the spirit of that Article ought also to apply to the consideration of any questions touching the admissibility of an application which the Court is to resolve ex-officio. It is also plainly incumbent upon the Court, under Article 53 of the Statute, to take special care to see that the provisions of Article 67 of the Rules are observed when the respondent is absent from the proceedings.

In sum, the Court, for the first time, has had occasion to apply the provision of its revised Rules which replaced the former provisions enabling preliminary objections to be joined to the merits. One may ask where the real difference between the new rule and the old lies. For my part, I consider that the new rule, like the old, bestows upon the Court a discretionary power to decide whether, in the initial stage of a case, such and such a preliminary question ought to be settled before anything else. In exercising this discretionary power the Court ought, in my view, to assess the degree of complexity of the preliminary question in relation to the whole of the questions going to the merits. If the preliminary question is relatively simple whereas consideration of the merits would give rise to lengthy and complicated proceedings the Court should settle the preliminary question at once. That is what the spirit in which the new Article 67 of the Rules was drafted requires. These considerations appear to me to be applicable to the present case.

The Court would have done itself the greatest harm if, without resolving the question of admissibility, it had ordered the commencement of proceedings on the merits in all their aspects, proceedings which would necessarily have been lengthy and complicated if only because of the scientific and medical problems involved. It should be recalled that, in the preliminary stage from which they have not emerged, the proceedings had already been subjected to considerable delays, which left the Australian Government ample time to prepare its written pleadings and oral arguments on all aspects of admissibility. How, in those circumstances, could the consideration of the question have been postponed to some later date?

As is clear from the foregoing, the admissibility of the Application depends, in my view, on the existence of a rule of customary international law which prohibits States from carrying out atmospheric tests of nuclear weapons giving rise to radio-active fall-out on the territory of other States. Now it is common knowledge, and is admitted by the Australian Government itself, that any nuclear explosion in the atmosphere gives rise to radio-active fall-out over the whole of the hemisphere where it takes place. Australia, therefore, is only one of many States on whose territory France's atmospheric nuclear tests, and likewise those of other States, have given rise to the deposit of radio-active fall-out. Since the Second World War, certain States have conducted atmospheric nuclear tests for the purposes of enabling them to pass from the atomic to the thermo-nuclear stage in the field of armaments. The conduct of these States proves that their Governments have not been of the opinion that customary international law forbade atmospheric nuclear tests. What is more, the Treaty of 1963 whereby the first three States to have acquired nuclear weapons mutually banned themselves from carrying out further atmospheric tests can be denounced. By the provision in that sense the signatories of the Treaty showed that they were still of the opinion that customary international law did not prohibit atmospheric nuclear tests.

To ascertain whether a customary rule to that effect might have come into being, it would appear more important to learn what attitude is taken up by States which have not yet carried out the tests necessary for reaching the nuclear stage. For such States the prohibition of atmospheric nuclear tests could signify the division of the international community into two groups: States possessing nuclear weapons and States not possessing them. If a State which does not possess nuclear arms refrains from carrying out the atmospheric tests which would enable it to acquire them and if that abstention is motivated not by political or economic considerations but by a conviction that such tests are prohibited by customary international law, the attitude of that State would constitute an element in the formation of such a custom. But where can one find proof that a sufficient number of States, economically and technically capable of manufacturing nuclear weapons, refrain from carrying out atmospheric nuclear tests because they consider that customary international law forbids them to do so? The example recently given by China when it exploded a very powerful bomb in the atmosphere is sufficient to demolish the contention that there exists at present a rule of customary international law prohibiting atmospheric nuclear tests would be unrealistic to close one's eyes to the attitude, in that respect of the State with the largest population in the world.

To complete this brief outline, one may ask what has been the attitude of the numerous States on whose territory radio-active fall-out from the atmospheric tests of the nuclear Powers has been deposited and continued to be deposited. Have they, generally speaking, protested to these Powers pointing out that their tests were in breach of customary international law? I do not observe that such has been the case. The resolutions passed in the General Assembly of the United Nations cannot be regarded as equivalent to legal protests made by one State to another and concerning concrete instances. They indicate the existence of a strong current of opinion in favour of proscribing atmospheric nuclear tests. That is political task of the highest urgency, but it is one which remains to be accomplished. Thus the claim submitted to the Court by Australia belongs to the political domain and is situated outside the framework of international law as it exists today.

I consider, consequently, that the Application of Australia was, from the very institution of proceedings, devoid of any object on which the Court could give a decision, whereas the Judgement finds only that such an object is lacking now. I concur with the Judgement so far as the outcome to be given the proceedings is concerned, i.e., that the Court is not called upon to give a decision, but that does not enable me to associate myself with the grounds on which the Judgement is based. The fact that I have nevertheless voted for it is explained by the following consideration.

The method whereby the judgements of the Court are traditionally drafted implies that a judge can vote for a judgement if he is in agreement with the essential content of the operative part, and that he can do so even he does not accept the grounds advanced, a fact which he normally makes known by a separate opinion. It is true that this method of ordering the matter is open to criticism, more particularly because it does not rule out the adoption of judgements whose reasoning is not accepted by the majority of the judges voting in favour of them, but such is the practice of the Court. According to this practice, the reasoning, which presents the fruit of the first and second readings in which all the judges participate, precedes the operative part and can no longer be changed the moment when the vote is taken at the end of the second reading. The vote concerns solely the operative part and is not followed by the indication of the reasons upheld by each judge. In such cases a judge who disapproves of the reasoning of the judgement but is in agreement with the outcome achieved by the operative feels himself obliged in the interests of justice to vote for the judgement, because if he voted other way he might frustrate the correct disposition of the case. The present phase of the proceedings in this case was in reality dominated by the question whether the Court could continue to deal with the case. On that absolutely essential point I reached the same conclusion as the Judgement, even if my grounds for doing so were different.

I have therefore been obliged to vote for the Judgement, even though I do not subscribe to any of its grounds. Had I voted otherwise I would have run the risk of contributing to the creation of a situation which would have been strange indeed for a Court whose jurisdiction is voluntary, a situation in which the merits of a case would have been considered even though the majority of the judges considered that they ought not to be. It is precisely that kind of situation which Article 8 of the Resolution concerning the Internal Judicial Practice of the Court is designed to avoid.

I have still to explain my position with regard to the question of the Court's jurisdiction, in the sense given to that term by the Order of 22 June 1973. As the Judgement expressly states, this many-faceted question is not examined therein. That being so, and as I personally do not feel any need to examine it in order to conclude in favour of the disposition of the case for which I have voted, I think that there is no place in this separate opinion for any account of the ideas I have formed on the subject. A separate opinion, as I conceive it, ought not to broach any questions not dealt with by the judgement, unless it is absolutely necessary to do so in order to explain the author's vote. I have therefore resisted the temptation to engage in an exchange of views on jurisdiction with those of my colleagues who have gone into this question in their dissenting opinions. A debate between judges on matters not dealt with in the judgement is not likely to

add up to anything more than a series of unrelated monologues - or choruses. For whatever purpose it may serve, however, I must stress that my silence on the subject does not signify consent to the proposition that the Court had jurisdiction.

(Signed) Sture PETREN

SEPARATE OPINION OF JUDGE IGNACIO-PINTO

[Translation]

I concur in the Judgement delivered by the Court in the second phase of this case, but without entirely sharing the grounds on which it has relied to reach the conclusion that the Australian claim "no longer has any object".

Before explaining on what points my reasoning differs from that of the Court, I must refer to the Order of 22 June 1973, by which the Court, after having acceded to Australia's request for the indication of interim measures of protection, decided that the proceedings would next be concerned with the questions of jurisdiction and admissibility. The Court having thus defined the character which the present phase of the proceedings was to possess, I find myself, much to my regret, impelled not to criticize the Court's Judgement, but to present the following observations in order unequivocally to substantiate my separate opinion in the matter.

First I wish to confirm my view, already set forth in the dissenting opinion which I appended to the above-mentioned Order of 22 June 1973, that, considering the all too markedly political character of this case, Australia's request for the indication of interim measures of protection ought to have been rejected as ill founded. Now that we have come to the end of these proceedings and before going any further, I think it useful to recall certain statements emanating from the competent authorities of the Australian Government which give the plainest possible illustration of the political character of this case.

I would first draw attention to the statement made by the Prime Minister and Minister for Foreign Affairs of Australia in a Note of 13 February 1973 to the Minister for Foreign Affairs of the French Government (Application, Ann.11, p.62):

> "In my discussion with your Ambassador on 8 February 1973, I referred to the strength of public opinion in Australia about the effects of French tests in the Pacific. I explained that the strength of public opinion was such that, whichever political party was in office it would be under great pressure to take action. The Australian public would consider it intolerable if the nuclear tests proceeded during discussions to which the Australian Government had agreed. (Emphasis added.)

Secondly I wish to recall what the Solicitor-General of Australia said at the hearing which the Court held on 22 May 1973:

> "May I conclude, Mr. President, by saying that few Orders of the Court would be more closely scrutinized than the one which the Court will make upon this application. Governments and people all over the world will look behind the contents of that Order to detect what they may presume to be the Court's attitude towards the fundamental question of the legality of further testing of nuclear weapons in the atmosphere." (Emphasis added.)

It appears therefore, taking into account my appreciation on the political character of the claim, that it was from the beginning that, basing myself on this point, I had considered the claim of Australia to be without object.

That said, I now pass to the observations for which my appraisal of the Court's Judgement calls, together with the explanation of my affirmative vote.

First of all, I consider that the Court, having called upon the Applicant to continue the proceedings and return before it so that it might rule upon its jurisdiction to entertain the case and on the admissibility of the Application, ought to treat these two questions clearly, especially as certain erroneous interpretations appear to have lent credence among the lay public to the idea that Australia "had won its case against France", since in the final analysis it had obtained the object of its claim, which was to have France forbidden to continue atmospheric nuclear testing.

As I see the matter, it is extremely regrettable that the Court should have thought it ought to omit doing this, so that unresolved problems remain with regard to the validity of the 1928 General Act, relied on by Australia, as also to the declaration filed under Article 36, paragraph 2, of the Statute and the express reservations made by France in 1966 so far as everything connected with its national defence was concerned. It would likewise have been more judicious to give an unequivocal ruling on the question of admissibility; having regard to what I consider to be the definitely political character revealed by the Australian claim, as I have recalled above.

These, I find, are so many important elements which deserved to be taken into consideration in order to enable the Court to give a clear pronouncement on the admissibility of Australia's claim, more particularly as the objective of this claim is to have the act of a sovereign State declared unlawful even though it is not possible to point to any positive international law.

I must say in these circumstances that I personally remain unsatisfied as to the procedure followed and certain of the grounds relied on by the Court for reaching the conclusion that the claim no longer has any object.

I nevertheless adhere to that conclusion, which is consistent with the position which I have maintained from the outset of the proceedings in the first phase; I shall content myself with the Court's recognition that the Australian Application "no longer" has any object, on the understanding, nevertheless, that for me it never had any object, and ought to have been declared inadmissible in limine litis and, therefore, removed from the list for the reasons which I gave in the dissenting opinion to which I have referred above.

The fact remains that, to my mind, the Court was right to take the decision it has taken today. I gladly subscribe - at least in part - to the considerations which have led to its doing so, for, failing the adoption by the Court of my position on the issues of jurisdiction and the admissibility of the Australian claim, I would in any case have been of the view that it should take into consideration, at least in the alternative, the new facts which supervened in the course of the present proceedings and after the closure of the oral proceedings, to wit various statements by interested States, with a view to ascertaining whether circumstances might not have rendered the object of the Application nugatory. Since, in the event, it emerges that the statements urbi et orbi of the competent French authorities constitute an undertaking on the part of France to carry out no more nuclear tests in the atmosphere, I can only vote in favour of the Judgement.

It is in effect evident that one could not rule otherwise than the Court has done, when one analyses objectively the various statements emanating whether from the Applicant or from France, which, confident in the reservations embodied in the declaration filed under Article 36, paragraph 2, of the Statute, contested the Court's jurisdiction even before the opening of oral proceedings.

As should be re-emphasized, it cannot be denied that the essential object of Australia's claim is to obtain from the Court the cessation by France of the atmospheric nuclear tests it has been conducting in the atoll of Mururoa which is situated in the South Pacific and is under French sovereignty. Consequently, if France had changed its attitude, at the outset of the proceedings, and had acquiesced in Australia's request that it should no longer carry out its tests, the goal striven for by the Applicant would have been attained and its claim would no longer have had any object. But now the Court has been led by the course of events to take note that the President of the French Republic and his competent ministers have made statements to the effect that the South Pacific test centre will not be carrying out any more atmospheric nuclear tests. It follows that the goal of the Application has been attained. That is a material finding which cannot properly be denied, for it is manifest that the object of the Australian claim no longer has any real existence. That being so, the Court is bound to accord this fact objective recognition and to conclude that the proceedings ought to be closed, inasmuch as it has acquired the conviction that, taking the circumstances in which they were made into account, the statements of the competent French authorities are sufficient to constitute an undertaking on the part of France which connotes a legal obligation erga onnes, despite the unilateral character of that undertaking.

One may regret - and I do regret - that the Court, particularly at this stage, did not devote more of its efforts to seeking a way of first settling the question of jurisdiction and admissibility. Some would doubtless go so far as strongly to criticize the grounds put forward by the Court to substantiate its decision. I could not take that attitude, for in a case so exceptionally characterized by politico-humanitarian considerations and in the absence of any guiding light of positive international law, I do not think the Court can be blamed for having chose, for the settlement of the dispute, the means which it considered to be the most appropriate in the circumstances, and to have relied upon the undertaking, made urbi et orbi in official statements by the President of the French Republic, that no more atmospheric nuclear tests will be carried out by the French Government. Thus the Judgement rightly puts an end to a case one of whose consequences would, in my opinion, be disastrous - I refer to the disregard of Article 36, paragraph 2, of the Statute of the Court - and would thereby be likely to precipitate a general flight from the jurisdiction of the Court, inasmuch as it would demonstrate that the Court no longer respects the expression of the will of a State which has subordinated its acceptance of the Court's compulsory jurisdiction to express reservations.

In spite of the criticisms which some of my colleagues have expressed in their opinions, and sharing as I do the opinion of Judge Forster, I will say, bearing in mind the old adage that "all roads lead to Rome", that I find the Judgement just and well founded and that there is, at all events, nothing in the French statements "which could be interpreted as an admission of any breach of positive international law",.

In conclusion, I would like to emphasize once again that I am fully in agreement with Australia that all atmospheric nuclear tests whatever should be prohibited, in view of their untold implications for the survival of mankind. I am nevertheless convinced that in the present case the Court has given a proper Judgement, which meets the major anxieties which I expressed in the dissenting opinion to which I have referred, inasmuch as it must not appear to be flouting the principles expressed in Article 2, paragraph 7, of the United Nations Charter (Order of 22 June 1973, I.C.J. Reports 1973, p.130), and

indirectly inasmuch as it respects the principle of sovereign equality of the member States of the United Nations. France must not be given treatment inferior to that given to all other States possessing nuclear weapons, and the Court's competence would not be well founded if it related only to the French atmospheric tests.

(Signed) L. IGNACIO-PINTO.

JOINT DISSENTING OPINION OF JUDGES ONYEAMA, DILLARD, JIMENEZ DE ARECHAGA AND SIR HUMPHREY WALDOCK

1. In its Judgement the Court decides, ex proprio motu, that the claim of the Applicant no longer has any object. We respectfully, but vigorously dissent. In registering the reasons for our dissent we propose first to make a number of observations designed to explain why, in our view, it is not justifiable to say that the claim of the Applicant no longer has any object. We shall then take up the issues of jurisdiction and admissibility which are not examined in the Judgement but which appear to us to be of cardinal importance to the Court's treatment of the matters decided in the Judgement. It is also to these two issues, not touched in the Judgement, to which the Applicant was specifically directed to address itself in the Court's Order of 22 June 1973.

PART I
REASONS FOR OUR DISSENT

2. Basically, the Judgement is grounded on the premise that the sole object of the claim of Australia is "to obtain a termination of" the "atmospheric nuclear tests conducted by France in the South Pacific region" (para.30). It further assumes that, although the judgement which the Applicant seeks would have been rested on a finding that "further tests would not be consistent with international law, such finding would be only a means to an end, and not an end in itself" (ibid.).

3. In our view the basic premise of the Judgement, which limits the Applicant's submissions to a single purpose, and narrowly circumscribes its objective in pursuing the present proceedings, in untenable. In consequence the Court's chain of reasoning leads to an erroneous conclusion. This occurs, we think, partly because the Judgement fails to take account of the purpose and utility of a request for a declaratory judgement and even more because its basic premise fails to correspond to and even changes the nature and scope of Australia's formal submissions as presented in the Application.

4. In the Application Australia:

> "... Asks the Court to adjudge and declare that, for the above-mentioned reasons or any of them or for any other reason that the Court deems to be relevant, the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law new line and to order that the French Republic shall not carry out any further such tests."

5. This submission, as observed by counsel for Australia before the Court (CR 73/3, p.60):

> "....has asked the Court to do two things: the first is to adjudge and declare that the conduct of further atmospheric nuclear tests is contrary to international law and to Australia's rights; the second is to order France to refrain from further atmospheric nuclear tests".

As appears from the initial words of the actual submission, its first part requests from the Court a judicial declaration of the illegality of atmospheric tests conducted by France in the South Pacific Ocean.

6. In paragraph 19 of the Application it is stated that:

> "The Australian Government will seek a declaration that the holding of further atmospheric tests by the French Government in the Pacific Ocean is not in accordance with international law and involves an infringement of the rights of Australia. The Australian Government will also request that, unless the French Government should give the Court an undertaking that the French Government will treat a declaration by the Court in the sense just stated as a sufficient ground for discontinuing further atmospheric testing, the Court should make an order calling upon the French Republic to refrain from any further atmospheric tests." (Emphasis added.)

In other words, the request for a declaration is the essential submission. If a declaration of illegality were obtained from the Court which the French Government agreed to treat as a sufficient ground for discontinuing further atmospheric tests, then Australia would not maintain its request for an Order.

Consequently, it can hardly be said, as is done in paragraph 30 of the Judgement, that the declaration of illegality of atmospheric tests asked for in the first part of the Applicant's formal submission is merely a means for obtaining a Court Order for the cessation of further tests. On the contrary, the declaration of illegality is the basic claim submitted by Australia to the Court; and this re-

quest is indeed described in the Memorial (para.430) as the "main prayer in the Application".

7. The Applicant asks for a judicial declaration to the effect that atmospheric nuclear tests are "not consistent ... with international law". This bare assertion cannot be described as constituting merely a reason advanced in support of the Order. The legal reasons invoked by the Applicant both in support of the declaration and the Order relate inter alia to the alleged violation by France of certain rules said to be generally accepted as customary law concerning atmospheric nuclear tests; and its alleged infringement of rights said to be inherent in the Applicant's own territorial sovereignty and of rights derived from the character of the high seas as *res communis*. These reasons, designed to support the submissions, are clearly distinguished in the pleadings from the decisions which the Court is asked to make. According to the terms of the submission the Court is requested to make the declaration of illegality "for the above-mentioned reasons or any of them or for any other reason that the Court deems to be relevant". Isolated from those reasons or legal propositions, the declaration that atmospheric nuclear tests are "not consistent with applicable rules of international law" is the precise formulation of something that the Applicant is formally asking the Court to decide in the operative part of the Judgement. While "it is no part of the judicial function of the Court to declare in the operative part of its Judgement that any of those arguments is or is not well founded[9], to decide and declare that certain conduct of a State is or is not consistent with international law is of the essence of international adjudication, the heart of the Court's judicial function.

8. The Judgement asserts in paragraph 30 that "the original and ultimate objective of the Applicant was and has remained to obtain a termination of those tests; thus its claim cannot be regarded as being a claim for a declaratory judgement". In our view the premise in no way leads to the conclusion. In international litigation a request for a declaratory judgement is normally sufficient even when the Applicant's ultimate objective is to obtain the termination of certain conduct of the Respondent which it considers to be illegal. As Judge Hudson said in his individual opinion in the Diversion of Water from the Meuse case:

> "In international jurisprudence, however, sanctions are of a different nature and they play a different rôle, with the result that a declaratory judgement will frequently have the same compulsive force as a mandatory judgement; States are disposed to respect the one not less than the other." (P.C.I.J., Series A/B, No.70, p.79.)

And, as Charles De Visscher has stated:

> "The essential tasks of the Court, as emerges both from the submissions of the parties and from the operative parts of its judgements, normally amounts to no more than defining the legal relationships between the parties, without indicating any specific requirements of conduct. Broadly speaking, the Court refrains from pronouncing condemnations and leaves it to the States parties to the case to draw the conclusions flowing from its decisions.[10]" [Translation.]

9. A dual submission, like the one presented here, comprising both a request for a declaration of illegality and a prayer for an order or injunction to end certain measures is not infrequent in international litigation.

This type of dual submission, when presented in other cases has been considered by this Court and its predecessor as containing two independent formal submissions, the first or declaratory part being treated as a true submission, as an end in itself and not merely as part of the reasoning or as a means to obtain the cessation of the alleged unlawful activity. (Diversion of Water from the Meuse, P.C.I.J., Series A/B, No.70, pp.5, 6 and 28; Right of Passage over Indian Territory, I.C.J. Reports 1960, pp.10 and 31).

The fact that consequential requests for an Order or an equivalent injunction are made, as they were made in the above-mentioned cases, was not then considered and cannot be accepted as a sufficient reason to ignore or put aside the Applicant's primary submission or to dispose of it as part of the reasoning. Nor is it justified to introduce a conceptual dichotomy between declaratory and other judgements in order to achieve the same effect. The fact that the Applicant's submissions are not limited to a declaration of the legal situation but also ask for some consequential relief cannot be used to set aside the basic submission in which the declaration of the legal situation is asked to be made in the operative part of the Judgement.

10. In the above-mentioned cases the judges who had occasion to analyze in detail in their individual opinions the Applicant's submissions recognized that in these basic submissions the Applicants sought a declaratory judgement from the Court. The individual opinion of Judge Hudson in the *Diversion of Water from the Meuse case* has already been mentioned. In the *Right if Passage over Indian Territory case*, Judges Winiarski and Badawi in their dissenting opinion recognized that: "What the Portuguese Government is asking of the Court, therefore, is that it shall deliver in the first place a declaratory judgement." They added something which is fully appli-

[9] Right of Passage over Indian Territory, I.C.J. Reports 1960, p.32.

[10] Ch. De Visscher, Aspects récents du droit procédural de la Cour internationale de Justice, Paris, 1966, p.54.

cable to the present case:

> ".... although this claim is followed by the two others, complementary and contingent, it constitutes the very essence of the case ... The object of the suit, as it follows from the first Portuguese submission, is to obtain from the Court a recognition and statement of the situation at law between the Parties" . (I.C.J. Reports 1960, p.74).

Judge Armand-Ugon in his dissenting opinion also said: "The Court is asked for a declaratory judgement as to the existence of a right of passage." (Ibid., p.77.) And this approach was not limited to dissenting opinions. The Court's Judgement in that case states that the Applicant invokes its right of passage and asked the Court to *declare* the existence of that right" (emphasis added) and also says:

> "To this first claim Portugal adds two others, though these are conditional upon a reply, wholly or partly favourable, to the first claim, and will lose their purpose if the right alleged is not recognized." (Ibid., p.29.)

11. In a case brought to the Court by means of an application the formal submissions of the parties define the subject of the dispute, as is recognized in paragraph 24 of the Judgement. Those submissions must therefore be considered as indicating the objectives which are pursued by an applicant through the judicial proceedings.

While the Court is entitled to interpret the submissions of the parties, it is not authorized to introduce into them radical alterations. The Permanent Court said in this respect: ".... though it can construe the submissions of the Parties, it cannot substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced" (*P.C.I.J., Series A, No.7, p.35, Case concerning Certain German Interests in Polish Upper Silesia*). The Judgement (para. 29) refers to this as a limitation on the power of the Court to interpret the submissions "when the claim is not properly formulated because the submissions of the parties are inadequate". If, however, the Court lacks the power to reformulate inadequate submissions, a fortiori it cannot reformulate submissions as clear and specific as those in this case.

12. In any event, the cases cited in paragraph 29 of the Judgement to justify the setting aside in the present instance of the Applicant's first submission do not, in our view, provide any warrant for such a summary disposal of the "main prayer in the Application". In those cases the submissions held by the Court not to be true submissions were specific propositions advanced merely to furnish reasons in support of the decision requested of the Court in the "true" final submission. Thus, in the Fisheries case the Applicant had summarized in the form of submissions a whole series of legal propositions, some not even contested, merely as steps logically leading to its true final submissions (I.C.J. Reports 1951, at pp. 121-123 and 126). In the *Minquiers and Ecrehos case* the "true" final submission was stated first and two legal propositions were then adduced by way of furnishing alternative grounds on which the Court might uphold it (I.C.J. Reports 1953, at p.52); and in the *Nottebohm case* a submission regarding the naturalization of Nottebohm in Liechtenstein was considered by the Court to be merely "a reason advanced for a decision by the Court in favour of Liechtenstein" on the "real issue" of the admissibility of the claim (I.C.J. Reports 1955, p.16). In the present case, as we have indicated, the situation is quite otherwise. The legality or illegality of the carrying out by France of atmospheric nuclear tests in the South Pacific Ocean is the basic issue submitted to the Court's decision, and it seems to us as wholly unjustifiable to treat the Applicant's request for a declaration of illegality merely as reasoning advanced in support of its request for an Order prohibiting further tests.

13. In accordance with these basic principles, the tree nature of the Australian claim, and of the objectives sought by the Applicant ought to have been determined on the basis of the clear and natural meaning of the text of its formal submission. The interpretation of that submission made by the Court constitutes in our view not an interpretation but a revision of the text, which ends in eliminating what the Applicant stated is "the main prayer in the Application", namely the request for a declaration of illegality of nuclear atmospheric tests in the South Pacific Ocean. A radical alteration or mutilation of an applicant's submission under the guise of interpretation has serious consequences because it constitutes a frustration of a party's legitimate expectations that the case which it has put before the Court will be examined and decided. In this instance the serious consequences have an irrevocable character because the Applicant is now prevented from resubmitting its Application and seizing the Court again by reason of France's denunciation of the instruments on which it is sought to base the Court's jurisdiction in the present dispute.

14. The Judgement revises, we think, the Applicant's submission by bringing in other materials such as diplomatic communications and statements made in the course of the hearings. These materials do not justify, however, the interpretation arrived at in the Judgement. They refer to requests made repeatedly by the Applicant for an assurance from France as to the cessation of tests. But these requests for an assurance cannot have the effect attributed to them by the Judgement. While litigation is in progress an applicant may address requests to a respondent to give an assurance that it will not pursue the contested activity, but such requests cannot by themselves support the inference that an unqualified assurance, if received, would satisfy all the objectives the applicant is seeking through the judicial proceedings; still less can they restrict or amend the claims formally submitted to

the Court. According to the Rules of Court, this can only result from a clear indication by the applicant to that effect, through a withdrawal of the case, a modification of its submissions or an equivalent action. It is not for nothing that the submissions are required to be presented in writing and bear the signature of the agent. It is a non sequitur, therefore, to interpret such requests for an assurance as constituting an implied renunciation, a modification or a withdrawal of the claim which is still maintained before the Court, asking for a judicial declaration of illegality of atmospheric tests. At the very least, since the Judgement attributes intentions and implied waivers to the Applicant, that Party should have been given an opportunity to explain its real intentions and objectives, instead of proceeding to such a determination inaudita parte.

15. The Judgement, while it reiterates that the Applicant's objective has been to bring about the termination of atmospheric nuclear tests, fails to examine a crucial question, namely from what date the Applicant sought to achieve this objective. To answer this point it is necessary to take into account the date from which, according to the Australian submission, the legality of the French atmospheric tests is brought into question. The term "further atmospheric tests: used in the submission was also employed in the Australian diplomatic Note of 3 January 1973 addressed to the French Government. In that Note the claim as to the illegality of the tests and an express request to refrain from them were raised for the first time. When a State sends a communication asking another State "to refrain from any further acts" which are said to be illegal, it seems obvious that this claim and request refer to all acts which may take place after the date of the diplomatic communication. Similarly, when Australia filed its Application it seems evident that its request to the Court to declare the illegality of "further atmospheric nuclear weapons tests" must be understood as referring to all tests conducted as from 9 May 1973, the date of the Application.

While an injunction or an Order from the Court on the holding of "further atmospheric tests" could have effect only as from the date it is delivered, a judicial declaration of illegality like the one requested would embrace not merely subsequent tests but also those which took place in 1973 and 1974 after the Application was filed. That such was the objective of the Applicant is confirmed by the fact that as soon as the Application was filed Australia requested interim measures in order to protect its position with regard to the possible continuation of atmospheric tests by France after the filing of the Application and before the delivery of the Court's Judgement on the merits. A request for a declaration of illegality covering the atmospheric tests which were conducted in 1973 and 1974, in disregard of the interim Order of the Court, could not be deprived of its object by statements of intention limited to tests to be conducted in 1975 or thereafter.

16. Such a view of the matter takes no account of the possibility of Australia seeking to claim compensation in respect of the 12 tests conducted in 1973 and 1974. It is true that the Applicant has not asked for compensation for damage in the proceedings which are now before the Court. However, the Australian Government has not waived its right to claim them in the future. It has significantly stated in the Memorial (para.435) that: "At the present time" (emphasis added), it is not the "intention of the Australian Government to seek pecuniary damages". The possibility cannot therefore be excluded that the Applicant may intend to claim damages, at a later dater, through the diplomatic channel or otherwise, in the event of a favourable decision furnishing it with a declaration of illegality. Such a procedure, which has been followed in previous cases before international tribunals, would have been particularly understandable in a case involving radio-active fall-out in which the existence and extent of damage may not readily be ascertained before some time has elapsed.

17. In one of the instances in which damages have been claimed in a subsequent Application on the basis of a previous declaratory judgement, the Permanent Court endorsed this use of the declaratory judgement, stating that it was designed:

> "...to ensure recognition of a situation at law, once and for all, and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned". (*Factory at Chorzow, P.C.I.J., Series A*, No.13, p.20).

18. Furthermore, quite apart from any claim to compensation for damage, a request for a declaration of the illegality of France's atmospheric nuclear weapon tests cannot be said to be without object in relation to the numerous tests carried out in 1973 and 1974. The declaration, if obtained, would characterize those tests as a violation of Australia's rights under international law. As the Court's Judgement in the Corfu Channel case clearly confirms (I.C.J. Reports 1949, at p.35) such a declaration is a form of "satisfaction" which the Applicant might have legitimately demanded when it presented its final submissions in the present proceedings, independently of any claim to compensation. Indeed, in that case the Court in the operative part of the Judgement pronounced such a declaration as constituting "in itself appropriate satisfaction." (ibid., p.36).

19. The Judgement implies that there was a dispute between the Parties, but asserts that such a dispute has now disappeared because "the objective of the claim has been achieved by other means" (para.55).

We cannot agree with this finding, which is based on the premise that the sole purpose of the Application was to obtain a cessation of tests as from the date of the Judge-

ment. In our view the dispute between the Parties has not disappeared since it has concerned, from its origin, the question of the legality of the tests as from the date of the Application. It is true that from a factual point of view the extent of the dispute is reduced if no further atmospheric tests are conducted in 1975 and thereafter, but from a legal point of view the question which remains in dispute is whether the atmospheric nuclear tests which were in fact conducted in 1973 and 1974 were consistent with the rules of international law.

There has been no change in the position of the Parties as to that issue. Australia continues to ask the Court to declare that atmospheric nuclear tests are inconsistent with international law and is prepared to argue and develop that point. France, on its part, as recognized in the Judgement (para. 51), maintains the view that "its nuclear experiments have not violated any rule of international law". In announcing the cessation of the tests in 1975 the French Government, according to the Judgement, did not recognize that France was bound by any rule of international law to terminate its tests (ibid.)

Consequently, the legal dispute between the Parties, far from having disappeared, still persists. A judgement by the Court on the legality of nuclear atmospheric tests in the South Pacific region would thus pronounce on a legal question in which the Parties are in conflict as to their respective rights.

20. We cannot accept the view that the decision of such a dispute would be a judgement in abstracto, devoid of object or having no raison d'être. On the contrary, as has been already shown, it would affect existing legal rights and obligations of the Parties. In case of the success of the Applicant, it would ensure for it advantages on the legal plane. In the event, on the other hand, of the Respondent being successful, it would benefit that Party by removing the threat of an unfounded claim. Thus a judgement on the legality of atmospheric nuclear tests would, as stated by the Court in the Northern Cameroons case:

> "... have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations" (I.C.J. Reports 1963, p. 34).

In the light of this statement, a declaratory judgement stating the general legal position applicable between the Parties - as would the one pronouncing on the first part of the Applicant's submission - would have given the Parties certainty as to their legal relations. This desired result is not satisfied by a finding by the Court of the existence of a unilateral engagement based on a series of declarations which are somewhat divergent and are not accompanied by an acceptance of the Applicant's legal contentions.

Moreover, the Court's finding as to that unilateral engagement regarding the recurrence of atmospheric nuclear tests cannot, we think, be considered as affording the Applicant legal security of the same kind or degree as would result from a declaration by the Court specifying, that such tests contravened general rules of international law applicable between France and Australia. This is shown by the very fact that the Court was able to go only so far as to find that the French Government's unilateral undertaking "*cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration*" (emphasis added); and that the obligation undertaken is one "the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed".

21. Whatever may be thought of the Judgement in the *Northern Cameroons* case, the Court in that case recognized a critically significant distinction between holding a declaratory judgement to be "without effect" the subject of which (as in that case) was a treaty which was no longer in force and one which "*interprets a treaty that remains in force*" (emphasis added) or "*expounds a rule of customary law*" (emphasis added). As to both the latter, the Court said that the declaratory judgement would have a "*continuing applicability*" (I.C.J. Reports, 1963, p.37). In other words, according to the *Northern Cameroons case* a judgement cannot be said to be "without effect" or an issue moot when it concerns an analysis of the continuing applicability of a treaty in force or of customary international law. That is precisely the situation in the present case.

The present case, as submitted by the Applicant, concerns the continuing applicability of a potentially evolving customary international law, elaborated at numerous points in the Memorial and oral arguments. Whether all or any of the contentions of the Applicant would or would not be vindicated at the stage of the merits is irrelevant to the central issue that they are not manifestly frivolous or vexatious but are attended by legal consequences in which the Applicant has a legal interest. In the language of the *Northern Cameroons case*, a judgement dealing with them would have "continuing applicability". Issues of both fact and law remain to be clarified and resolved.

The distinction drawn in the *Northern Cameroons* case is thus in keeping with the fundamental purpose of a declaratory judgement which is designed, in contentious proceedings involving a genuine dispute, to clarify and stabilize the legal relations of the parties. By foreclosing any argument on the merits in the present stage of the proceedings the Court has precluded this possibility. Accordingly, the Court, in our view, has not only wrongly interpreted the thrust of the Applicant's submissions, it has also failed to recognize the valid role which a declaratory judgement may play in reducing uncertainties in the legal relations of the parties and in composing potential discord.

22. In paragraph 23 the Judgement states that the Court has "inherent" jurisdiction enabling it to take such actions as may be required. It asserts that it must "ensure" the observance of the "inherent limitations on the exercise of the judicial function of the Court" and "maintain its judicial character". It cites the *Northern Cameroons case* in support of these very general statements.

Without pausing to analyze the meaning of the adjective "inherent", it is our view that there is nothing whatever in the concept of the integrity of the judicial process ("inherent" or otherwise) which suggests, much less compels, the conclusion that the present case has become "without object". Quite the contrary, due regard for the judicial function, properly understood, dictates the reverse.

The Court, "whose function is to decide in accordance with international law such disputes as are submitted to it" (Art.38, para.1, of the Statute), has the duty to hear and determine the cases it is seized of and is competent to examine. It has not the discretionary power of choosing those contentious cases it will decide and those it will not. Not merely requirements of judicial propriety, but statutory provisions governing the Court's constitution and functions impose upon it the primary obligation to adjudicate upon cases brought before it with respect to which it possesses jurisdiction and finds no ground of inadmissibility. In our view, for the Court to discharge itself from carrying out that primary obligation must be considered as highly exceptional and a step to be taken only when the most cogent considerations of judicial propriety so require. In the present case we are very far from thinking that any such considerations exist.

23. Furthermore, any powers which may attach to "the inherent jurisdiction" of the Court and its duty "to maintain its judicial character" invoked in the Judgement would, in our view, require it at least to give a hearing to the Parties or to request their written observations on the questions dealt with and determined by the Judgement. This applies in particular to the objectives the Applicant was pursuing in the proceedings, and to the question of the status and scope of the French declarations concerning future tests. Those questions could not be examined fully and substantially in the pleadings and hearings, since the Parties had received definite directions from the Court that the proceedings should "first be addressed to the questions of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Application". No intimation or suggestion was ever given to the Parties that this direction was no longer in effect or that the Court would go into other issues which were neither pleaded no argued but which now form the basis for the final disposal of the case.

It is true that counsel for the Applicant alluded to the first French declaration of intention during one of the hearings, but he did so only as a prelude to his treatment of the issues of jurisdiction and admissibility and in the context of a review of developments in relation to the proceedings. He was moreover then acting under formal directions from the Court to deal exclusively with the questions of jurisdiction and admissibility of the Application. Consequently, counsel for the Applicant could not and did not address himself to the specific issues now decided in the Judgement, namely what were the objectives sought by the Applicant by the Judicial proceedings and whether the French declarations and statements had the effect of rendering the claim of Australia without object.

The situation is in this respect entirely different from that arising in the *Northern Cameroons case* where the Parties had full opportunity to plead, both orally and in writing, the question whether the claim of the Applicant had an object or had become "moot" before this was decided by the Court.

Accordingly, there is a basic contradiction when the Court invokes its "inherent jurisdiction" and its "judicial character" to justify its disposal of the case, while, at the same time, failing to accord the Applicant 'any opportunity whatever to present a countervailing argument.

No-one doubts that the Court has the power in its discretion to decide certain issues ex proprio mitu. The real question is not one of power, but whether the exercise of power in a given case is consonant with the due administration of justice. For all the reasons noted above, we are of the view that, in the circumstances of this case, to decide the issue of "mootness" without affording the Applicant any opportunity to submit counter-arguments is not consonant with the due administration of justice.

In addition, we think that the Respondent should at least have been notified that the Court was proposing to consider the possible effect on the present proceedings of declarations of the French Government relating to its policy in regard to the conduct of atmospheric tests in the future. This was essential, we think, since it might, and did in fact lead the Court to pronounce upon nothing less than France's obligations, said to have been unilaterally undertaken, with respect to the conduct of such tests.

24. The conclusions above are reinforced when consideration is paid to the relationship between the issue of mootness and the requirements of the judicial process.

It is worth observing that a finding that the Applicant's claim no longer has any object is only another way of saying that the Applicant no longer has any stake in the outcome. Located in the context of an adversary proceeding, the implication is significant.

If the Applicant no longer has a stake in the outcome, i.e., if the case is really moot, then the judicial process tends to be weakened, inasmuch as the prime incentive

for the Applicant to argue the law and facts with sufficient vigour and thoroughness is diluted. This is one of the reasons which justifies declaring a case moot, since the integrity of the judicial process presupposes the existence of conflicting interests and requires not only that the parties be accorded a full opportunity to explore and expose the law and facts bearing on the controversy but that they have the incentive to do so.

Applied to the present case, it is immediately apparent that this reason for declaring a case moot or without object is totally missing, a conclusion which is not nullified by the absence of the Respondent in this particular instance.

The Applicant, with industry and skill, has already argued the nature of its continuing legal interests in the dispute and has urged upon the Court the need to explore the matter more fully at the stage of the merits. The inducement to do so is hardly lacking in light of the Applicant's submissions and the nature and purposes of a declaratory judgement.

25. Furthermore the Applicant's continued interest is manifested by its conduct. If, as the Judgement asserts, all the Applicant's objectives have been met, it would have been natural for the Applicant to have requested a discontinuance of the proceedings under Article 74 of the Rules. This it has not done. Yet this Article, together with Article 73 on settlement, provides for the orderly regulation of the termination of proceedings once these have been instituted. Both Articles require formal procedural actions by agents, in writing, so as to avoid misunderstandings, protect the interests of each of the two parties and provide the Court with the certainty and security necessary in judicial proceedings.

26. Finally, we believe the Court should have proceeded, under Article 36(6) and Article 53 of the Statute, to determine its own jurisdiction with respect to the present dispute. This is particularly important in this case because the French Government has challenged the existence of jurisdiction at the time the Application was filed, and, consequently, the proper seizing of the Court, alleging that the 1928 General Act is not a treaty in force and that the French reservation concerning matters of national defence made the Court manifestly incompetent in this dispute. In the Northern Cameroons case, invoked in paragraph 23 of the Judgement, while the Respondent had raised objections to the jurisdiction of the Court, it recognized that the Trusteeship Agreement was a convention in force at the time of the filing of the Application. There was no question then that the Court had been regularly seised by way of application.

27. In our view, for the reasons developed in the second part of this opinion, the Court undoubtedly possesses jurisdiction in this dispute. The Judgement, however, avoids the jurisdictional issue, asserting that questions related to the observance of "the inherent limitations on the exercise of the Court's judicial function" require to be examined in priority to matters of jurisdiction (paras. 22 and 23). We cannot agree with this assertion. The existence or lack of jurisdiction with respect to a specific dispute is a basic statutory limitation on the exercise of the Court's judicial function and should therefore have been determined in the Judgement as Article 67, paragraph 6, of the Rules of Court seems clearly to expect.

28. It is difficult to us to understand the basis upon which the Court could reach substantive findings of fact and law such as those imposing on France an international obligation to refrain from further nuclear tests in the Pacific, from which the Court deduces that the case "no longer has any object", without any prior finding that the Court is properly seised of the dispute and has jurisdiction to entertain it. The present Judgement by implication concedes that a dispute existed at the time of the Application. That differentiates this case from those in which the issue centres on the existence ab initio of any dispute whatever. The findings made by the Court in other cases as to the existence of a dispute at the time of the Application were based on the Court's jurisdiction to determine its own competence, under the Statute. But in the present case the Judgement disclaims any exercise of that statutory jurisdiction. According to the Judgement the dispute has disappeared or has been resolved by engagements resulting from unilateral statements in respect of which the Court "holds that they constitute an undertaking possessing legal effect" (para.51) and "finds that France has undertaken the obligation, to hold no further nuclear tests in the atmosphere in the South Pacific" (para.52). In order to make such a series of findings the Court must possess jurisdiction enabling it to examine and determine the legal effect of certain statements and declarations which it deems relevant and connected to the original dispute. The invocation of an alleged "inherent jurisdiction ... to provide for the orderly settlement of all matters in dispute" in paragraph 23 cannot provide a basis to support the conclusions reached in the present Judgement which pronounce upon the substantive rights and obligations of the Parties. An extensive interpretation appears to be given in the Judgement to that inherent jurisdiction "on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes of" providing "for the orderly settlement of all matters in dispute" (para.23). But such an extensive interpretation of the alleged "inherent jurisdiction" would blur the line between the jurisdiction conferred to the Court by the Statute and the jurisdiction resulting from the agreement of States. In consequence, it would provide an easy and unacceptable way to bypass a fundamental requirement firmly established in the jurisprudence of the Court and international law in general, namely that the jurisdiction of the Court is based

on the consent of States.

The conclusion thus seems to us unavoidable that the Court, in the process of rendering the present Judgement, has exercised substantive jurisdiction without having first made a determination of its existence and the legal grounds upon which that jurisdiction rests.

29. Indeed, there seems to us to be a manifest contradiction in the jurisdictional position taken up by the Court in the Judgement. If the so-called "inherent jurisdiction" is considered by the Court to authorize it to decide that France is now under a legal obligation to terminate atmospheric nuclear tests in the South Pacific Ocean, why does the "inherent jurisdiction" not also authorize it on the basis of that same international obligation, to decide that the carrying out of any further such tests would "not be consistent with applicable rules of international law" and to order that "the French Republic shall not carry out any further such tests"? In other words, if the Court may pronounce upon France's legal obligations with respect to atmospheric nuclear tests, why does it not draw from this pronouncement the appropriate conclusions in relation to the Applicant's submissions instead of finding them no longer to have any object? The above observation is made solely with reference to the concept of "inherent jurisdiction" developed in the Judgement and is of course not addressed to the merits of the case, which are not before the Court at the present stage.

Since we consider a finding both as to the Court's jurisdiction and as to the admissibility of the Application to be an essential basis for the conclusions reached in the Judgement as well as for our reasons for dissenting from those conclusions, we now proceed to examine in turn the issues of jurisdiction and admissibility which confront the Court in the present case.

PART II
JURISDICTION

INTRODUCTION

30. At the outset of the present proceedings the French Government categorically denied that the Court has any competence to entertain Australia's Application of 9 May 1973; and it has subsequently continued to deny that there is any legal basis for the Court's Order of 22 June 1973 indicating provisional measures of protection or for the exercise of any jurisdiction by the Court with respect to the matters dealt with in the Application. The Court, in making that Order for provisional measures, stated that the material submitted to it led to the conclusion, at that stage of the proceedings, that the jurisdictional provisions invoked by the Applicant appeared "prima facie, to afford a basis on which the jurisdiction of the Court might be founded". At the same time, it directed that the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application should be the subject of the pleadings in the next stage of the case, that is, in the proceedings with which the Court is now concerned. In our view, these further proceedings confirm that the jurisdictional provisions invoked by the Applicant not merely afforded a wholly sufficient basis for the Order of 22 June 1973 but also provided a valid basis for establishing the competence of the Court in the present case.31. The Application specifies as independent and alternative bases of the Court's jurisdiction:

> "(i) Article 17 of the General Act for the Pacific Settlement of International Disputes, 1928, read together with Articles 36(1) and 37 of the Statute of the Court. Australia and the French Republic both acceded to the General Act on 21 May 1931. The texts of the conditions to which their accessions were declared to be subject are set forth in Annex 15 and Annex 16 respectively.
>
> (ii)Alternatively, Article 36 (2) of the Statute of the Court. Australia and the French Republic have both made declarations thereunder."

It follows that, if there are indeed two independent and alternative ways of access to the Court and one of them is shown to be effective to confer jurisdiction in the present case, this will suffice to establish the Court's jurisdiction irrespective of the effectiveness or ineffectiveness of the other. As the Court stated in its Judgement on the Appeal Relating to the Jurisdiction of the ICAO Council, if the Court is invested with jurisdiction on the basis of one set of jurisdictional clauses "it becomes irrelevant to consider the objections to other possible bases of jurisdiction" (I.C.J. Reports 1972, p.60).

The General Act of 1928

32. Article 17 of the General Act of 1928 reads as follows:

> "All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.
>
> It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice."

The disputes "mentioned in Article 36 of the Statute of the Permanent Court" are all or any of the classes of legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.

33. The same four classes of legal disputes are reproduced word for word, in Article 36(2) - the optional clause - of the Statute of the present Court which, together with the declarations of Australia and France, constitutes the second basis of jurisdiction invoked in the Application.

34. Accordingly, the jurisdiction conferred on the Court under Article 17 of the General Act of 1928 and under the optional clause of the present Statute, in principle, covers the same disputes: namely the four classes of legal disputes listed above. In the present instance, however, the bases of jurisdiction resulting from these instruments are clearly not co-extensive because of certain differences between the terms of the Parties' accessions to the General Act and the terms of their declarations accepting the optional clause. In particular, France's declaration under the optional clause excepts from the Court's jurisdiction "disputes concerning activities connected with national defence", whereas no such exception appears in her accession to the General Act of 1928. Consequently, it is necessary to examine the two bases of jurisdiction separately.

35. The French Government, in its letter of 16 May 1973 addressed to the Registrar, and in the Annex to that letter, put forward the view that the present status of the General Act of 1928 and the attitude of the Parties, more especially of France, in regard to it preclude that Act from being considered today as a clear expression of France's will to accept the Court's jurisdiction. It maintained that, since the demise of the League of Nations, the Act of 1928 is recognized either as no longer being in force or as having lost its efficacy or as having fallen into desuetude. In support of this view, the French Government agreed that the Act of 1928 was, ideologically, an integral part of the League of Nations system "in so far as the pacific settlement of international disputes had necessarily in that system to accompany collective security and disarmament"; that there was correspondingly a close link between the Act and the Structures of the League, the Permanent Court of International Justice, the Council, the Secretary-General, the States Members and the Secretariat; that these links were emphasized in the terms of certain of the accessions to the Act, including those of Australia, New Zealand and France; and that this was also shown by the fact that Australia and New Zealand, in acceding to the Act, made reservations regarding disputes with States not members of the League. It further argued that the integration of the Act into the structure of that League of Nations was shown by the fact that, after the latter's demise, the necessity was recognized of a revision of the Act, substituting new terms for those of the defunct system instead merely of relying on the operation of Article 37 of the Statute of the Court. This, according to the French Government, implied that the demise of the League was recognized as having rendered it impossible for the General Act of 1928 to continue to function normally.

36. The fact that the text of the General Act of 1928 was drawn up and adopted within the League of Nations does not make it a treaty of that Organization; for even a treaty adopted within an organization remains the treaty of its parties. Furthermore, the records of the League of Nations Assembly show that it was deliberately decided not to make the General Act an integral part of the League of Nations structure (Ninth Ordinary Session, Minutes of the First Committee, p.68); that the General Act was not intended to be regarded as a constitutional document of the League or adjunct of the Covenant (ibid., p.69); that the General Act was envisaged as operating parallel to, and not as part of the League of Nations system (ibid., p.71) and that the substantive obligations of the parties under the General Act were deliberately made independent of the functions of the League of Nations. Stressing the last point, Mr. Rolin of Belgium said specifically:

> "The intervention of the Council of the League was not implied as a matter of necessity in the General Act; the latter had been regarded as being of use in connection with the general work of the League, but it had no administrative or constitutional relationship with it." (Ibid., p.71; emphasis added.)

That the French Government also then understood the pacific settlement system embodied in the General Act to be independent of that of the Covenant of the League of Nations was made clear when the ratification of the Act was laid before the French Chambre des deputés, whose Commission des affaires étrangères explained:

> "... alors que, dans le système conçu par les fondateurs de la Société des Nations, l'action du Conseil, telle quelle est prévue par l'article 15, constitue un mode normal de règlement des différends au même titre que la procédure d'arbitrage, l'Acte général, au contraire, ignore complètement le Conseil de la Société des Nations" (Journal officiel, documents parlementaires, Chambre, 1929, p.407; emphasis added).

37. Australia and France, it is true, inserted reservations in their accessions to the General Act designed to ensure the priority of the powers of the Council of the League over the obligations which they were assuming by acceding to the Act. But the fact that they and some other States thought it desirable so to provide in their instru-

ments of accession seems to testify to the independent and essentially autonomous character of the General Act rather than to its integration in the League of Nations system. Similarly, the fact that, in order to exclude disputes with non-member States from their acceptance of obligations under the Act, Australia and some other States inserted an express reservation of such disputes in their instruments of accession, serves only to underline that the Covenant and the General Act were separate systems of pacific settlement. The reservation was needed for the very reason that the General Act was established as a universal system of pacific settlement independent of the League of Nations and open to States not members of the Organization, as well as to Members (cf. Reports of Mr. Politis, as Rapporteur, 18th Plenary Meeting of 25 September 1928, at p.170).

38. Nor do we find any more convincing the suggested "idiological integration" of the General Act in the League of Nations system: i.e., the thesis of its inseparable connection with the League's trilogy of collective security, disarmament and pacific settlement. Any mention of a connection between those three subjects is conspicuously absent from the General Act, which indeed makes no reference at all to security or disarmament, unlike certain other instruments of the same era. In these circumstances, the suggestion that the General Act was so far intertwined with the League of Nations system of collective security and disarmament as necessarily to have vanished with that system cannot be accepted as having any solid basis.

39. Indeed, if that suggestion had a sound basis, it would signify the extinction of numerous other treaties of pacific settlement belonging to the same period and having precisely the same ideological approach as the General Act of 1928. Yet these treaties, without any steps having been taken to amend or to "confirm" them, are unquestionably considered as having remained in force despite the dissolution of the League of Nations in 1946. As evidence of this two examples will suffice: the Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927, Article 17 of which was applied by this Court as the source of its jurisdiction in the *Barcelona Traction, Light and Power Company, Limited case* (*I.C.J. Reports 1964*, pp.26-39); and the Franco-Spanish Treaty of Arbitration of 10 July 1929 on the basis of which France herself and Spain constituted the *Lac Lanoux* arbitration in 1956 (UNRIAA, Vol. 12, at p.285). In truth, these treaties and the General Act itself, although largely inspired by the League of Nations aim of promoting the peaceful settlement of disputes together with collective security and disarmament, also took their inspiration from the movement for the development of international arbitration and judicial settlement which had grown up during the nineteenth century and had played a major role at the Hague Peace Conferences of 1899 and 1907. It was, moreover, the French Government itself which in the General Assembly in 1948 emphasized this quite separate source of the "idiology" of the General Act of 1928. Having referred to the General Act as "a valuable document inherited from the League of Nations", the French delegation added that it constituted:

> "... an integral part of a long tradition of arbitration and conciliation which had proved itself effective long before the existence of the League itself". (G.A, O.R., Third Session, Plenary Meeting, 199th Meeting, p.193).

That tradition certainly did not cease with the League of Nations.

40. The General Act of 1928 was, however, a creation of the League of Nations era, and the machinery of pacific settlement which it established almost inevitably exhibited some marks of that origin. Thus, the tribunal to which judicial settlement was to be entrusted was the Permanent Court of International Justice (Art.17); if difficulties arose in agreeing upon members of a conciliation commission, the parties were empowered, as one possible option, to entrust the appointment to the President of the Council of the League (Art.6); the Conciliation Commission was to meet at the seat of the League, unless otherwise agreed by the parties or otherwise decided by the Commission's President (Art.9); a Conciliation Commission was also empowered in all circumstances to request assistance from the Secretary-General of the League (Art.9); if a deadlock arose in effecting the appointment of members of an arbitral tribunal, the task of making the necessary appointments was entrusted to the President of the Permanent Court of International Justice (Art.23); in cases submitted to the Permanent Court, it was empowered to lay down "provisional measures" (Art.33), and to decide upon any third party's request to intervene (Art.36) and its Registrar was required to notify other parties to a multilateral convention the construction of which was in question (Art.37); the Permanent Court was also entrusted with a general power to determine disputes relating to the interpretation or application of the Act (Art.41); the power to extend invitations to non-member States to become parties to the General Act was entrusted to the Council of the League (Art.43); and, finally, the depositary functions in connection with the Act were entrusted to the Secretary-General of the League (Arts.43-47). The question has therefore to be considered whether these various links with the Permanent Court and with the Council of the League of Nations and its Secretariat are of such a character that the dissolution of these organs in 1946 had the necessary result of rendering the General Act of 1928 unworkable and virtually a dead letter.

41. In answering this question, account has first to be taken of Article 37 of the Statute of this Court, on which the Applicant specifically relies for the purpose of founding the Court's jurisdiction on Article 17 of the 1928

Act. Article 37 of the Statute reads:

> "Whenever a treaty or convention in force provides for reference of a matter ... to the Permanent Court of International Justice, the matter shall, as between the parties of the present Statute, be referred to the International Court of Justice."

The objects and purposes of that provision were examined at length by this Court in the *Barcelona Traction, Light and Power Company Limited case (New Application, Preliminary Objections, I.C.J. Reports 1964, at pp.31-36)* where, inter alia, it said:

> "The intention therefore was to create a special régime which, as between the parties to the Statute, would automatically transform references to the Permanent Court in these jurisdictional clauses, into references to the present Court.
>
> In these circumstances it is difficult to suppose that those who framed Article 37 would willingly have contemplated, and would not have intended to avoid, a situation in which the nullification of the jurisdictional clauses whose continuation it was desired to preserve, would be brought about by the very event - the disappearance of the Permanent Court - the effects of which Article 37 both foresaw and was intended to parry; or that they would have viewed with equanimity the possibility that, although the Article would preserve many jurisdictional clauses, there might be many others which it would not; thus creating that very situation of diversification and imbalance which it was desired to avoid." (P.31, emphasis added.)

In a later passage the Court was careful to enter the caveat that Article 37 was not intended "to prevent the operation of causes of extinction other than the disappearance of the Permanent Court" (ibid., p.34). However, it continued:

> "And precisely because it was the sole object of Article 37 to prevent extinction resulting from the particular cause which the disappearance of the Permanent Court would represent, it cannot be admitted that this extinction should in fact proceed to follow from this very event itself." (Ibid., emphasis added.)

42. The Court's observations in that case apply in every particular to the 1928 Act. It follows that the dissolution of the Permanent Court in 1946 was in itself wholly insufficient to bring about the termination of the Act. Unless some other "cause of extinction" is shown to prevent the Act from being considered as "a treaty or convention in force" at the date of the dissolution of the Permanent Court, Article 37 of the Statute automatically has the effect of substituting this Court for the Permanent Court at the tribunal designated in Article 17 of the General Act for the judicial settlement of disputes. And Article 37 in our opinion also has the effect of automatically substituting this Court for the Permanent Court in Articles 33, 36, 37 and 41 of the General Act.

43. Account has further to be taken of the arrangements reached in 1946 between the Assembly of the League and the General Assembly of the United Nations for the transfer to the United Nations Secretariat of the depositary functions performed by the League Secretariat with respect to treaties. Australia and France, as Members of both organizations, were parties to these arrangements and are, therefore, clearly bound by them. In September 1945 the League drew up a List of Conventions with Indication of the Relevant Articles Conferring Powers on the Organs of the League of Nations, the purpose of which was to facilitate consideration of the transfer of League functions to the United Nations in certain fields. In this list appeared the General Act of 1928, and there can be no doubt that when resolutions of the two Assemblies provided in 1946 for the transfer of the depository functions of the League Secretariat to the United Nations Secretariat, the 1928 Act was understood as, in principle, included in those resolutions. Thus, the first list published by the Secretary-General in 1949 of multilateral treaties in respect of which he acts as depositary contained the General Act of 1928 (Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary, UN Publications, 1949, Vol.9). Moreover, in a letter of 12 June 1974, addressed to Australia's Permanent Representative and presented by Australia to the Court, the Secretary-General expressly confirmed that the 1928 Act was one of the "multilateral treaties placed under the custody of the Secretary-General by virtue of General Assembly resolution 24 (I) of 12 February 1946".

44. Consequently, on the demise of the League of Nations in 1946, the depositary functions entrusted to the Secretary-General and Secretariat of the League of Nations by Article 43 to 47 of the 1928 Act were automatically transferred to the Secretary-General and Secretariat of the United Nations. It follows that the demise of the League of Nations could not possibly constitute "a cause of extinction" of the General Act by reason of the references to the League Secretariat in those Articles.

45. The disappearance of the League of Nations system, it is true, did slightly impair the full efficacy of the machinery provided for in the 1928 Act. In conciliation, recourse could no longer be had to the President of the Council as one of the means provided by Article 6 of the Act for resolving disagreements in the appointment of members of the conciliation commission; nor could the commission any longer assert the right under Article 9 of the Act to meet at the seat of the League and to request assistance from the Secretary-General of the League. As to arbitration, it becomes doubtful whether Article 37 of the Statute would suffice, in the event of the parties' disagreement, to entrust to the President of this Court the extra-judicial function of appointing members of an arbitral tribunal entrusted by Article 23 of the

1928 Act to the President of the Permanent Court. In both conciliation and arbitration, however, the provisions involving League organs concerned machinery of a merely alternative or ancillary character, the disappearance of which could not be said to render the 1928 Act as a whole unworkable or impossible of performance. Nor could their disappearance be considered such a fundamental change of circumstances as might afford a ground for terminating or withdrawing from the treaty (cf. Art.62 of the Vienna Convention on the Law of Treaties). Moreover, non of these provisions touched, still less impaired, the procedure for judicial settlement laid down in Article 17 of the 1928 Act.

46. Another provision the efficacy of which was impaired by the dissolution of the League was Article 43, under which the power to open accession to the General Act to additional States was given to the Council of the League. The disappearance of the Council put an end to this method of widening the operation of the 1928 Act and prejudiced, in consequence, the achievement of a universal system of pacific settlement founded on the Act. It did not, however, impair in any way the operation of the Act as between its parties. Indeed, in principle, it did not preclude the parties to the Act from agreeing among themselves to open it to accession by additional States.

47. Analysis of the relevant provisions of the General Act of 1928 thus suffices, by itself, to show that neither the dissolution of 1946 of the Permanent Court of International Justice nor that of the several organs of the League of Nations can be considered as "a cause of extinction" of the Act. This conclusion is strongly reinforced by the fact, already mentioned, that a large number of treaties for the pacific settlement of disputes, clauses of which make reference to organs of the League, are undoubtedly accepted as still in force; ;and that some of them have been applied in practice since the demise of the League. For present purposes, it is enough to mention the application by France herself and by Spain of their bilateral Treaty of Arbitration of 10 July 1929 as the basis for the constitution of the *Lac Lanoux* Arbitral Tribunal in 1946 (UNRIAA, Vol.12, at p.282). That convention was conspicuously a treaty of the League of Nations era, containing references to the Covenant and to the Council of the League as well as to the Permanent Court. Moreover, some of those references did not deal with the mere machinery of peaceful settlement procedures but with matters of substance. Article 20, for example expressly reserved to the parties, in certain events, a right of unilateral application to the Council of the League;; and Article 21, which required provisional measures to be laid down by any tribunal dealing with a dispute under the treaty, provided that "it shall be the duty of the Council of the League of Nations, if the question is brought before it, to ensure that suitable provisional measures be taken". Those Articles provided for much more substantial links with organs of the League than anything contained in the 1928 Act; yet both France and Spain appear to have assumed that the treaty was in force in 1956 notwithstanding the demise of the League.

The So-Called Revision of the General Act

48. In the case of the 1928 Act, the French Government maintains that the so-called revision of the General Act undertaken by the General Assembly in 1948 implies that the demise of the League was recognized as having rendered it impossible for the 1928 Act to continue to function normally. This interpretation of the proceedings of the General Assembly and the Interim Committee regarding the "revision" of the Act does not seem to us sustainable. Belgium introduced her proposal for the revision of the 1928 Act in the Interim Committee at a time when the General Assembly was engaged in revising a number of treaties of the League of Nations era in order to bring their institutional machinery and their terminology into line with the then new United Nations system. It is therefore understandable that, notwithstanding the automatic transfers of functions already effected by Article 37 of the Statute and General Assembly resolution 24 (I), the Interim Committee and the General Assembly should have concerned themselves with the replacement of the references in the General Act to the Permanent Court, the Council of the League and the League Secretariat by references to their appropriate counterparts in the United Nations system.

49. In any event, what began as a proposal for the revision of the 1928 General Act was converted in the Interim Committee into the preparation of a text of a new Revised General Act which was to be opened for accession as an entirely independent treaty. This was to avoid the difficulty that certain of the parties to the 1928 Act, whose agreement was necessary for its revision, were not members of the United Nations and not taking part in the revision (cf. Arts. 39 and 40 of the Vienna Convention on the Law of Treaties). As the Belgian delegation explained to the Interim Committee, the consent of the parties to the 1928 Act would now be unnecessary "since in its final form their proposal did not suppress or modify the General Act, established in 1928, but left it intact as also, therefore, whatever rights the parties to that Act might still derive from it" (emphasis added). This explanation was included in the Committee's report to the General Assembly and, in our opinion, clearly implies that the 1928 Act was recognized to be a treaty still in force in 1948. Moreover, the records of the debates contain a number of statements by individual delegations indicating that the 1928 Act was then understood by them to be in force; and those statements did not meet with contradiction from any quarter.

50. Equally, the mere fact that the General Assembly drew up and opened for accession a new Revised Gen-

eral Act could not have the effect of putting an end to, or undermining the validity of, the 1928 Act. In the case of the amendment of multilateral treaties, the principle is well settled that the amending treaty exists side by side with the original treaty, the latter remaining in force unamended as between those of its parties which have not established their consent to be bound by the amending treaty (cf. Art.40 of the Vienna Convention on the Law of Treaties). Numerous examples of the application of this principle are to be found precisely in the practice of the United Nations regarding the amendment of League of Nations Treaties; and it was this principle to which the General Assembly gave expression in the preamble to its resolution 268A (III), by which it instructed the Secretary-General to prepare and open to accession the text of the Revised Act. The preamble to the resolution, inter alia, declared:

"Whereas the General Act, thus amended, will only apply as between States having acceded thereto, and, *as a consequence, will not affect the rights of such States, parties to the Act as established on 26 September 1928, as should claim to invoke it in so far as it might still be operative.*" (Emphasis added.)

It is therefore evident that the General Assembly neither intended that the Revised General Act should put an end to its predecessor, the 1928 Act, nor understood that this would be the result of its adoption of the Revised Act. Such an intention in the General Assembly would indeed have been surprising when it is recalled that the "revision" of the General Act was undertaken in the context of a programme for encouraging the development methods for the pacific settlement of disputes.

51. In the above-quoted clause of the preamble, it is true, resolution 268A (III) qualifies the statement that the amendments would not affect rights of parties to the 1928 Act by the words "in so far as it might still be operative". Moreover, in another clause of the preamble the resolution also speaks of its being "expedient to restore to the General Act its original efficacy, impaired by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared". We cannot, however, accept the suggestion that by these phrases the General Assembly implied that the 1928 Act was no longer capable of functioning normally. These phrases find a sufficient explanation in the fact, which we have already mentioned, that the disappearance of the League organs and the Permanent Court would affect certain provisions regarding alternative methods for setting up conciliation commissions or arbitral tribunals, which might in the event of disagreements impair the efficacy of the procedures provided by the Act.

52. But there was also another reason for including those words in the preamble to which the Interim Committee drew attention in its report (UN doc. A/605, para. 46):

> "Thanks to a few alterations, the new General Act would, for the benefit of those States acceding thereto, restore the original effectiveness of the machinery provided in the Act of 1928, an Act which, though still theoretically in existence, has largely become inapplicable.
>
> It was noted, for example, that the provisions of the Act relating to the Permanent Court of International Justice had lost much of their effectiveness in respect of parties which are not members of the United Nations or parties to the Statute of the International Court of Justice." (Emphasis added.)

In 1948 several parties to the 1928 Act were neither members of the United Nations nor parties to the Statute of this Court so that, even with the aid of Article 37 of the Statute, the provisions in the 1928 Act on judicial settlement were not "operative" as between them and other parties to the Act. Therefore, in this respect also it could properly be said that the original efficacy of the 1928 Act had been impaired. On the other hand, the clear implication, a contrario, of the Interim Committee's report was that the provisions of the 1928 Act concerning judicial settlement - Article 17 - had not lost their efficacy as between those of its parties who were parties to the Statute of this Court.

The Question of the Continued Force of the 1928 Act

53. Equally, we do not find convincing the thesis put forward by the French Government that the 1928 Act cannot serve as a basis for the competence of the Court because of "the desuetude into which it has fallen since the demise of the League of Nations system". Desuetude is not mentioned in the Vienna Convention on the Law of Treaties as one of the grounds for termination of treaties, and this omission was deliberate. As the International Law Commission explained in its report on the Law of Treaties:

> "...while 'obsolescence' or 'desuetude' may be a factual cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty" (Year-book of the International Law Commission, 1966, Vol.II, p.237).

In the present instance, however, we find it impossible to imply from the conduct of the parties in relation to the 1928 Act, and more especially from that of France prior to the filing of the Application in this case, their consent to abandon the Act.

54. Admittedly, until recently the Secretary-General was not called upon to register any new accession or other notification in relation to the 1928 Act. But this cannot be considered as evidence of a tacit agreement to aban-

don the treaty, since multilateral treaties not infrequently remain in force for long periods without any changes in regard to their parties.

55. Nor is such evidence to be found in the fact, referred to in the Annex to the French Government's letter of 16 May 1973, that "Australia and Canada did not feel, in regard to the Act, any need to regularize their reservations of 1939 as they did those expressed with regard to their optional declarations". The reservations in question, made by both countries four days after the outbreak of the Second World War, notified the depositary that they would not regard their accessions to the 1928 Act as "covering or relating to any dispute arising out of events occurring during the present crisis". These reservations were not in accord with Article 45 of the 1928 Act, which permitted modification of the terms of an accession only at the end of each successive five-year period for which the Act runs unless denounced. But both countries justified the reservations on the basis of the breakdown of collective security under the League and the resulting fundamental changes in the circumstances existing when they acceded to the Act; and if that justification was well founded there was no pressing need to "regularize" their reservations in 1944 when the current five-year period was due to expire. Nor would it be surprising if in that year of raging war all over the globe they should not have had their attention turned to this question. Moreover, the parallelism suggested between the position of these two countries under the 1928 Act and under the optional clause is in any case inexact. Their declarations under the optional clause expired in 1940, so that they were called upon to re-examine their declarations; under Article 45 of the 1928 Act, on the other hand, their accessions remained in force indefinitely unless denounced.

56. A more general argument in the Annex to the letter of 16 May 1973, regarding a lack of parallelism in States' acceptance respectively of the 1928 Act and the optional clause also appears to us unconvincing. The desuetude of the 1928 Act, it is said, ought to be inferred from the following facts: up to 1940 reservations made to the 1928 Act and to the optional clause were always similar but after that date the parallelism ceased; reservations to the optional clause then became more restrictive and yet the same States appeared unconcerned with the very broad jurisdiction to which they are said to have consented under the Act.

57. Even before 1940, however, the suggested parallelism was by no means complete. Thus, France's declaration of 19 September 1929, accepting the optional clause, did not contain the reservation of matters of domestic jurisdiction which appeared in her accession to the 1928 Act; and the declarations made in that period by Australia, Canada, New Zealand and the United Kingdom did not exclude disputes with non-member States, as did their accessions to the 1928 Act. The provisions of Articles 39 and 45 of the Act in any case meant that there were material differences in the conditions under which compulsory jurisdiction was accepted under the two instruments. Moreover, even granting that greater divergences appear in the two systems after 1940, this is open to other explanations than the supposed desuetude of the 1928 Act. The more striking of these divergences arise from reservations to the optional clause directed to specific disputes either already existing or imminently expected. Whereas under the optional clause many States have placed themselves in a position to change the terms of their declarations in any manner they may wish, without notice and with immediate effect, their position under the 1928 General Act is very different by reason of the provisions of Articles 39 and 45 regulating the making and taking effect of reservations. Because of these provisions a new reservation to the 1928 Act directed to a specific matter of dispute may serve only to alert the attention of the other party to the State's obligations under the Act and hasten a decision to institute proceedings before the reservation becomes effective under Article 45. In short, any parallelism between the optional clause and the 1928 Act is in this respect an illusion.

58. As to the further suggestion in the above-mentioned letter that if the 1928 Act were still in force the refusal of Australia, New Zealand and France to become parties to the Revised General Act would be difficult to explain, this does not appear to us to bear a moment's examination. Since 1946, the 1928 Act has had a limited number of existing parties and has been open to accession only by a small and finite group of other States, while the Revised General Act is open to accession by a much wider and still expanding group of States. Accordingly, it is no matter for surprise that parties to the 1928 General Act should have been ready simply to continue as such, while not prepared to take the new step of assuming more wide-ranging commitments under the Revised Act. Even more decisive is the fact that, of the six parties to the 1928 Act which have been the parties to the Revised Act, at least four are on record as formally recognizing that the 1928 Act is also still in force for them.

59. It follows that, in our opinion, the various considerations advanced in the French Government's letter and Annex of 16 May 1973 fall far short of establishing its thesis that the 1928 Act must now be considered as having fallen into desuetude. Even if this were not the case, the State practice in relation to the Act in the post-war period, more especially that of France herself, appears to us to render that thesis manifestly untenable.

Evidence of the 1928 Act's Continuance in Force

60. Between the dissolution of the League of Nations in April 1946 and Australia's invocation of the 1928 Act in her Application of 9 May 1973 there occurred a number

of examples of State practice which confirm that, so far from abandoning the Act, its parties continued to recognize it as a treaty in force. The first was the conclusion of the Franco-Siamese Settlement Agreement on 17 November 1946 for the purpose of re-establishing the pre-war territorial situation on Siam's borders and renewing friendly relations between the two countries. Siam was not a party to the General Act of 1928, but in the Franco-Siamese Treaty of Friendship of 1937 she had agreed to apply the provisions of the Act for the settlement of any disputes with France. Under the Settlement Agreement of 1946 France and Siam agreed to constitute immediately "a Conciliation Commission, composed of the representatives of the Parties and three neutrals, in accordance with the General Act of Geneva of 26 September 1928 for the Pacific-Settlement of International Disputes, which governs the constitution and working of the Commission". The 1928 Act, it is true, applied between France and Siam, not as such, but only through being incorporated by reference into the 1937 Treaty of Friendship. But it is difficult to imaging that in November 1946, a few months after she had participated in the dissolution of the League, France should have revived the operation of the provisions of the 1928 Act in her relations with Siam if she had believed the dissolution of the League to have rendered that Act virtually defunct.

61. In 1948-1949, as we have already pointed out, a number of member States in the debates and the General Assembly in resolution 268A (III) referred to the 1928 Act as still in force, and met with no contradiction. In 1948 also the 1928 Act was included in New Zealand's official treaty list not published that year. Again in 1949 the Norwegian Foreign Minister, in reporting to Parliament on the Revised Act, stated that the 1928 Act was still in force, and in 1950 the Swedish Governent did likewise in referring the Revised Act to the Swedish Parliament. Similarly, in announcing Denmark's accession to the Revised Act in 1952, the Danish Government referred to the 1928 Act as still in force.

62. Accordingly, France was doing no more than conform to the general opinion when in 1956 and 1957 she made the 1928 Act one of the bases of her claim against Norway before this Court in the Certain Norwegian Loans case (I.C.J. Reports 1957, p.9). In three separate passages of her written pleadings France invoked the 1928 Act as a living, applicable, treaty imposing an obligation upon Norway to submit the dispute to arbitration; for in each of these passages she characterized Norway's refusal to accept arbitration as a violation, inter alia, of the General Act of 1928 (*I.C.J. Pleadings, Certain Norwegian Loans case*, Vol.I, at pp. 172, 173 and 180). She did so again in a diplomatic Note of 17 September 1956, addressed to the Norwegian Government during the course of the proceedings and brought to the attention of the Court (ibid., p.211), and also at the oral hearings (ibid., Vol.II, p.60). The reason was that Norway was not entitled unilaterally to modify the conditions of the loans in question "without negotiation with the holders, with the French State which has adopted the cause of its nationals, or without arbitration ..." *(I.C.J. Reports 1957, at. p.18, emphasis added).*

Consequently, the explanation given in the Annex to the French Government's letter of 16 May 1973 that it had confined itself in the *Certain Norwegian Loans case* "to a very brief reference to the General Act, without relying on it expressly as a basis of its claim", is not one which it is possible to accept.

63. Nor do we find the further explanation given by the French Government in that Annex any more convincing. In effect this is that, if the 1928 Act had been considered by France to be valid at the time of the *Certain Norwegian Loans case*, she would have used it to found the jurisdiction of the Court in that case so as to "parry the objection which Norway was to base upon the reciprocity clause operating with reference to the French Declaration"; and that her failure to found the Court's jurisdiction on the 1928 Act "is only explicable by the conviction that in 1955 it had fallen into desuetude". This explanation does not hold water for two reasons. First, it does not account for the French Government's repeated references to the 1928 Act as imposing an obligation on Norway in 1955 to arbitrate, one of which included a specific mention of Chapter II of the Act relating to judicial settlement. Secondly, it is not correct that France by founding the Court's jurisdiction on the Act, would have been able to escape the objection to jurisdiction under the optional clause raised by Norway on the basis of a reservation in France's declaration; and it is unnecessary to look further than to Article 31, paragraph I, of the 1928 Act for the reason why France did not invoke the Act as a basis for the Court's jurisdiction. This paragraph reads:

> "In the case of a dispute the occasion of which, according to the municipal law of one of the parties, falls within the competence of its judicial or administrative authorities, *the party in question may object to the matter in dispute being submitted for settlement by the different methods laid down in the present General Act until a decision with final effect has been pronounced* ..." (Emphasis added.)

Since the French bond holders had deliberately abstained from taking any action in the Norwegian tribunals, the above clear and specific provision of Article 31 constituted a formidable obstacle to establishing the Court's jurisdiction on the basis of the 1928 Act.

64. Thus, the position taken by France in the Certain Norwegian Loans case, so far from being explicable only on the basis of a conviction of the desuetude of the Act, provides evidence of the most positive kind of her belief in its continued validity and efficacy at that date. As to

Norway, it is enough to recall her Government's statement in Parliament in 1949 that the 1928 Act remained in force, and to add that at no point in the *Certain Norwegian Loans case* did Norway question either the validity or the efficacy of the Act as an instrument applicable between herself and France at that date.

65. Furthermore, the interpretation placed in the Annex on the treatment of the 1928 Act by the Court and Judge Basdevant in the *Certain Norwegian Loans case* does not seem to us to be sustained by the record of the case. The Court did not, as the French Government maintains, have to decide the question of the 1928 Act. Stressing that France had based her Application "clearly and precisely on the Norwegian and French declarations under Article 36, paragraph 2, of the Statute", the Court held it "would not be justified in seeking a basis for its jurisdiction different from that which the French Government itself set out in its Application ...". Having so held, it examined the question of its jurisdiction exclusively by reference to the parties' declarations under the optional clause and made no mention of the 1928 Act. As to Judge Basdevant, at the outset of his dissenting opinion (p.71) he emphasized that on the question of jurisdiction he did not dispute the point of departure on which the Court had placed itself. In holding that the matters in dispute did not fall within the reservation of matters of domestic jurisdiction, on the other hand, expressly relied on the 1928 Act as one of his grounds for so holding. The fact that the Court did not follow him in this approach to the interpretation of the reservation cannot, in our view, be understood as meaning that it rejected his view as to the 1928 Act's being in force between France and Norway. Indeed, if that had been the case, it is almost inconceivable that Judge Basdevant could have said, as he did, of the 1928 Act: "At no time has any doubt been raised as to the fact that this Act is binding as between France and Norway" (I.C.J. Reports 1957, p.74).

66. The proceedings in the Certain Norwegian Loans case, therefore, in themselves constitute unequivocal evidence that the 1928 Act did survive the demise of the League and was recognized by its parties, in particular by France, as in force in the period 1955-1957. We may add that in this period statements by parties to the 1928 Act are also to be found in the records of the proceedings of the Council of Europe leading to the adopting of the European Convention for the Pacific Settlement of International Disputes in 1957, which show that they considered the Act to be still in force. A Danish delegate, for example, stated in the Consultative Assembly in 1955, without apparent contradiction from anyone, that the 1928 Act "binds twenty States".

67. No suggestion is made in the letter of 16 May 1973 or its Annex that, if the 1928 Act was in force in 1957, there was nevertheless some development which deprived it of validity before Australia filed her Application; nor does the information before the Court indicate that any such development occurred. On the contrary, the evidence consistently and pointedly confirms the belief of the parties to the 1928 Act as to its continuance in force. In 1966 Canada's official publication *The Canada Treaty Series:* 1928-1964 listed the 1928 Acct as in force; as likewise did Finland's list in the following year. In Sweden the treaty list published by footnote "still in force as regards some countries". In 1971 the Netherlands Minister for Foreign Affairs, in submitting the Revised Act for parliamentary approval, referred to the 1928 Act as an agreement to which the Netherlands is a party and, again, as an Act "which is still in force for 22 States"; and Australia's own official treaty list published in that year included the 1928 Act. In addition, the 1928 Act appears in a number of unofficial treaty lists compiled in different countries.

68. As to France herself, there is nothing in the evidence to show any change of position on her part regarding the 1928 Act prior to the filing of Australia's Application on 9 May 1973. Indeed, a written reply to a deputy in the National Assembly, explaining why France was not contemplating ratification of the European Convention for the Pacific Settlement of Disputes, gives the opposite impression. That reply stated that, like the majority of European States, France was already bound by numerous obligations of pacific settlement amongst which was mentioned "l'Acte général d'arbitrage du 26 septembre 1928 revisé en 1949". The French Government, in a footnote in the Livre blanc sur les expériences nucléres, has drawn attention to the confused character of the reference to the 1928 Act revised in 1949. Even so, and however defective the formulation of the written reply, it is difficult to understand it in any other way than as confirming the position taken up by the French Government in the *Certain Norwegian Loans case*, that the 1928 Act was to be considered as a treaty in force with respect to France; for France had not ratified the Revised General Act and could be referred to as bound by the General Act only in its original form, the 1928 Act.

69. Accordingly, we are bound to conclude that the 1928 Act was a treaty in force between Australia and France on 9 May 1973 when Australia's Application in the present case was filed. Some months after the filing of the Application, on 10 January 1974, the French Government transmitted to the Secretary-General a notification of its denunciation of the Act, without prejudice to the position which it had taken regarding the lack of validity of the Act. Under the settled jurisprudence of the Court, however, such a notification could not have any retroactive effect on jurisdiction conferred upon the Court earlier by the filing of the Application; the *Nottebohm case* (*Preliminary Objection, I.C.J. Reports 1953*, at pp.120-124).

70. Nor, in our view, can the conclusion that the 1928

Act was a treaty in force between Australia and France on 9 May 1973 be in any way affected by certain action taken with respect to the Act since that date by two other States, India and the United Kingdom. In the case concerning *Trial of Pakistani Prisoners of War*[11], by a letter of 24 June 1973 India informed the Court of its view that the 1928 Act had ceased to be a treaty in force upon the disappearance of the organs of the League of Nations. Pakistan, however, expressed a contrary view and has since addressed to the Secretary-General a letter from the Prime Minister of Pakistan affirming that she considers the Act as continuing in force. Again, although the United Kingdom, in a letter of 6 February 1974, referred to doubts having been raised as to the continued legal force of the Act and notified the Secretary-General of its denunciation of the Act in conformity with the provisions of paragraph 2 of Article 45, it did so in terms which do not prejudge the question of the continuance in force of the Act. In any event, against these inconclusive elements of State practice in relation to the 1928 Act which have occurred since the filing of Australia's Application, we have to set the many indications of the Act's continuance in force, some very recent, to which we have already drawn attention. Moreover, it is axiomatic that the termination of a multilateral treaty requires the express or tacit consent of all the parties, a requirement which is manifestly not fulfilled in the present instance.

We are therefore clearly o the opinion that Article 17 of the 1928 Act, in combination with Article 37 of the Statute of the Court, provided Australia with a valid basis for submitting the *Nuclear Tests case* to the Court on 9 May 1973, subject only to any particular difficulty that might arise in the application of the Act between Australia and France by reason of reservations made by either of them. This question we now proceed to examine.

Applicability of the 1928 Act as Between

Australia and France

71. The French Government has urged in the Annex to its letter of 16 May 1973 that, even if the 1928 Act should be considered as not having lost its validity, it would still not be applicable as between Australia and France by reason of two reservations made by Australia to the Act itself and, in addition, a reservation made by France to its Declaration under the optional clause of 20 May 1966.

72. The Australian reservations to the 1928 Act here in question are (1) a clause allowing the temporary suspension of proceedings under the Act in the case of a dispute that was under consideration by the Council of the League of Nations and (2) another clause excluding from the scope of the Act disputes with any state party to the Act but not a member of the League of Nations. The disappearance of the League of Nations, it is said, means that there is now uncertainty as to the scope of these reservations; and this uncertainty, it is further said, is entirely to the advantage of Australia and unacceptable.

73. The clause concerning suspension of proceedings was designed merely to ensure the primacy of the powers of the Council of the League in the handling of the disputes; and the disappearance of the Council, in our opinion, left intact the general obligations of pacific settlement undertaken in the Act itself. Indeed, a similar reservation was contained in a number of the declarations made under the optional clause of the Statute of the Permanent Court of International Justice, and there has never been any doubt that those declarations remained effective notwithstanding the demise of the Council of the League. Thus, in the Anglo-Iranian Oil Co. case the declarations of both Parties contained such a reservation and yet it was never suspected that the demise of the Council of the League had rendered either of them ineffective. On the contrary, Iran invoked the reservation, and the United Kingdom contested Iran's right to do so only on the ground that the merits of the dispute were not under consideration by the Security Council (*I.C.J. Pleadings. Anglo/Iranian Oil Co. Case,* pp.282 and 367-368). Furthermore France's own occasion to the 1928 Act contained a reservation in much the same terms and yet in the *Certain Norwegian Loans case* she does not seem to have regarded this fact as any obstacle to the application of the Act between herself and Norway.

74. Equally, the disappearance of the League of Nations cannot be considered as having rendered the general obligations of pacific settlement embodied in the 1928 Act inapplicable by reason of Australia's reservation excluding disputes with States not members of the League. This Court has not hesitated to apply the term Member of the League of Nations in connection with the Mandate of *South West Africa cases*, *I.C.J. Reports 1950*, pp.138, 158-159, and 169. *South West Africa Cases*, *I.C.J. Reports 1962*, pp.335-338); nor has the Secretary-General in discharging his functions as depositary of the League of Nations multilateral treaties open to participation by States "Members of the League of Nations".

75. Should any question arise in a case today concerning the application of either of the two reservations found in Australia's accession to the 1928 Act, it would be for the Court to determine the status of the reservation and to appreciate its meaning and effect. Even if the Court were to hold that one or other reservation was no longer capable of application, that would not detract from the essential validity of Australia's accession to the 1928 Act.

[11] I.C.J. Reports 1973, p.318

Moreover, owing to the well-settled principle of reciprocity in the application of reservations, any uncertainty that might exist as to the scope of reservations could not possibly work entirely to the advantage of Australia. It may be added that France has not suggested that the present case itself falls within the operation of either reservation.

76. In the light of the foregoing considerations, we are unable to see in Australia's reservations any obstacle to the applicability of the 1928 Act as between her and France.

77. Another and quite different ground is, however, advanced by the French Government for considering the 1928 Act inapplicable between France and Australia with respect to the present dispute. The terms of the declarations of the two countries under the optional clause, it is said, must be regarded as prevailing over the terms of their accessions to the 1928 Act, the reservations in France's declaration of 1966 under the optional clause are, she maintains, to be treated as applicable. Those reservations include the one which excepts from France's acceptance of jurisdiction and under the optional clause "disputes concerning activities connected with national defence"; and according to the French Government that reservation necessarily covers the present dispute regarding atmospheric nuclear weapon tests conducted by France.

78. One argument advanced in support of that contention is that, the Statute of the Court being an integral part of the Charter of the United Nations, the obligations of Members undertaken on the basis of the optional clause of the Statute must in virtue of Article 103 of the Charter be regarded as prevailing over their obligations under the 1928 Act. This argument appears to us to be based on a misconception. The Charter itself places no obligation on member States to submit their disputes to judicial settlement, and any such obligation assumed by a Member under the optional clause of the Statute is therefore undertaken as a voluntary and additional obligation which does not fall within the purview of Article 103. The argument is, in any case, self-defeating because it could just plausibly be argued that the obligations undertaken by parties to the 1928 Act are obligations under Article 36(1) of the Statute and thus also obligations under the Charter.

79. The French Government, however, also rests the contention on the ground that the situation here is analogous to one where there is "a later treaty relating to the same subject-matter as a treaty concluded earlier in the relations between the same countries". In short, according to the French Government, the declarations of the Parties under the optional clause are to be considered as equivalent to a later treaty concerning acceptance of compulsory jurisdiction which, being a later expression of the wills of the Parties, should prevail over the earlier Act of 1928, relating to the same subject-matter. In developing this argument, we should add the French Government stresses that it does not wish to be understood as saying that, whenever any treaty contains a clause conferring jurisdiction on the Court, a party may release itself from its obligations under that clause by an appropriate reservation inserted in a subsequent declaration under the optional clause. The argument applies only to the case of a treaty, like the General Act, "the exclusive object of which is the peaceful settlement of disputes, and in particular judicial settlement".

80. This argument appears to us to meet with a number of objections, not the least of which is the fact that "treaties and conventions in force" and declarations under the optional clause have always been regarded as two different sources of the Court's compulsory jurisdiction. Jurisdiction provided for in treaties is covered in paragraph I of Article 36 and jurisdiction under declarations accepting the optional clause in paragraph 2; and the two paragraphs deal with them as quite separate categories. The paragraphs reproduce corresponding provisions in Article 36 of the Statute of the Permanent Court, which were adopted to give effect to the compromise reached between the Council and other Members of the League on the question of compulsory jurisdiction. The compromise consisted in the addition, in paragraph 2, of an optional clause allowing the establishment of the Court's compulsory jurisdiction over legal disputes between any States ready to accept such an obligation by making a unilateral declaration to that effect. Thus, the optional clause was from the first conceived of as an independent source of the Court's jurisdiction.

81. The separate and independent character of the two sources of the Court's jurisdiction - treaties and unilateral declarations under the optional clause - is reflected in the special provisions inserted in the present Statute for the purpose of preserving the compulsory jurisdiction attaching to the Permanent Court at the time of its dissolution. Two different provisions were considered necessary to achieve this purpose: Article 36 (5) dealing with jurisdiction under the optional clause, and Article 37 with jurisdiction under "treaties and conventions in force". The separate and independent character of the two sources is also reflected in the jurisprudence of both Courts. The Permanent Court in its Order refusing provisional measures in the *Legal Status of the South-Eastern Territory of Greenland* case and with reference specifically to a clause in the 1928 Act regarding provisional measures, underlined that a legal remedy would be available "even independently of the acceptance by the Parties of the optional clause" (*P.C.I.J., Series A/B, No.48*, at p.289). Again, in the *Electricity Company of Sofia and Bulgaria* case the Permanent Court held expressly that a bilateral treaty of conciliation, arbitration and judicial settlement and the Parties' declarations under the optional

clause opened up separate and cumulative ways of access to the Court; and that if examination of one of these sources of jurisdiction produced a negative result, this did not dispense the Court from considering "the other source of jurisdiction invoked separately and independently from the first" (*P.C.I.J., Series A/B, No.77*, at pp.76 and 80). As to this Court, in the *Barcelona Traction, Light and Power Company, Limited* case it laid particular emphasis on the fact that the provisions of Article 37 of the Statute concerning "treaty and conventions in force" deal with "a different category of instrument" from the unilateral declarations to which Article 36(5) relates (*I.C.J. Reports 1964*, at p.29). More recently, in the *Appeal Relating to the Jurisdiction of the ICAO Council* case the Court based one of its conclusions specifically on the independent and autonomous character of these two sources of its jurisdiction (*I.C.J. Reports 1992*, at pp 59 and 60).

82. In the present instance, this objection is reinforced by the fact that the 1928 Act contains a strict code of rules regulating the making of reservations, whereas no such rules govern the making of reservations to acceptances of the Court's jurisdiction under the optional clause. These rules, which are to be found in Articles 39, 40, 41, 43 and 45 of the Act, impose restrictions, inter alia, on the kinds of reservations that are admissible and the times at which they may be made and at which they will take effect. In addition, a State accepting jurisdiction under the optional clause may fix for itself the period for which its declaration is to run and may even make it terminable at any time by giving notice, whereas Article 45 (1) of the Act prescribes that the Act is to remain in force for successive fixed periods of five years unless denounced at least six months before the expiry of the current period. That the framers of the 1928 Act deliberately differentiated its régime in regard to reservations from that of the optional clause is clear; for the Assembly of the League, when adopting the Act, simultaneously in another resolution drew the attention of States to the wide possibilities of limiting the extent of commitments under the optional clause "both as regards duration and as regards scope". Consequently, to admit that reservations made by a State under the uncontrolled and extremely flexible system of the optional clause may automatically modify the conditions under which it accepted jurisdiction under the 1928 Act would run directly counter to the strict system of reservations deliberately provided for in the Act.

83. The French Government evidently feels the force of that objection; for it suggests that its contention may be reconciled with Article 45 (2) of the Act, which requires any changes in reservations to be notified at least six months before the end of the current five-year period of the Act's duration, by treating France's reservations made in her 1966 declaration as having taken effect only at the end of the then current period, namely in September 1969. This suggestion appears, however, to disregard the essential nature of a reservation. A reservation, as Article 2, paragraph I (d), of the Vienna Convention on the Law of Treaties records, is:

> "... a unilateral statement, however phased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".

Thus, in principle, a reservation relates exclusively to a State's expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations. The mere fact that it never seems to have occurred to the Secretary General of the League or of the United Nations that reservations made in declarations under the optional clause are of any concern whatever to parties to the General Act shows how novel is this suggestion.

84. The novelty is further underlined by the fact, whenever States have desired to establish a link between reservations to jurisdiction under the optional clause and jurisdiction under a treaty, this has been done by an express provision to that effect. Thus, the parties to the Brussels Treaty of 17 March 1948 agreed in Article VIII to refer to the Court all disputes falling within the scope of the optional clause subject only, in the case of each of them, to any reservation already made by that party when accepting that clause. Even in that treaty, we observe, the parties envisaged the application to jurisdiction under the treaty only of optional clause reservations "already made". Article 35, paragraph 4, of the European Convention for the Peaceful Settlement of Disputes goes further in that it empowers a party at any time, by simple declaration, to make the same reservations to the Convention as it may make to the optional clause. But under this Article a specific declaration, made with particular reference to the European Convention, is needed in order to incorporate reservations contained in a party's declaration under the optional clause into its acceptance of jurisdiction under the Convention. Moreover, the power thus given by Article 35, paragraph 4, of the Convention is expressly subjected to the general restrictions on the making of reservations laid down in paragraph I of that Article, which confine them to reservations excluding "dispute concerning particular cases or clearly specified special matters, such as territorial disputes or disputes dealing with clearly defined categories (language taken directly from Article 39 para 2(c) of the 1928 Act). It therefore seems to us abundantly clear that the Euro-

pean States which framed these two European treaties assumed that declarations under the optional clause, whether prior or subsequent to the treaty, would not have any effect on the jurisdictional obligations of the parties under the treaty, unless they inserted an express provision to that effect and that this they were only prepared to agree to under conditions specially stipulated in the treaty in question.

85. The question of the relation between reservations made under the optional clause and jurisdiction accepted under treaties has received particular attention in the United States in connection with the so-called "Connally Amendment", the adoption of which by the Senate resulted in the United States inserting in its declaration under the optional clause its domestic jurisdiction. Two years later, the United States signed the Pact of Bogota, a general inter-American treaty of pacific settlement which conferred jurisdiction on the Court for the settlement of legal disputes "in conformity with Article 36 (2) of the Statute". The United States, however, made its signature subject to the reservation that its acceptance of compulsory jurisdiction under the Pact is to be limited by "any jurisdictional or other limitations contained in any declaration deposited by the United States under the optional clause and in force at the time of the submission of any case". It thus appears to have recognized that its reservations to the optional clause would not be applicable unless it made provision for this specially by an appropriate reservation to the Pact of Bogota itself. This is confirmed by the facts that, whenever it has desired the Connally reservation to apply to jurisdiction conferred by treaty, the United States has insisted on the inclusion of a specific provision to that effect, and that the Department of State has consistently advised that, without such a provision, the Connally reservation will not apply (*cf. American Journal of International Law*, 1960, pp.941-942, and, ibbid., 1961, pp.135-141). Moreover, the Department of State has taken this position not merely with reference to jurisdictional clauses attached to treaties dealing with a particular subject-matter, but also with reference to optional protocols, the sole purpose of which was to provide for the judicial settlement of certain categories of legal disputes (*cf. Whiteman's Digest of International Law*, Vol.12, p.1333). On this point, the United States appears clearly to recognize that any jurisdiction conferred by treaty on the Court under Article 36 (I) of the Statute is both separate from and independent of jurisdiction conferred on it under Article 36 (2) by accepting the optional clause. Thus, in a report on ratification of the Supplementary Slavery Convention, the Foreign Relations Committee of the Senate said: "Inasmuch as the Connally amendment applies to cases referred to the Court under Article 36 (2), it does not apply to cases referred under Article 36 (I) which would include cases arising out of this Convention." (*US Senate, 90 Congress, 1st Session, Executive Report No.17, p.5.)*

86. In our opinion, therefore, the suggestion that the reservation made by France in her optional clause declaration of 1966 ought to be considered as applicable to the Court's jurisdiction under the 1928 Act does not accord with either principle or practice.

87. It remains to consider the French Government's main thesis that the terms of its 1966 declaration must be held to prevail over those of the 1928 Act on the ground that the optional clause declarations of France and Australia are equivalent to a later treaty relating to the same subject-matter as the 1928 Act. This proposition seems probably to take its inspiration from the dissenting opinions of four judges in the *Electricity Company of Sofia and Bulgaria case (P.C.I.J., Series A/B, No.17)*, although the case itself is not mentioned in the French Government's letter of 16 May 1973. These judges, although their individual reasoning differed in some respects, were at one in considering that a bilateral treaty of conciliation, arbitration and judicial settlement concluded between Belgium and Bulgaria in 1931 should prevail over the declarations of the two Governments under the optional clause, as being the later agreement between them. Quite apart, however, from any criticisms that may be made of the actual reasoning of the opinions, they provide very doubtful support for the proposition advanced by the French Government. This is because the situation in that case was the reverse of the situation in the present case; for there the bilateral treaty was the more recent "agreement". It is one thing to say that a subsequent treaty, mutually negotiated and agreed, should prevail over an earlier agreement resulting from separate unilateral acts; it is quite another to say that a State, by its own unilateral declaration alone, may alter its obligations under an existing treaty.

88. In any event, the thesis conflicts with the Judgement of the Permanent Court in that case; and is diametrically opposed to the position taken by France and by Judge Basdevant on the question in the *Certain Norwegian Loans case* as well as with that taken by this Court in the *Appeal Relating to the Jurisdiction of the ICAO Council* case. In the *Electricity Company of Sofia and Bulgaria* case while regarding the two optional clause declarations as amounting to an agreement, the Permanent Court held that they and the 1991 Treaty constituted independent and alternative ways of access to the Court both of which, and each under its own conditions, could be used cumulatively by the Applicant in trying to establish the Court's jurisdiction. It based its decision on what it found was the intention of the Parties in entering into the multiplicity of agreements:

> "... the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to *open up new ways of access to the Court rather than to close old ways or allow them to cancel each other out with the ulti-*

mate result that no jurisdiction would remain" (emphasis added: *P.C.I.J., Series* A/B, No.77, p.76).

Moreover, as indications of this intention, it underlined that both Parties had argued their cases "in light of the conditions independently laid down by each of these two agreements"; and that:

> *"Neither the Bulgarian nor the Belgian Government at any time considered the possibility that either of these agreements might have imposed some restriction on the normal operation of the other during the period for which they were both in force."* (Ibid., p.75; emphasis added.)

89. In the *Certain Norwegian Loans* case, as we have already indicated in paragraphs 62-65 of this opinion, France sought to found the jurisdiction of the Court upon the optional clause declarations alone; and she invoked the 1928 Act, together with an Arbitration Convention of 1904 and Hague Convention No.II of 1907, for the purpose of establishing that Norway was subject to an obligation to submit the matters in dispute to arbitration. In that case, therefore, the issue of the relation between the respective jurisdictional obligations of the Parties under the optional clause and under treaties did not arise with reference to the Court's own jurisdiction. It was raised, however, by France herself in the context of the relation between the obligations of the Parties to accept compulsory jurisdiction under the optional clause and their obligations compulsorily to accept arbitration under the three treaties. Moreover , in this context the temporal relation between the acceptances of jurisdiction under the optional clause and under the treaties was the same as in the present case, the three treaties all antedating the Parties' declarations under the optional clause. In its observations on Norway's preliminary objections, after referring to the General Act of 1928 and the other two treaties, the French Government invoked with every apparent approval the pronouncement of the Permanent Court in the *Electricity Company of Sofia and Bulgaria* case that:

> "... the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the result that no jurisdiction would remain".

Again at the oral hearing of 14 May 1957, after referring specifically to Article 17 of the 1928 Act, the French Government said:

> "Pour que, de cette multiplicité d'engaments d'arbitrage et de jurisdiction, découle l'incompétence de la Cour, malgré la régle contraire de l'arrêt Compagnie d'Electricité de Sofia, il faudrait que la Cour estime qu'il n'y a aucun différend d'ordre juridique ..." (I.C.J. Pleadings, Certain Norwegian Loans, Vol. II, at pp.60-61; emphasis added.)

And in its oral reply - this time in connection with Hague Convention No.11 of 1907 - the French Government yet again reminded the Court of that passage in the Judgement in the Electricity Company of Sofia and Bulgaria case (ibid., at p.197).

90. The Court, in the *Certain Norwegian Loans* case, for the reasons which have already been recalled, found it unnecessary to deal with this question. Judge Basdevant, on the other hand, did refer to it and his observations touch very directly the issue raised by the French Government in the present case. Having pointed out that the French declaration under the optional clause limited "the sphere of compulsory jurisdiction more than did the General Act in relations between France and Norway", Judge Basdevant observed:

> "Now, it is clear that this unilateral Declaration by the French Government could not modify, in this limitative sense, the law that was then in force between France and Norway.
>
> In a case in which it had been contended that not a unilateral declaration but a treaty between two States had limited the scope as between them of their previous declarations accepting compulsory jurisdiction, the Permanent Court rejected this contention ..." (I.C.J. Reports 1957, p.75.)

He then quoted the passage from the *Electricity Company of Sofia and Bulgaria* case about "multiplicity of agreements" and proceeded to apply it to the *Certain Norwegian Loans* case as follows:

> "A way of access to the Court was opened up by the accession of the two Parties to the General Act of 1928. It could not be closed or cancelled out by the restrictive clause which the French Government, and not the Norwegian Government, added to its fresh acceptance of compulsory jurisdiction stated in its declaration of 1949. This restrictive clause, emanating from only one of them does not constitute the law between France and Norway. The clause is not sufficient to set aside the judicial system existing between them on this point. It cannot close the way of access to the Court that was formerly open or cancel it out with the result that no jurisdiction would remain. (I.C.J. Reports 1957, pp.75 and 76, emphasis added).

It is difficult to imagine a more forcible rejection of the thesis that a unilateral declaration may modify the terms on which compulsory jurisdiction has been accepted under an earlier treaty than that of Judge Basdevant on the *Certain Norwegian Loans* case.

91. The issue did arise directly with reference to the Court's jurisdiction in the *Appeal Relating to the Jurisdiction of the ICAO Council* case (*I.C.J. Reports 1972*, p.46), where India in her Application had founded the jurisdiction of the Court on certain provisions of the Convention on International Civil Aviation and of the

International Air Services Transit Agreement, together with Articles 36 and 37 of the Statute of the Court. Pakistan, in addition to raising certain preliminary objections to jurisdiction on the basis of provisions in the treaties themselves, had argued that the Court must in any event hold itself to lack jurisdiction by reason of the effect of one of India's reservations to her acceptance of compulsory jurisdiction under the optional clause (*ibid.*, p.53, and *I.C.J. Pleadings, Appeal Relating to the Jurisdiction of the ICAO Council*, p.379). In short, Pakistan had specifically advanced in that case the very argument now put forward by the French Government in the Annex to its letter of 16 May 1973. Furthermore, India's declaration containing the reservation in question had been made subsequently to the conclusion of the two treaties, so that the case was on all fours with the present case. The Court, the Judgement shows, dealt with the treaties and the optional clause declarations as two separate and wholly independent sources of jurisdiction. Speaking, inter alia, of Pakistan's reliance on the reservation in India's declaration, the Court observed:

> "In any event, such matters would become material only if it should appear that the Treaties and their jurisdictional clauses did not suffice, and that the Court's jurisdiction must be sought outside them, which, for reasons now to be stated, the Court does not find to be the case." (I.C.J. Reports 1972, p.53.)

Having then stated these reasons, which were that the Court rejected Pakistan's preliminary objections relating to the jurisdictional clauses of the Treaties and upheld its jurisdiction under those clauses, the Court summarily disposed of the objection based on the reservation in India's declaration:

> "Since therefore the Court is invested with jurisdiction under those clauses and, in consequence ... under Article 36, paragraph 1, and under Article 37, of its Statute, *it becomes irrelevant to consider the objections to other possible bases of jurisdiction*" (*Ibid., p.60; emphasis added.*)

Thus the Court expressly held the reservation in India's subsequent declaration under the optional clause to be of no relevance whatever in determining the Court's jurisdiction under the earlier treaties.

Australia's Alleged Breach of the 1928 Act in 1939

92. Finally, one further argument put forward in the Annex to the letter of 16 May 1973 for considering the 1928 Act inapplicable between France and Australia needs to be mentioned. In connection with another contention of the French Government, we have already referred to the notification addressed by Australia to the Secretary-General of the League of Nations four days after the outbreak of the Second World War to the effect that she would not regard her accession to the Act as "covering or relating to any dispute arising out of events occurring during present crisis" (para.27). The further argument now requiring our attention is that this notification was not in accord with the provision in Article 45 concerning modification of reservations; that Australia refrained from regularizing her position with regard to this provision when it could have done so in 1944; and that, although France never protested against the supposed breach of the Act, the French Government is not bound to respect a treaty which Australia herself has "ceased to respect since a date now long past". We have already pointed out that Australia, as also Canada, justified her notification of the new reservation on the basis of the breakdown of collective security under the League and the resulting fundamental change in the situation obtaining when she acceded to the Act, and that if that justification was well founded, there was no pressing need to "regularize" her position under the Act in 1944. Reference to the historical context in which the Australian notification was made shows also that this further argument lacks all plausibility.

93. In February 1939 France, the United Kingdom, India and New Zealand each notified the Secretary-General of their reservations from the 1928 Act of "disputes arising out of any war in which they might be engaged". These notifications were all made expressly under Article 45 of the Act, and were accompanied by explanations referring to the withdrawal of some Members of the League and the reinterpretation by others of their collective security obligations. Having regard d to the similarity of the terms of the four notifications and the fact that they were deposited almost simultaneously (on 14th and 15th February 1939) it seems evident that the four States acted together. Similar action was not, however, taken by either Australia or Canada with reference to the 1928 Act at that date.

On 7 September 1939, four days after the outbreak of hostilities, the United Kingdom, Australia, New Zealand and Canada by letter notified the Secretary-General of the League that they would "not regard their acceptance of the optional clause as covering disputes arising out of events occurring during the present hostilities". The United Kingdom's letter contained lengthy explanations referring to the breakdown of collective security under the League and the resulting fundamental change in the conditions which had existed when it accepted the optional clause; and these explanations have generally been understood as invoking, whether rightly or wrongly, the doctrine of fundamental change of circumstances. The Australian Government specifically associated itself with the explanations given by the United Kingdom Government, as also did the French Government when it deposited its notification of a similar reservation only three days later. South Africa and India followed suit a short time afterwards. Again, it is evident that the notifications of France and the Commonwealth States were made in consultation and with an eye to disputes which might

arise between the Allies and neutral States. It was in accord with this policy that Australia, on the same day as she made her notification regarding the optional clause, also notified her similar reservation in respect of the General Act. In doing so, she expressly based herself on the explanations given by the United Kingdom in its notification regarding the optional clause with which, as has been stated, France also associated herself. Furthermore, if Australia's notification regarding the General Act did not conform to the terms of Article 45 of that Act, France's notification regarding the optional clause equally did not conform to the terms of her acceptance of the optional clause, which was due to continue in force without modification until 25 August 1941. Accordingly, if France was justified in invoking fundamental change of circumstances with respect to her acceptance of the optional clause, Australia was also justified in doing so with respect to her acceptance of the 1928 Act.

The mere recalling of the historical context thus suffices to discount this argument regarding Australia's alleged breach of the Act. Even if this were not so, the suggestion that France is now entitled to invoke the alleged breach as a ground for considering the Act inapplicable with respect to Australia, for the first time nearly 35 years after the event, does not commend itself as compatible with the law of treaties (cf. Arts. 45 and 60 of the Vienna Convention on the law of Treaties).

CONCLUSIONS ON THE QUESTION OF JURISDICTION

94. In our view, therefore, close examination of the various objections to the Court's assuming jurisdiction on the basis of the General Act of 1928, which are developed in the French Government's letter and Annex of 16 May 1973, show them all to be without any sound foundation. Nor has our own examination of the matter, proprio motu, revealed any other objection calling for consideration. We accordingly conclude that Article 17 of the 1928 Act provides in itself a valid and sufficient basis for the Applicant to establish the jurisdiction of the Court in the present case.

95. It follows that, as was said by the Court in *the Appeal Relating to the Jurisdiction of the ICAO Council case*, "it becomes irrelevant to consider the objections to other possible bases of jurisdiction". We do not, therefore, find it necessary to examine the alternative basis of jurisdiction invoked by the Applicant, i.e. the two declarations of the Parties under the optional clause, or any problems which the reservations to these declarations may raise.

PART III
THE REQUIREMENTS OF ARTICLE 17 OF THE 1928 ACT AND THE ADMISSIBILITY OF THE APPLICATION

96. In our view, it is clear that there are no grounds on which the Applicant's claim might be considered inadmissible. The extent to which any such proposed grounds are linked to the jurisdictional issue or are considered apart from that issue will be developed in this part of our opinion. At the outset we affirm that there is nothing in the concept of admissibility which should have precluded the Applicant from being given the opportunity of proceeding to the merits. This observation applies, in particular, to the contention that the claim of the Applicant reveals no legal dispute or, put differently, that the dispute is exclusively of a political character and thus non-justiciable.

97. Under the terms of Article 17 of the 1928 Act, the jurisdiction which it confers on the Court is over "all disputes with regard to which the parties are in conflict as to their respective rights (subject of course to the reservations made under Article 39 of the Act.) Article 17 provides: "it is understood that the disputes referred to are in particular those mentioned in Article 36 of the Statute of the Permanent Court..." The disputes mentioned in Article 36 of the Statute of the Permanent Court are the four classes of legal disputes in the optional clause of that Statute and of the present Statute. Moreover, subject to one possible point which does not arise in the present case it is generally accepted that these four classes of legal disputes and the earlier expression in Article 17 "all disputes with regard to which the parties are in conflict as to their respective rights" have to all intents and purposes the same scope. It follows that what is a dispute "with regard to which the parties are in conflict as to their respective rights" will also be a dispute which falls within one of the four categories of legal disputes mentioned in the optional clause and vice versa.

98. In the present proceedings, Australia has described the subject of the dispute in paragraphs 2-20 of her Application. Inter alia, she there states that in a series of diplomatic Notes beginning in 1963 she repeatedly voiced to the French Government her opposition to France's conduct of atmospheric nuclear tests in the South Pacific region; and she identifies the legal dispute as having taken shape in diplomatic Notes of 3 January, 7 February and 13 February 1973 which she annexed to her Application. In the first of these three Notes, the Australian Government made clear its opinion that the conducting of such tests would:

"... be unlawful - particularly in so far as it involves modification of the physical conditions of and over Australian territory; pollution of the atmosphere and of the resources of the seas; interference with freedom of navigation both on the high seas and in the airspace above; and infraction of legal norms concerning atmospheric testing of nuclear weapons".

This opinion was challenged by the French Government in its reply of 7 February 1973, in which it expressed its conviction that "its nuclear experiments have not violated any rule of international law" and controverted Australia's legal contentions point by point. In a further Note of 13 February, however, the Australian Government expressed its disagreement with the French Government's views, repeated its opinion that the conducting of the tests violates rules of international law, and said it was clear that "in this regard there exists between our two Governments a substantial legal dispute". Then, after extensive observations on the consequences of nuclear explosions, the growth of the awareness of the danger of nuclear testing and of the particular aspects and specific consequences of the French tests, Australia set out seriatim, in paragraph 49 of her Application, three separate categories of Australia's rights which she contends have been, are, and will be violated by the French atmospheric tests.

99. Prima facie, it is difficult to imagine a dispute which in its subject matter and in its formulation is more clearly a "legal dispute" than the one submitted to the Court in the Application. The French Government itself does not seem in the diplomatic exchanges to have challenged the Australian Government's characterization of the dispute as a "substantial legal dispute", even although in the above-mentioned Note of 7 February 1973 it expressed a certain skepticism regarding the legal considerations invoked by Australia. Moreover, neither in its letter of 16 May 1973 addressed to the Court nor in the Annex enclosed with that letter did the French Government for a moment suggest that the dispute is not a dispute "with regard to which the parties are in conflict as to their respective rights" or that it is not a "legal dispute". Although in that letter and Annex, the French Government advanced a whole series of arguments for the purpose of justifying its contention that the jurisdiction of the Court cannot be founded in the present case on the General Act of 1928, it did not question the character of the dispute as a "legal dispute" for the purposes of Article 17 of the Act.

100. In the Livre blanc sur les expériences nucléaires published in June 1973, however, the French Government did take the stand that the dispute is not a legal dispute. Chapter II, entitled "Questions juridiques" concludes with a section on the question of the Court's jurisdiction, the final paragraph of which reads:

"La Cour n'est pas compétente, enfin, parce que l'affaire qui lui est soumise n'est pas fondamentalement un différend d'ordre juridique. Elle se trouve, en fait et par divers biais, invitée à prodre position sur un problème purement politique et militaire. Ce n'est, selon le Gouvernement français, ni son rôle ni sa vocation." (P.23.)

This clearly is an assertion that the dispute is one concerned with matters other than legal and, therefore, not justiciable by the Court.

101. Complying with the Court's Order of 22 June 1973, Australia submitted her observations on the questions of the jurisdiction of the Court and the admissibility of the Application. Under the rubric of "jurisdiction" she expressed her views, inter alia, on the question of the political or legal nature of the dispute; and under the rubric of "admisability" she furnished further explanations of the three categories of rights which she claims to be violated by France's conduct of nuclear atmospheric tests in the South Pacific region. These rights, as set out in paragraph 49 of the Application and developed in her pleadings, may be broadly described as follows:

(1) A right aimed to be possessed by any State, including Australia, to be free from atmospheric nuclear weapon tests, conducted by any State, in virtue of what Australia maintains is now a generally accepted rule of customary international law prohibiting all such tests. As support for the alleged right the Australian Government invoked a variety of considerations, including the development from 1955 onwards of a public opinion strongly opposed to atmospheric tests, the conclusion of the Moscow Test Ban Treaty in 1963, the fact that some 106 States, have since become parties to that Treaty, diplomatic and other expressions of protests by numerous States in regard to atmospheric tests, rejected resolutions of the General Assembly condemning such tests as well as pronouncements of the Stockholm Conference on the Human Environment, Articles 55 and 56 of the Charter, provisions of the Universal Declaration of Human Rights and of the International Covenant on Economic, Social and Cultural Rights and other pronouncements on human rights in relation to the environment.

(2) A right, said to be inherent in Australia's own territorial sovereignty, to be free from the deposit on her territory and dispersion in her air space, without her consent, of radio-active fall-out from the French nuclear tests. The mere fact of the trespass of the fall-out, the harmful effects which flow from such fall-out and the impairment of her independent right to determine what acts shall take place within her territory (which she terms her "decisional sovereignty") all constitute, she maintains, violations of this right. As support for this alleged right, the Australian Gov-

ernment invoked a variety of legal material, including pronouncements of this Court in the *Corfu Channel* case (*I.C.J. Reports 1949*, at pp.22 and 35), of Mr. Huber in *the Island of Palmas Arbitration* (*UNRIAA, Vol.II*, p.839) and of the Permanent Court of International Justice in the *Customs Union* case (*P.C.I.J., Series A/B*, No.41, at p.39), the General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation, the Charter of the Organization of African Unity, and Declarations of the General Assembly and of Unesco regarding satellite broadcasting and opinions of writers.

(3) A right, said to be derived from the character of the high seas as res commumis and to be possessed by Australia in common with all other maritime States, to have the freedoms of the high seas respected by France; and, in particular, to require her to refrain from (a) interference with the ship and aircraft of other States on the high seas and in the superjacent air space, and (b) the pollution of the high seas by radioactive fallout. As support for this alleged right, the Australian Government referred to Articles 2 and 25 of the Geneva Convention of 1958 on the High Seas, commentaries of the International Law Commission on the corresponding provisions of its draft Articles on the Law of the Sea and to other legal materials including the record of the —— of the International Law Commission; passages in the Court's Judgement in the Anglo-Norwegian Fisheries case, various declarations and treaty provisions relating to marine pollution, and opinions of writers.

In response to a question put by a Member of the Court, the Australian Government also furnished certain explanations regarding (i) the distinction which it draws between the transmission of chemical or other matter from one State's territory to that of another as a result of a normal and natural use of the former's territory and one which does not result from a normal and natural use; and (ii) the relevance or otherwise of harm or potential harm as an element in the legal cause of action in such cases.

102. In regard to each of the above-mentioned categories of legal rights, Australia maintained that there is a correlative legal obligation resting upon France, the breach of which would involve the latter in international responsibility towards Australia. In addition, she developed a general argument by which she sought to engage the international responsibility of France on the basis of the doctrine of "abuse of rights" in the event that France should be considered as, in principle, invested with a right to carry out atmospheric nuclear tests. In this connection, she referred to a dictum of Judge Alvarez in the *Anglo-Iranian Oil Co.* case, the Report of the Asian-African Legal Consultative Committee in 1964 on the Legality of Nuclear Tests, Article 74 of the Charter, the opinions of certain jurists and other legal materials.

103. Under the rubric of "admissibility", Australia also presented her views on the question, mentioned in paragraph 23 of the Order of 22 June 1973, of her "legal interest" in respect of the claims put forward in her application. She commented, in particular, on the question whether, in the case of a right possessed by the international community as a whole, an individual State, independently of material damage to itself, is entitled to seek the respect of that right by another State. She maintained in regard to certain categories of obligations owed erga omnes that every State may have a legal interest in their performance, citing certain pronouncements of the Permanent Court and of this Court and more especially the pronouncement of this Court on the matter in the Barcelona Traction Light and Power Company Case (second phase *I.C.J. Reports 1970*, p.32). With regard to the right said to be inherent in Australia's own territorial sovereignty, she considered it obvious that a state possesses a legal interest in the protection of its territory from any form of external harmful action as well as in the defence of the well-being of its population and in the protection of national sovereignty and independence" with regard to the right said to be derived from the character of the high seas as *raes communis*, Australia maintained that every State has a legal interest in safeguarding the respect by other States of freedom of the seas; that the practice of States demonstrates the irrelevance of the possession a specific interest on the part of the individual State, and that this general legal interest of all States in safeguarding the freedom of the seas has received express recognition in connection with nuclear tests. As support for the above proposition she cited a variety of legal material.

104. In giving this very summary account of the legal contentions of the Australian Government, we are not to be taken to express any view as to whether any of them are well or ill founded. We give it for the sole purpose of indicating the context in which Article 17 of the 1928 Act has to be applied and the admissibility of Australia's Application determined. Before we draw any conclusions, however, from that account of Australia's legal contentions, we must also indicate our understanding of the principles which should govern our determination of these matters at the present stage of the proceedings.

105. The matters raised by the issues of "legal or political dispute" and "legal interest", although intrinsically matters of admissibility, are at the same time matters which, under the terms of Article 17 of the 1928 Act, also go to the Court's jurisdiction in the present case. Accordingly, it would be pointless for us to characterize any particular issue as one of jurisdiction or of admissibility, more especially as the practice neither of the Permanent Court nor of this Court supports the drawing of a sharp distinction between preliminary objections to jurisdiction and admissibility. In the Court's practice the emphasis has been

laid on the essentially preliminary or non-preliminary character of the particular objection rather than on its classification as a matter of jurisdiction or admissibility (cf. Art. 62 of the Rules of the Permanent Court, Art. 62 of the old Rules of this Court and Art. 67 of the new Rules). This is because, owing to the consensual nature of the jurisdiction of an international tribunal, an objection to jurisdiction no less than an objection to admissibility may involve matters which relate to the merits; and then the critical question is whether the objection can or cannot properly be decided in the preliminary proceedings without pleadings affording the parties the opportunity to plead to the merits. The answer to this question necessarily depends on whether the objection is genuinely of a preliminary character or whether it is too closely linked to the merits to be susceptible of a just decision without first having pleadings on the merits. So it is that, in specifying the task of the Court when disposing of preliminary objections of Article 67 paragraph 7 of the Rules expressly provides as one possibility, that the Court should "declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character." These principles clearly apply in the present case even although owing to the absence of France from the proceedings, the issues of jurisdiction and admissibility now before the Court have not been raised in the form of objections *stricto sensu.*

106. The French Government's assertion that the dispute is not fundamentally of a legal character and concerns a purely political and military question is, in essence, a contention that it is not a dispute in which the Parties are in conflict as to their legal rights; or that it does not fall within the categories of legal disputes mentioned in Article 36(2) of the Statute. Or, again, the assertion may be viewed as a contention that international law imposes no legal obligations upon France in regard to the matters in dispute which, therefore, are to be considered as matters left by international law exclusively within her national jurisdiction; or, more simply, as a contention that France's nuclear experiments do not violate any existing rule of international law, as the point was put by the French Government in its diplomatic Note to the Australian Government of 7 February 1973. Yet, however the contention is framed, it is manifestly and directly related to the legal merits of the Applicant's case. Indeed, in whatever way it is framed, such a contention, as was said of similar pleas by the Permanent Court in the *Electricity Company of Sofia and Bulgaria* case, "forms a part of the actual merits of the dispute" and "amounts not only to encroaching on the merits, but to coming to a decision in regard to one of the fundamental factors of the case" (*P.C.I.J., Series A/B, No.77*, at pp.78 and 82-83). In principle, therefore, such a contention cannot be considered as raising a truly preliminary question.

107. We say "in principle" because we recognize that, if an applicant were to dress up as a legal claim a case which to any informed legal mind could not be said to have any rational, that is, reasonably arguable, legal basis, an objection contesting the legal character of the dispute might be susceptible of decision *in limine* as a preliminary question. This means that in the preliminary phase of proceedings, the Court may have to make a summary survey of the merits to the extent necessary to satisfy itself that the case discloses claims that are reasonably arguable or issues that are reasonably contestable; in other words, that these claims or issues are rationally grounded on one or more principles of law, the application of which may resolve the dispute. The essence of this preliminary survey of the merits is that the question of jurisdiction for admissibility under consideration is to be determined not on the basis of whether the applicant's claim is right but exclusively on the basis whether it discloses a right to have the claim adjudicated. An indication of the merits of the applicant's case may be necessary to disclose the rational and arguable character of the claim, but neither such a preliminary indication of the merits nor any finding of jurisdiction or admissibility made upon it may be taken to prejudge the merits . It is for this reason that, in investigating the merits for the purpose of deciding preliminary issues, the Court has always been careful to draw the line at the point where the investigation may begin to encroach upon the decision of the merits. This applies to disputed questions of law no less than to disputed questions of fact: the maxim *jura novit curia* does not mean that the Court may adjudicate on points of law in a case without hearing the legal arguments of the parties.

108. The precise test to be applied may not be easy to state in a single combination of words. But the consistent jurisprudence of the Permanent Court and of this Court seems to us clearly to show that, the moment a preliminary survey of the merits indicates that issues raised in preliminary proceedings cannot be determined without encroaching upon and prejudging the merits, they are not issues which may be decided without first having pleadings on the merits (*cf. Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, P.C.I.J.,Series B, No. 4; Right of Passage over Indian Territory case, I.C.J. Reports 1957, at pp. 133-134; the Interhandel case, I.C.J. Reports 1959, pp.23-25*). We take as our general guide the observations of this Court in the *Interhandel* case when rejecting a plea of domestic jurisdiction which had been raised as a preliminary objection:

"In order to determine whether the examination of the grounds thus invoked is excluded from the jurisdiction of the Court for the reason alleged by the United States, the Court will base itself on the course followed by the Permanent Court of International Justice in its Advisory Opinion concerning *Nationality Decrees issued in Tunis and Morocco* (Series B, No.4), when dealing with a similar divergence of view. Accordingly, the Court does not, at the present stage of the proceedings, intend to assess the validity of the grounds invoked by the Swiss Gov-

ernment or to give an opinion on their interpretation, since that would be to enter upon the merits of the dispute. The Court will confine itself to considering *whether the grounds invoked by the Swiss Government are such as to justify the provisional conclusion that they may be of relevance in this case and if so, whether questions relating to the validity and interpretation of those grounds are questions of international law.*" (Emphasis added.)

In the Interhandel case, after a summary consideration of the grounds invoked by Switzerland, the Court concluded that they both involved questions of international law and therefore declined to entertain the preliminary objection.

109. The summary account which we have given above of the grounds invoked by Australia in support of her claims appears to us amply sufficient, in the language of the Court in the Interhandel Case, "to justify the provisional conclusion that they may be of relevance in this case", and that "questions relating to the validity and interpretation of these grounds are questions of international law". It is not for us "to assess the validity of those grounds" at the present stage of the proceedings since that would be to "enter upon the merits of the dispute". But our summary examination of them satisfies us that they cannot fairly be regarded as frivolous or vexatious or as a mere attorney's mantle artfully displayed to cover an essentially political dispute. On the contrary, the claims submitted to the Court in the present case and the legal contentions advanced in support of them appear to us to be based on rational and reasonably arguable grounds. Those claims and legal contentions are rejected by the French Government on legal grounds. In our view, these circumstances in themselves suffice to qualify the present dispute as a "dispute in regard to which the parties are in conflict as to their legal rights" and as a "legal dispute" within the meaning of Article 17 of the 1928 Act.

110. The conclusion just stated conforms to what we believe to be the accepted view of the distinction between disputes as to rights and disputes as to so-called conflicts of interests. According to that view, a dispute is political, and therefore non-justiciable, where the claim is demonstrably rested on other than legal considerations, e.g. on political, economic or military considerations. In such disputes one, at least, of the parties is not content to demand its legal rights, but asks for the satisfaction of some interest of its own even although this may require a change in the legal situation existing between them. In the present case, however, the Applicant invokes legal rights and does not merely pursue its political interest; it expressly asks the Court to determine and apply what it contends are existing rules of international law. In short, it asks for the settlement of the dispute "on the basis of respect for law", which is the very hall-mark of a request for judicial, not political settlement of an international dispute (*cf. Interpretation of Article 3, paragraph 2, of the Treaty of Lausanne, P.C.I.J., Series B, No.12*, p.26). France also, in contesting the Applicant's claims, is not merely invoking its vital political or military interests but is alleging that the rules of international law invoked by the Applicant do not exist or do not warrant the import given to them by the Applicant. The attitudes of the Parties with reference to the dispute, therefore, appear to us to show conclusively its character as a "legal" and justiciable dispute.

111. This conclusion cannot, in our view, be affected by any suggestion or supposition that in bringing the case to the Court, the Applicant may have been activated by political motives or considerations. Few indeed would be cases justiciable before the Court if a legal dispute were to be regarded as deprived of its legal character by reason of one of the parties being also influenced by political considerations. Neither in contentious cases nor in requests for advisory opinions has the Permanent Court or this Court ever at any time admitted the idea that an intrinsically legal issue would loose its legal character by reason of political considerations surrounding it.

112. Nor is our conclusion in any way affected by the suggestion that in the present case the Court, in order to give effect to Australia's claims, would have to modify rather than apply the existing law. Quite apart from the fact that the Applicant explicitly asks the Court to apply the existing law, it does not seem to us that the Court is here called upon to do anything other than exercise its normal function of deciding the dispute by applying the law in accordance with the express directions given to the Court in Article 38 of the Statute. We fully recognize that, as was emphasized by the Court recently in the *Fisheries Jurisdiction* cases, "the Court, as a court of law, cannot render judgement sub specie legis feren dae, or anticipate the law before the legislator has laid it down" (*I.C.J., Reports 1974*, at pp.23-24 and 192). That pronouncement was, however, made only after full consideration of the merits in those cases. It can in no way mean that the Court should determine in limine litis the character, as lex lata or lex furanda, of an alleged rule of customary law and adjudicate upon its existence or non-existence in preliminary proceedings without having first afforded the parties the opportunity to plead the legal merits of the case. In the present case, the Court is asked to perform its perfectly normal function of assessing the various elements of State practice and legal opinion adduced by the Applicant as indicating the development of a rule of customary law. This function the Court performed in the *Fisheries Jurisdiction* cases, and if in the present case the Court had proceeded to the merits and upheld the Applicant's contentions in the present case, it could only have done so on the basis that the alleged rule had indeed acquired the character of lex lata.

113. Quite apart from these fundamental considerations,

we cannot fail to observe that, in alleging violations of its territorial sovereignty and of rights derived from the principle of the freedom of the high seas, the Applicant also rests its case on long-established - indeed elemental - rights, the character of which as lex lata is beyond question. In regard to these rights the task which the Court is called upon to perform is that of determining their scope and limits vis-à-vis the rights of other States, a task inherent in the function entrusted to the Court by Article 38 of the Statute.

114. These observations also apply to the suggestion that the Applicant is in no position to claim the existence of a rule of customary international law operative against France in as much as the Applicant did not object to, and even actively, assisted in, the conduct of atmospheric nuclear tests in the Pacific Ocean region prior to 1963. Clearly this is a matter involving the whole concept of the evolutionary character of customary international law upon which the Court should not pronounce in these preliminary proceedings. The very basis of the Applicant's legal position, as presented to the Court, is that in connection with and after the tests in question there developed a growing awareness of the dangers of nuclear fall-out and a climate of public opinion strongly opposed to atmospheric tests and that the conclusion of the Moscow Test Ban Treaty in 1963 led to the development of a rule of customary law prohibiting such tests. The Applicant has also drawn attention to its own constant opposition to atmospheric tests from 1963 onwards. Consequently, although the earlier conduct of the Applicant is no doubt one of the elements which would have had to be taken into account by the Court, it would have been upon the evidence of State practice as a whole that the Court would have had to make its determination of the existence or non-existence of the alleged rule. In short, however relevant, this point appears to us to belong essentially to the legal merits of the case, and not to be one appropriate for determination in the present preliminary proceedings.

115. We are also unable to see how the fact that there is a sharp conflict of view between the Applicant and the French Government concerning the materiality of the damage or potential risk of damage resulting from nuclear fall-out could either affect the legal character of the dispute or call for the Application to be adjudged inadmissible here and now. This question again appears to us to belong to the stage of the merits. On the one side, the Australian Government has given its account of "nuclear explosions and their consequences" in paragraphs 22-39 of the Application and, in dealing with the growth of international concern on this matter, has cited a series of General Assembly resolutions, the establishment of UNSCEAR in 1955 and its subsequent reports on atomic radiation, the Test Ban Treaty itself, the Treaty for the Prohibition of Nuclear Weapons in Latin America, and declarations and resolutions of South Pacific States, Latin American States, African and Asian States, and a resolution of the Twenty-sixth Assembly of the World Health Organization. It has also referred to the psychological injury said to be caused to the Australian people through their anxiety as to the possible effects of radioactive fall-out on the well-being of themselves and their descendants. On the other side, there are before the Court repeated assurances of the French Government, in diplomatic Notes and public statements, concerning the precautions taken by her to ensure that the nuclear tests would be carried out "in complete security". There are also reports of various scientific bodies, including those of the Australian National Radiation Advisory Committee in 1967, 1969, 1971 and 1972 and of the New Zealand National Radiation Laboratory in 1972, which all concluded that the radioactive fall-out from the French tests was below the damage level for public health purposes. In addition, the Court has before it the report of Meeting of Australia and French scientists in May 1973 in which they arrived at common conclusions to the data of the amount of fall-out but differed as to the interpretation of the data in terms of the biological risks involved. Whatever impressions may be gained from a prima facie reading of the evidence so far presented to the Court, the questions of the materiality of the damage resulting from, and of the risk of future damage from, atmospheric nuclear tests, appear to us manifestly questions which cannot be resolved in preliminary proceedings without the parties having had the opportunity to submit their full case to the Court.

116. The dispute as to the facts regarding damage and potential damage from radio-active nuclear fall-out itself appears to us to be a matter which falls squarely within the third of the categories of legal disputes listed in Article 36 (2) of the Statute: namely a dispute concerning "the existence of any fact which, if established, would constitute a breach of an international obligation" Such a dispute, in our view, is inextricably linked to the merits of the case. Moreover, Australia in any event contends, in respect of each one of the rights which she invokes, that the right is violated by France's conduct of atmospheric tests independently of proof of damage suffered by Australia. Thus, the whole issue of material damage appears to be inextricably linked to the merits. Just as the question whether there exists any general rule of international law prohibiting atmospheric tests is "a question of international law" and part of the legal merits of the case, so also is the point whether material damage is an essential element in that alleged rule. Similarly, just as the questions whether there exist any general rules of international law applicable to invasion of territorial sovereignty by deposit of nuclear fall-out and regarding violation of so-called "decisional sovereignty" by such a deposit are "questions of international law" and part of the legal merits, so also is the point whether material damage is an essential element in any such alleged rules. Mutatis mutandis, the same may be said of the question

whether a State claiming in respect of an alleged violation of the freedom of the seas has to adduce material damage to its own interests.

117. Finally, we turn to the question of Australia's legal interest in respect of the claims which she advances. With regard to the right said to be inherent in Australia's territorial sovereignty, we think that she is justified in considering that her legal interest in the defence of that right is self-evident. Whether or not she can succeed in persuading the Court that the particular right which she claims falls within the scope of the principle of territorial sovereignty, she clearly has a legal interest to litigate that issue in defence of her territorial sovereignty. With regard to the right to be free from atmospheric tests, said to be possessed by Australia in common with other States, the question of legal interest appears to us to be part of the general legal merits of the case. If the materials adduced by Australia were to convince the Court of the existence of a general rule of international law, prohibiting atmospheric nuclear tests, the Court would at the same time have to determine what is the precise character and content of that rule and, in particular, whether it confers a right on every State individually to prosecute a claim to secure respect for the rule. In short, the question of "legal interest" cannot be separate from the substantive legal issue of the existence and scope of the alleged rule of customary international law. Although we recognize that the existence of a so-called actio popularis in international law is a matter of controversy, the observations of this Court in the *Barcelona Traction, Light and Power Company, Limited* case[12], suffice to show that the question is one that may be considered as capable of rational legal argument and a proper subject of litigation before this Court.

118. As to the right said to be derived from the principle of the freedom of the high seas, the question of "legal interest" once more appears clearly to belong to the general legal merits of the case. Here, the existence of the fundamental rule, the freedom of the high seas, is not in doubt, finding authoritative expression in Article 2 of the Geneva Convention of 1958 on the High Seas. The issues disputed between the Parties under this head are (i) whether the establishment of a nuclear weapon-testing zone covering areas of the high seas and the superjacent air space are permissible under that rule or are violations of the freedoms of navigation and fishing, and (ii) whether atmospheric nuclear tests also themselves constitute violations of the freedom of the seas by reason of the pollution of the waters alleged to result from the deposit of radio-active fall-out. In regard to these issues, the Applicant contends that it not only has a general and common interest as a user of the high seas but also that its geographical position gives it a special interest in freedom of navigation, over-flight and fishing in the South Pacific region. That States have individual as well as common rights with respect to the freedoms of the high seas is implicit in the very concept of such freedoms which involve rights of way possessed by every State as is implicit in numerous provisions of the Geneva Convention of 1958 on the High Seas. It is indeed evidenced in the long history of international disputes arising from intradictory assertions of their rights on the high seas by individual States. Consequently it seems to us that it would be difficult to admit that the applicant in the present case is not entitled even to litigate the question whether it has a legal interest individually to institute proceedings in respect of what she alleges to be violations of the freedom of the high seas, overflight and fishing. This question **[illegible]** in our view, could only be decided by the Court at the stage of the merits.

119. Having regard to the foregoing observations, we think it clear that none of the questions discussed in this part of our opinion would constitute a bar to the exercise of the Court's jurisdiction with respect to the merits of the case on the basis of Article 17 of the 1928 Act. Whether regarded as matters of jurisdiction or of admissibility, they are all either without substance or do "not possess, in the circumstances of the case, an exclusively preliminary character". Dissenting, as we do, from the Court's decision that the claim of Australia no longer has any object, we consider that the Court should have now decided to proceed to pleadings on the merits.

PART IV
CONCLUSION

120. Since we are of the opinion that the Court has jurisdiction and that the case submitted to the Court discloses no ground on which Australia's claims should be considered inadmissible, we consider that the Applicant had a right under the Statute and the Rules to have the case adjudicated. This right the Judgement takes away from the Applicant by a procedure and by reasoning which, to our regret, we can only consider as lacking any justification in the Statute and Rules or in the practice and jurisprudence of the Court.

(Signed) Charles D. ONYEAMA.

(Signed) Hardy C. DILLARD.

(Signed) E. JIMENEZ DE ARECHAGA.

(Signed) H. WALDOCK.

[12] *(Text not legible from the original)*

DISSENTING OPINION OF JUDGE DE CASTRO

[Translation]

In its Order of 22 June 1973 the Court decided that the written pleadings should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application. The Court ought therefore to give a decision on these two preliminary questions.

Nevertheless, the majority of the Court has now decided not to broach them, because it considers, in view of the statements made by French authorities on various occasions concerning the cessation of atmospheric nuclear tests, that the dispute no longer has any object.

That may be described as a prudent course to follow, and very learned arguments have been put forward in support of it, but I am sorry to say that they fail to convince me. It is therefore, I feel, incumbent upon me to set out the reasons why I am unable to vote with the majority, and briefly to state how, in my view, the Court ought to have pronounced upon the questions specified in the above-mentioned Order.

I
IS THE DISPUTE NOW WITHOUT OBJECT?

Attention should in my view be drawn to various points concerning the value to be attached to the French authorities' statements in relation to the course of the proceedings:

1. I think the Court has done well to take these statements into consideration. It is true they do not form part of the formal documentation brought to the cognizance of the Court, but some have been cited by the Applicant and others are matters of public knowledge as to ignore them would be to shut one's eyes to conspicuous reality. Given the non-appearance of the Respondent, it is the duty of the Court to make sure proprio motu of every fact that might be significant to the decision by which it is to render justice in the case (Statute, Art. 53). In matters of procedure, the Court enjoys a latitude which is not to be found in the municipal law of States (*P.C.I.J., Series A, No.2*, p.34 Statute, Arts 30 and 48).

As in the Northern Cameroons case, the Court may examine the questions whether it is or is not "impossible for the Court to render a judgement capable of effective application". (*I.C.J. Report, 1963* p.33) and whether the dispute submitted to it still exists. In other words, it may enquire whether, on account of a new fact, there is no longer any surviving dispute.

There is before the Court a preliminary question (separate opinion of Sir Gerald Fitzmaurice p.103) which must be given priority once any question of jurisdiction (*ibid. p.105*); namely whether the statements of the French authorities have removed the legal interest of the Application and whether they may so be relied on as to render superfluous any judgement whereby the Court might uphold the Applicant's claims.

2. I am wholly aware that the vote of the majority can be viewed as a sign of prudence. The "new fact" which the statements of the French authorities represent is of an importance which should not be overlooked. They are clear, formal and repeated statements, which emanate from the highest authorities and show that those authorities seriously and deliberately intend henceforth to discontinue atmospheric nuclear testing. The French authorities are well aware of the anxiety aroused all over the world by the tests conducted in the South Pacific region and of the sense of relief produced by the announcement that they were going to cease and that underground tests would hereafter be carried out. These statements are of altogether special interest to the Applicant and to the Court.

It is true that the French Government has not appeared in the proceedings but, in point of fact, it has, both directly and indirectly, made known to the Court its views on the case, and those views have been studied and taken into consideration in the Court's decisions. The French Government knows this. One must therefore suppose that the French authorities have been able to take account of the possible effect of their statements on the course of the proceedings.

It may be the confidence warranted by the statements of responsible authorities which explains why the majority of the Court has thought it desirable to terminate proceedings which it felt to be without object. An element of conflict (lis) is endemic in any litigation, which it seems only wise, pro pace, to regard as terminated as soon as possible; this is more-over in line with the peace-making function proper to an organ of the United Nations.

3. Even so, it must be added that the Court, as a judicial organ, must first and foremost have regard to the legal worth of the French authorities' statements.

Upon the Court there falls the task of interpreting their meaning and verifying their purpose. They can be viewed as the announcement of a programme, of an intention with regard to the future, their purpose being to enlighten all those who may be interested in the method which the

French authorities propose to follow where nuclear tests are concerned. They can also be viewed as simple promises to conduct no more nuclear tests in the atmosphere. Finally, they can be considered as promises giving rise to a genuine legal obligation.

It is right to point out that there is not a world of difference between the expression of an intention to do or not to do something in the future and a promise envisaged as a source of legal obligations. But the fact remains that not every statement of intent is a promise. There is a difference between a promise which gives rise to a moral obligation (even when reinforced by oath or word of honour) and a promise which legally binds the promisor. This distinction is universally prominent in municipal law and must be accorded even greater attention in international law.

For a promise to be legally binding on a State, it is necessary that the authorities from which it emanates should be competent so to bind the State (a question of internal constitutional law and international law) and that they should manifest the intention and will to bind the State (a question of interpretation). One has therefore to ask whether the French authorities which made the statements had the power, and were willing, to place the French State under obligation to renounce all possibility of resuming atmospheric nuclear tests, even in the event that such tests should again prove necessary for the sake of national defence: an obligation which, like any other obligation stemming from a unilateral statement, cannot be presumed and must be clearly manifested if it is to be reliable in law (obligatio autem non oritum nisi ex voluntate certu et plane declarata).

The identification of the necessary conditions to render a promise animo sibi vinculandi legally binding has always been a problem in municipal law and, since Grotius at least, in international law also. When an obligation arises whereby a person is bound to act, or refrain from acting, in such and such a way, this results in a restraint upon his freedom (alienatio cuiusdam libertatis) in favour of another, upon whom he confers a right in respect of his own conduct (signum volendi ius proprium alteri conferri); for that reason, and with the exception of those gratuitous acts which are recognized by the law (e.g., donation, pollicitation), the law generally requires that there should be a quid pro quo from the beneficiary to the promisor. Hence - and this should not be forgotten - any promise (with the exception of pollicitation) can be withdrawn at any time before its regular acceptance by the person to whom it is made (*ante acceptationem, quippe iure nondum translatum, recovari possessiner inuistitia*).

4. On the occasion of another unilateral statement - discontinuance - the Court established that an act of that kind must be considered in close relationship with the circumstances of the particular case (*I.C.J. Reports 1964*, p.19). And it is with the circumstances of the present case in mind that one must seek an answer to the following questions:

Do those statements of the French authorities with which the Judgement is concerned mean anything other than the notification to the French people - or the world at large - of the nuclear-test policy which the Government will be following in the immediate future?

Do those statements contain a genuine promise never in any circumstances, to carry out any more nuclear tests in the atmosphere?

Can those statements be said to embody the French Government's firm intention to bind itself to carry out no more nuclear tests in the atmosphere?

Do these same statements possess a legal force such as to debar the French State from changing its mind and following some other policy in the domain of nuclear tests, such as to place it vis-à-vis other States under an obligation to carry out no more nuclear tests in the atmosphere?

To these questions one may reply that the French Government has made up its mind to cease atmospheric nuclear testing from now on, and has informed the public of its intention to do so. But I do not feel that it is possible to go farther. I see no indication warranting a presumption that France wished to bring into being an international obligation, possessing the same binding force as a treaty - and vis-à-vis whom, the whole world?

It appears to me that, to be able to declare that the dispute brought before it is without object, the Court requires to satisfy itself that, as a fact evident and beyond doubt, the French State wished to bind itself, and has legally bound itself, not to carry out any more nuclear tests in the atmosphere. Yet in my view the attitude of the French Government warrants rather the inference that it considers its statements on nuclear tests to belong to the political domain and to concern a question which, inasmuch as it relates to national defence, lies within the domain reserved to a State's domestic jurisdiction.

I perfectly understand the reluctance of the majority of the Court to countenance the protraction of proceedings which from the practical point of view have become apparently, or probably, pointless. It is however not only the probable, but also the possible, which has to be taken into account if rules of law are to be respected. It is thereby that the application of the law becomes a safeguard for the liberty of States and bestows the requisite security on international relations.

II
JURISDICTION OF THE COURT

In its Order of 22 June 1973 the Court considered that the material submitted to it justified the conclusion that the provisions invoked by the Applicant appeared, prima facie, to afford a basis upon which the jurisdiction of the Court might be founded. At the present stage of the proceedings, the Court must satisfy itself that it has jurisdiction under Articles 36 and 37 of the Statute[13].

I. Jurisdiction of the Court by Virtue of the French Government's Declaration of 20 May 1966 (Art.36, para.2, of the Statute).

The first objection to the jurisdiction of the Court is based on the reservation made by the French Government as to

> "... disputes arising out of a war or international hostilities, disputes arising out of a crisis affecting national security or any measure or action relating thereto, and disputes concerning activities connected with national defence".

This reservation certainly seems to apply to the nuclear tests. It is true that it has been contended that the nuclear tests do not fall within activities connected with national defence, because their object is the perfection of a weapon of mass destruction. But it must be borne in mind that we are dealing with a unilateral declaration, an optional declaration of adhesion to the jurisdiction of the Court. Thus the intention of the author of the declaration is the first thing to be considered, and the terms of the declaration and the contemporary circumstances permit of this being ascertained. The term "national defence" is broad in meaning: "Ministry of National Defence" is commonly used as corresponding to "Ministry of the Armed Forces". National defence also includes the possibility of riposting to the offensive of an enemy. This is the idea behind the "strike force". The expression used ("concerning activities connected with ...") rules out any restrictive interpretation. Furthermore, it is well known that the intention of the French Government was to cover the question of nuclear tests by this reservation; it took care to modify reservation (3) to its declaration of 10 July 1959[14] six weeks before the first nuclear test[15].

The Applicant contends that the French reservation is void because it is subjective and automatic, and thus void as being incompatible with the requirements of the Statute. This argument is not convincing. In reservation (3) of the French declaration, it is neither stated explicitly nor implied that the French Government reserves the power to define what is connected with national defence. However that may be, if the reservation were void as contrary to law, the result would be that the declaration would be void, so that the source of the Court's jurisdiction under Article 36, paragraph 2, of the Statute would disappear along with the reservation. (In this sense, cf. separate opinion of Judge Sir Hersch Lauterpacht, *I.C.J. Reports 1957*, pp.34 and 57-59; dissenting opinion of Judge Sir Hersch Lauterpacht, *I.C.J. Reports 1959*, p. 101; separate opinion of Judge Sir Percy Spender, *I.C.J. Reports 1959*, p. 59). The reservation is not a statement of will which is independent and capable of being isolated. Partial nullity, which the Applicant proposes to apply to it, is only permissible when there is a number of terms which are entirely distinct ("tot sunt stipulations, quot corpora", D.45, I, I, para. 5) and not when the reservation is the "essential basis" of the consent (Vienna Convention on the Law of Treaties, Art.44, para.3 (b))[16]

The controversy is really an academic one. The exception or reservation in the French declaration states, in such a way as to exclude any possible doubt, that the French Government does not confer competence on the Court for disputes concerning activities connected with national defence. There is no possibility in law of the Court's jurisdiction being imposed on a State contrary to the clearly expressed will of that State. It is not possible to disregard both the letter and the spirit of Article 36 of the Statute and Article 2, paragraph 7, of the United Nations Charter.

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[13] I believe that I am entitled to express my opinion on the jurisdiction of the Court and the admisibility of the Application. It is true that, in a declaration appended to the Judgement in the South West Africa cases (I.C.J. Reports 1966, pp.51-57), President Sir Percy Spender endeavoured to narrow the scope of the questions with which judges might deal in their opinions. But he was actually going against the practice followed in the cases upon which the Court was giving judgement at the time. It was in the following terms that he stated his view: "....such opinions should not purport to deal with matters that fall entirely outside the range of the Court's decision, or of the decisions motivation" (ibid., p.55). In the present case, it does not seem to me that the questions of jurisdiction and admissibility fall outside the range of the Court's decision. They are the questions specified in the Court's Order or 22 June 1973, and they are those which have to be resolved unless the dispute is manifestly without object.

[14] By adding the words "and disputes concerning activities concerned with national defence".

[15] In my opinion, the Co urt does not have to deal with sophistical arguments of the Applicant on this point, ingenious though they be. The objective nature of the reservation does not require that the meaning of the expression "national defence", or what the French Government meant when it used it, be proved by evidence. The reservation should simply be interpreted as a declaration of unilateral will, should be interpreted, that is to say, taking into account the natural meaning of the words and the presumed intention of the declarer. What would require proof would be that it had a meaning contrary to the natural meaning of the terms used.

[16] (text illegible from the original)

2. Jurisdiction of the Court by Virtue of the General Act of Geneva of 26 September 1928 (Art. 36, para. 1, and Art. 37 of the Statute)

The question which most particularly requires to be examined is whether the General Act is still in force. Article 17 thereof reads as follows:

> "All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal."

Article 37 of the Statute provides that:

> "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the Parties to the present Statute be referred to the International Court of Justice." The French Government has informed the Court that it considers that the General Act cannot serve as a basis for the competence of the Court. It is therefore necessary to examine the various questions which have been raised as to the efficacy of the Act of Geneva after the dissolution of the League of Nations.

(a) The General Act, like the contemporary treaties or conciliation, judicial settlement and arbitration, originated in the same concern for security and the same desire to ensure peace as underlay the system of the League of Nations. The question which arises in the present case is whether Article 17 of the General Act is no more than a repetition or duplication of Article 36, paragraph 2, of the Statute of the Permanent Court. If this is so, is Article 17 of the General Act subject to the vicissitudes undergone by Article 36, paragraph 2, of the Statute, and likewise to the reservations permitted by that provision?

The two Articles certainly coincide both in objects and means, but they are independent provisions which each have their own individual life. This appeared to be generally recognized. For brevity's sake, I will simply refer to the opinion of two French writers of indisputable authority. Gallus, in his study "L'Act général a-t-il une réele utilite, reaches the above conclusion. He points out the similarities between the Articles, and goes on: "But it would not be correct to say that the General Act is no more than a confirmation of the system of Article 36 of the Statute of the Permanent Court of International Justice" (Revue de droit international (Lapradelle), Vol. III, 1931, p. 390). The author is also careful to point out the differences between the two sources of jurisdiction (members, conditions of membership, permitted reservations, duration, denunciation) and the complications caused by the co-existence of the two sources (ibid., pp.392-395). In his view, the General Act amounts to "a step further than the system of Article 36 of the Statute of the Court" (ibid., p.391).

In the same sense, René Cassin has said:

"Does the recent accession of France to the Protocol of the aforesaid Article 36 not duplicate its accession to Chapter II of the General Act of arbitration? The answer must be that it does not." ("L'Acte général d'arbitrage", Questions politiques et juridiques, *Affaires étrangères*, 1931, p.17.)[17]

(b) It has been said that the reservations contemplated by Article 39, paragraph 2 (b), of the General Act, applicable between the Governments which are Parties to this case, may be regarded as covering reservation 31 of the French declaration of 1966.

This view is not convincing. The reservation permitted by the General Act is for "disputes concerning questions which by international law are solely within the domestic jurisdiction of States". This coincides with reservation (2) in the French declaration of 1959 relating to questions which by international law fall exclusively under domestic jurisdiction. That reservation was retained (also as Number 2) in the French declaration of 1966; but it was thought necessary to add to reservation (3), an exclusion relating to disputes concerning activities connected with national defence.

This addition to reservation (3) was necessary in order to modify its scope in view of the new circumstances created by the nuclear tests. The reserved domain of domestic jurisdiction does not include disputes arising from acts which might cause fall-out on foreign territory. The final phrase of reservation (3) of the French declaration of 1966 has an entirely new content, and one which therefore differs from Article 39, paragraph 2 (b), of the General Act.

(c) Paradoxically enough, doubt has been cast on the continuation in force of the General Act in the light of the proceedings leading up to General Assembly resolution 268A (III) on Restoration to the General Act of its Original Efficacy, and in view also of the actual terms of the resolution.

[17] Chapter II of the General Act, which is entitled "Judicial Settlement", begin with Article 17. The individual and independent value of the Act, even after the winding-up of the League of Nations, is clear from the *travaux preparatoires* of resolution —— (III) of the United Nations General Assembly, and from the actual text of that resolution.

It is true that ambiguous expressions can be found in the records of the preliminary discussions. It was said that the draft resolution would not imply approval on the part of the General Assembly, and that it would thus confine itself to allowing the States to re-establish "the validity" of the General Act of 1928 of their own free will (Mr. Entezam of Iran, United Nations, *Official Records of the Third Session of the General Assembly, Part I, Special Political Committee*, 26th Meeting, 6 December 1948, p.302)[18]. The spokesmen for the socialist republics, for their part, vigorously criticized the General Act for political reasons, regarding it as a worthless instrument that had brought forth stillborn measures.

But the signatories of the Act, when they spoke of regularizing and modifying the Act, were contemplating the restoration of its full original efficacy, and were not casting doubt on its existing validity. Mr. Larock (Belgium) explained that the General Act "was still valid, but needed to be brought up to date" (ibid., 28th Meeting, p.323). Mr. Ordonneau (France) stated that "the Interim Committee simply proposed practical measures designed to facilitate the application of provisions of Article 33 [of the Charter]" (ibid., p. 324). Mr. Van Langenhove (Belgium) said that "the General Act of 1928 was still in force; nevertheless its effectiveness had diminished since some of its machinery (i.e., machinery of the League of Nations] had disappeared" (United Nations, *Official Records of the Third Session of the General Assembly, Part II*, 198th Plenary Meeting, 28 April 1949, p.176). Mr. Viteri Lafronte (Equador) the rapporteur, explained that there was no question of reviving the Act of 1928 or of making adherence to it obligatory. The Act remained binding on those signatories that had not denounced it (ibid., p.189). Mr. Lapie (France) also said that the General Act of 1928, which it was proposed "to restore to its original efficacy, was a valuable document inherited from the League of Nations and it had only to be brought into accordance with the new Organization" (ibid., 199th Plenary Meeting, 28 April 1949, p.193). To sum up and without there being any need to burden this account of the matter with further quotations, it would seem that no one at that time claimed the Act had ceased to exist as between its signatories, and that on the contrary it was recognized to be still in force between them.

Resolution 268A (III) of 28 April 1949, on the Restoration to the General Act of its Original Efficacy, gives a clear indication of what its object and purpose is. It considers that the Act was impaired by the fact that the organs of the League of Nations and the Permanent Court had disappeared, and that the amendments mentioned were of a nature to restore to it its original efficacy. The resolution emphasizes that such amendments

> "will only apply as between the States having acceded to the General Act as thus amended and, as a consequence, will not affect the rights of such States, parties to the Act as established on 26 September 1928, as should claim to invoke it in so far as it might still be operative".

(d) Are Articles 17, 33, 34 and 37 of the General Act, which refer to the Permanent Court of International Justice, still applicable by the operation of Article 37 of the Statute? Solely an affirmative answer would appear to be tenable.

The Court answered the question indirectly in the *Barcelona Traction, Light and Power Company, Limited* case (Preliminary Objections stage); Judge Armand-Ugon demonstrated that the bilateral treaties of conciliation, in judicial settlement and arbitration of the time were of the same nature as the General Act, a multilateral treaty. He said of the Hispano-Belgian treaty of 1927 that it "is nothing other than a General Act on a small scale between two States". That is true. He then reasoned as follows: Resolution 268A (III) seemed to him to show, beyond all possible doubt, that the General Assembly did not think it could apply Article 37 of the Statute of the Court to the provisions of the General Act relating to the Permanent Court, because for such a transfer "a new agreement [the 1949 Act] was essential. This meant that Article 37 did not operate" (dissenting opinion, *I.C.J. Reports 1964*, p.156). The Court did not accept Judge Armand-Ugon's reasoning as sound, and impliedly denied his interpretation of the 1949 Act and found Article 37 of the State applicable to the 1928 General Act[19]. The doctrine of the Court is that the real object of the jurisdictional clause invoking the Permanent Court (under Art. 37) was not "to specify one tribunal other than another but to create the obligation of compulsory adjudication" (I.C.J. Reports 1964, p.38).

(e) The question which would appear to bear on the discussion on the continuance in force of the General Act is whether that instrument has been subjected to tacit abrogation.

International law does not look with favour on tacit abrogation of treaties. The Vienna Convention, which may be regarded as the codification of *communis opinion* in the field of treaties (*I.C.J. Reports* 1971, p.47 has laid down that the "termination of a treaty" may take place only "as a result of the application of the provisions of the treaty or of the present Convention" (Art. 42, para.2), and that the termination of a treaty under the Convention may take place: "(a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with other contracting

[18] Mr. Entezam was perhaps using the word "validity" in the sense of "full efficacy".

[19] It held that the Hispano-Belgian treaty was still in force because of the applicability to it of Article 37 of the Statutes.

States" (Art.54).

The General Act laid down the minimum period for which it should be in force, provided for automatic renewal for five-year periods, and prescribed the form and means of denunciation (Art.45). Like the Vienna Convention, the Act did not contemplate tacit abrogation; and this is as it should be. To admit tacit abrogation would be to introduce confusion into the international system. Furthermore, if tacit abrogation were recognized, it would be necessary to produce proof of the facta concludendi which would have to be relied on to demonstrate the contrarious consensus of the parties; and proof of sufficient force to relieve the parties of the obligation undertaken by them under the treaty.

(f) It seems to me to be going too far to argue from the silence surrounding the Act that this is such as to give rise to a presumption of lapse[20]. Digests and lists of treaties in force have continued to mention the Act; legal authors have done likewise.[21]

In the Court also, Judge Basdevant affirmed that the General Act was still in force between France and Norway, which were both signatories to it. He drew attention to the fact that the Act had been mentioned in the Observations of the French Government and had later been explicitly invoked by the Agent of the Government as a basis of the Court's jurisdiction in the case: he likewise pointed out that the Act had also been mentioned by counsel for the Norwegian Government (I.C.J. Reports 1957, p.74). This is an opinion of considerable authority. But it seems to me relevant also to observe that, when the Court (despite Judge Basdevant's opinion) dismissed the French claim in the *Certain Norwegian Loans* case, it did not throw doubt on the validity and efficacy of the General Act[22].

The dissenting opinion of Judges Guerrero, McNair, Read and Hsu Mo, in the case concerning Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide, also referred to the 1928 General Act and to the Revised Act (I.C.J. Reports 1951, p.37)[23].

In my view, one can only agree with the following statement, taken from a special study of the matter:

> "In conclusion it may be affirmed that the General Act of Geneva is in force between twenty contracting States[24] which are still bound by the Act, and not only in a purely formal way, for it retains full efficacy for the contracting States despite the disappearance of some organs of the League of Nations[25]."

(g) The continuance in force of the General Act being admitted, it has still been possible to ask whether the French declaration recognizing the compulsory jurisdiction of the Court, with the 1966 reservation as to national defence, might not have modified the obligations undertaken by France when it signed the Act, in particular those contained in Chapter II. In more general terms, the question is whether the treaties and conventions in force in which acceptance of the Court's jurisdiction is specially provided for (the hypothesis of Art.36, para. 1, of the Statute), are subordinate to the unilateral declarations by States accepting the compulsory jurisdiction of the Court (the

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[20] The non-invocation of a treaty may in fact be due to its efficacy in obviating disputes between the parties - and thereby constitute the best evidence of its continuance in force.

[21] It has been cited as being still in force by the most qualified writers in France and in other countries. Nonetheless, the doubts of Siorat should be noted, as to the validity of the Act after the winding-up of the League of Nations. He raises the problem whether the General Act might not have lapsed for a reason other than the Winding-up of the Permanent Court; impossibility of execution, as a result of the disappearance of the machinery of the League of Nations, might be asserted. But for termination to to have occurred, it would be necessary to prove that the functions laid on the League of Nations have not been transferred to the United Nations, and that the situation would both make execution literally impossible and create a total, complete and permanent impossibility. Generally accepted desuetude might also be asserted. This writer mentions that the attitude of the parties towards the Act is difficult to interpret, and point out that for there to be desuetude it would be necessary to prove indisputably that the parties had adopted a uniform attitude by acting with regard to the Act as though it did not exist, and that they had thus, in effect, concluded a tacit agreement to regard the Act as having terminated (L'article 37 du Statut de la Cour internationale de Justice", Annuaire françaiis de droit international, 1962, pp.321-323). It should be observed that the data given by this writer are somewhat incomplete.

[22] The Court said that the French Government had mentioned the General Act of Geneva, but went on to say that such a reference could not be regarded as sufficient to justify the view that the Application of the French Government was based upon the General Act. "If the French Government had intended to had intended to proceed upon that basis it would expressly have so stated." The Court considered that the Application of the French Government was based clearly and precisely on Article 36, paragraph 2, of the Statute. For that reason, the Court felt that it would not be justified in seeking a basis for its jurisdiction "different from that which the French Government itself set out in its Application and by reference to which the case had been presented by both Parties to the Court" (I.C.J. Reports 1957, p.24f.) It seems that it would not have been in the interest of the French Government to place emphasis on the General Act, because the latter, in Article 31, required the exhaustion of local remedies.

[23] The Act is also cited in I.C.J. Reports 1961, p.19, Pakistan invoked it as basis of the Court's jurisdiction in its Application of 11 May 1973 against India (a case which was removed from the list by an Order of 15 December 1973 following a discontinuance by Pakistan).

[24] France and the United Kingdom have denounced the Act since the institution of the present proceedings.

[25] Kunzmann, "Die Generalakte von New York und Generals St———————— der Vereinten Nationen", 56 Die Friedens-Warte (1961-1966), Basle, p.22.

hypothesis of Art.36 para 2 of the Statute) and depend on those declarations, with the result that the abrogation of the obligation to the subject to the Court's jurisdiction or its limitation by the introduction of additional reservations, also entails the abrogation or limitation of the obligations undertaken under a previous bilateral or multilateral convention.

The respect due to the sovereignty of States, and the optional nature of the Court's jurisdiction (Art.2, para,7, of the Charter), would not serve to warrant setting aside the principle of pacta sunt servanda, an essential pillar of international law. Once submission to the Court's jurisdiction has been established in a treaty or convention (Art. 36, para.1, of the Statute), the parties to the treaty or convention cannot of their own free will and by unilateral declaration escape the obligation undertaken toward another State. Such declaration does not have prevailing force simply because it provides for the jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute, or because it is made subject to reservations, or enshrines a possibility of arbitrarily depriving the Court of jurisdiction. To undo the obligation undertaken, it will always be necessary to denounce the treaty or convention in force, in accordance with the prescribed conditions.

Even if it be thought that a declaration filed under Article 36, paragraph 2, of the Statute gives rise to obligations of a contractual nature, the answer would still be that such declaration cannot free the declarant State from all or any of the obligations which it has already undertaken in a prior agreement, otherwise than in accordance with the conditions laid down in that agreement. For there to be implied termination of a treaty as a result of the conclusion of a subsequent treaty, a primary requirement is that "all the parties to it conclude a later treaty relating to the same subject-matter" (Vienna Convention, Art.59).

It should also be noted that there is not such incompatibility between declarations made by virtue of Article 36, paragraph 2, of the Statute, and the General Act, as to give rise to tacit abrogation as a result of a new treaty. The Act operates between the signatories thereto, a closed group of 20 States, and imposes special conditions and limitations on the parties. The Statute, on the contrary, according to the interpretation which has been given of Article 36, paragraph 2, opens the door to practically all States (Art. 93 of the Charter), and permits of conditions and reservations of any kind whatever being laid down.

The relationship between the General Act and subsequent acceptance of the compulsory jurisdiction of the Court has been explained in concise and masterly fashion by Judge Basdevant:

> "A way of access to the Court was opened up by the accession of the two Parties to the General Act of 1928. It could not be ..... or cancelled out by the restrictive clause which the French Government, and not the Norwegian Government, added to its .... acceptance of compulsory jurisdiction stated in its Declaration of 1949. The restrictive clause, emanating from only one of them, does not constitute the law as between France and Norway. The clause is not sufficient to set aside the judicial system existing between them on this point. It cannot close the way of access to the Court that was formerly open, or cancel it with the result that no jurisdiction would remain". (*I.C.J. Reports 1957*, pp.75f).

(h) There still remains a teasing mystery: why did the French Government not denounce the General Act at the appropriate time and in accordance with the required forms, in exercise of Article 45, paragraph 3, of the Act, at the time in 1966 when it filed its declaration recognizing the jurisdiction of the Court subject to new reservations? It seems obvious that the French Government was in 1966 not willing that questions concerning national defence should be capable of being brought before the Court, and we simply do not know why the French Government preserved the Court's jurisdiction herein vis-à-vis the signatories to the Act[26]. But this anomalous situation cannot be regarded as sufficient to give rise to a presumption of tacit denunciation of the General Act by the French Government, and to confer on such denunciation legal effectiveness in violation of the provisions of the Act itself. To admit this would be contrary to legal security and even to the requirements of the law as to presumptions.

III
THE ADMISSIBILITY OF THE APPLICATION

The Order of 22 June 1973 decided that the written pleadings should be addressed both to the question of the Court's jurisdiction to entertain the dispute and to that of the admissibility of the Application. The Court has thus followed Article 67 of its Rules.

The term "admissibility" is a very wide one, but the Order, in paragraph 23, throws some light on the meaning in which it uses it, by stating that it cannot be assumed a prior that the Applicant may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application".

[26] Though various hypotheses have been put forward to explain this contradictory conduct.

The question is whether the Applicant, in its submissions, has or has not asserted a legal interest as basis of its action. At the preliminary stage contemplated by the Order, the Court has first to consider whether the Applicant is entitled to open the proceedings (legitimation ad processus Rechtsschazanspruch), to set the procedural machine in motion, before turning to examination of the merits of the case. Subsequently the question would arise as to whether the interest alleged was in fact and in law worthy of legal protection[27]. But that would belong to the merits of the case, and it therefore does not fall to be considered here.

The Applicant refers to violations by France of several legal rules, and endeavours to show that it has a legal interest to complain of each of these violations. It will therefore be necessary to examine the interest thus invoked in each case of alleged violation, but it would be as well for me first of all to devote some attention to the meaning of the expression "legal interest".

2. The idea of legal interest is at the very heart of the rules of procedure (cf. the maxim "no interest, no action"). It must therefore be used with the exactitude required by its judicial function. The General Act affords a good guide in this respect: it distinguishes between "disputes of every kind" which may be submitted to the procedure of conciliation (Art.I), the case of "an interest of a legal nature" in a dispute for purposes of intervention (Art.36), and "all disputes with regard to which the Parties are in conflict as to their respective rights" (Art. 17); only the latter are disputes appropriate to judicial settlement, and capable of being submitted for decision to the Permanent Court of International Justice in accordance with the General Act[28].

As is apparent, Article 17 of the General Act does not permit an extensive interpretation of the "legal interest" which may be asserted before the Court. What is contemplated is a right specific to the Applicant which is at the heart of a dispute, because it is the subject of conflicting claims between the Applicant and the Respondent. Thus it is a right in the proper sense of that term (ius dominatirum) the meaning of which is that it belongs to one or another State, that State being entitled to negotiate in respect thereof, and to renounce it.

The Applicant however seems to overlook Article 17 and considers that it is sufficient for it to have a collective or general interest. It has cited several authorities to support its view that international law recognizes that every State has an interest of a legal nature in the observation by other countries of the obligations imposed upon them by international law, and to the effect also that law recognizes an interest of all States with regard to general humanitarian causes.

If the texts which have been cited are closely examined, a different conclusion emerges. In *South West Africa (Preliminary Objections)* Judge Jessup showed how international law recognized that States may have interests in matters which do not affect their "material" or, say, "physical" or "tangible" interests. But Judge Jessup also observes that "States have asserted such legal interests on the basis of some treaty", in support of this observation he mentions the minorities treaties, the Convention for the Prevention and Punishment of the Crime of Genocide, conventions sponsored by the International Labour Organization, and the mandates system (separate opinion, I.C.J. Reports 1962, pp.425 ff.). Judge Jessup's opinion in the second phase of the *South West Africa cases*, in which he criticizes the Court's Judgement which did not recognize that the Applicants or any State had a right of a recourse to a tribunal when the Applicant does not allege its own legal interest relative to the merits, is very subtly argued. Judge Jessup took into account the fact that it was a question of "fulfillment of fundamental treaty obligations contained in a treaty which has what may fairly be called constitutional characteristics" (dissenting opinion, I.C.J. Reports 1969, p. 386). More specifically, he added: "There is no generally established *actio popularis* in international law" (ibid., p. 387). In the same case Judge Tanaka stated:

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[27] Judge Morelli once pointed out that the distinction between a right of action and a substantive interest is proper to municipal law, whereas it is necessary in international law to ascertain whether there is a dispute (separate opinion, I.C.J. Reports 1963, pp.132f.). I do not find this observation particularly useful. To hold an application inadmissible because of the applicant's want of legal interest, or to reach the same conclusion because for want of such interest there is no dispute, comes to one and the same thing. Judge Morelli felt bound to criticize the 1962 South West Africa Judgement because in his view it confused "the right to institute proceedings" (which has to be examined as a preliminary question) and the existence of "a legal right or interest" or "a substantive right vested in the Applicants" (which has to be regarded as a question touching the merits) (separate opinion, I.C.J. Reports 1966, p.61).

[28] Sir Gerald Fitzmaurice has shed light on the meaning to be given to the term "dispute". He says that a legal dispute exists

"only if its outcome or result, in the form of a decision of the Court, is capable of affecting the legal interests or relations of the parties, in the sense of conventions or imposing upon (or confirming for) one or other of them, a legal right or obligation, or of operating as an injunction or a prohibition for the future, or as a ruling material to a still substituting legal situation" (separate opinion, I.C.J. Reports 1963, p.110).

The point thus made is not upset by the fact that proceedings can be instituted to secure a declaratory ruling, but in that connection it must be noted that what may properly fall to be determined in contentious proceedings is the existence or non-existence of a right vested in a party thereto, or of a concrete or specific obligation. The Court cannot be called upon to make a declaratory finding of an abstract or general character as to the existence or non-existence of an objective rule of law, or of a general or non-specific obligation. That kind of declaration may be sought by means of a request for an advisory opinion.

> "We consider that in these treaties and organizations common humanitarian interests are incorporated. By being given organizational form, these interests take the nature of legal interest' and require to be protected by specific procedural organs." (Dissenting opinion, I.C.J. Reports 1966, p. 252).

In reply to the argument that it should allow "the equivalent *actio popularis*, or right resident to any member of a community to legal action in vindication of a public interest", the Court stated:

> "Although a right of this kind may be known in certain national systems of law, it is not known to international law as it is at present; nor is the Court able to regard it as one of the general principles of law referred to in Article 38 para 1(c) of its Statute (*I.C.J. Reports 1966, p.47 para 88*).

On the other hand the Court has also said that:

"In particular, an essential distinction should be made between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes." (I.C.J. Reports 1970, p.32, para.33.)

These remarks, which have been described as progressive and have been regarded as worthy of sympathetic consideration, should be taken cum grano salis. It seems to me that the obiter reasoning expressed therein should not be regarded as amounting to recognition of the actio popularis in international law; it should be interpreted more in conformity with the general practice accepted as law. I am unable to believe that by virtue of this dictum the Court would regard as admissible, for example, a claim by State A against State B that was not applying "principles and rules concerning the basic rights of the human person" (*I.C.J. Reports 1970*, p.32, para.34) with regard to the subjects of State B or even State C. Perhaps in drafting the paragraph in question the Court was thinking of the case where State B injured subjects of State A by violating the fundamental rights of the human person. It should also be borne in mind that the Court appears to restrict its dictum on the same lines as Judges Jessup and Tanaka when referring to "international instruments of a universal or quasi-universal character" (*I.C.J. Reports 1970*, p.32, para,34)[29].

In any event, if, as appears to me to be the case, the Court's jurisdiction in the present case is based upon Article 17 of the General Act and not on the French declaration of 1966, the Application is not admissible unless the Applicant shows the existence of a right of its own which it asserts to have been violated by the act of the Respondent.

3. The claim that the Court should declare that atmospheric nuclear tests are unlawful by virtue of a general rule of international law, and that all States, including the Applicant, have the right to call upon France to refrain from carrying out this sort of test, gives rise to numerous doubts.

Can the question be settled in accordance with international law, or does it still fall within the political domain? There is also the question whether this is a matter of admissibility or one going to the merits. A distinction must be made as to whether it relates to the political or judicial character of the case (a question of admissibility), or whether it relates to the rule to be applied and the circumstances in which that rule can be regarded as part of customary law (a question going to the merits)[30]. This is a difficulty which could have been resolved by joining the question of admissibility to the merits.

But there is no need to settle these points. In my opinion, it is clear that the Applicant is not entitled to ask the Court to declare that atmospheric nuclear tests are unlawful. The Applicant does not have in its own material legal interest, still less a right which has been disputed by the other Party as required by the General Act. The request that the Court make a general and abstract declaration as to the existence of a rule of law goes beyond the Court's judicial function. The Court has no jurisdiction to declare that all atmospheric nuclear tests are unlawful, even if as a matter of conscience it considers that such tests, or even all nuclear tests in general, are contrary to morality and to every humanitarian consideration.

4. The right relied on by the Applicant with regard to the deposit of radio-active fall-out on its territory was considered in the Order of 22 June 1973 (para. 30). We must now consider whether reliance on this right makes

[29] The expression "obligations erga onmes" calls to mind the principal of municipal law to the effect that ownership imposes an obligation erga omunes; but this obligation gives rise to a legal right or interest to assert ownership before a tribunal for the benefit of the owner who has been injured in respect of his right or interest, or whose right or interest has been disregarded. Even in the case of theft, one cannot speak of an action popilaris - which is something different from capacity to report the theft to the authorities. It should also be born in mind that a decision of the Court is not binding erga omnes: it has no binding force except between the parties to the proceedings and in respect of the particular case decided (Statute, Art.59).

[30] The idea that the Moscow Treaty, by its nature, partakes of customary law or its cogens is laid open to some doubt by its want of universality and the reservation in its Article IV to the effect that "Each Party shall ... have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject-matter of this Treaty, have jeopardized the supreme interests of its country".

the request for examination of the merits of the case admissible. The Applicant's complaint against France of violation of its sovereignty by introducing harmful matter into its territory without its permission is based on a legal interest which has been well known since the time of Roman law. The prohibition of *immissio* (of water, smoke, fragments of stone) into a neighbouring property was a feature of Roman law (D.8, 5, 8, para.5). The principle *sic utere tuo ut aliaenat non laedas* is a feature of law both ancient and modern. It is well known that the owner of a property is liable for intolerable smoke or smells, "because he oversteps [the physical limits of his property], because there is immissio over the neighbouring properties, because he causes injury[31]".

In international law, the duty of each State not to use its territory for acts contrary to the rights of other States might be mentioned (*I.C.J. Reports 1949*, p.22). The arbitral awards of 16 April 1938 and 11 March 1941 given a dispute between the United States and Canada mentioned the lack of precedents as to the pollution of the air, but by analogy with the pollution of water, and the Swiss litigation between the canton of Soleure and Aargon. The conflict between the United States and Canada with regard to the Trail Smelter was decided on the basis of the following rule:

> "No State has the right to use of permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another .... when the case is of serious consequence and the injury is established by clear and convincing evidence." (Trail Smelter arbitration, 1938-1941, *United States of America* v. *Canada*. UNRIAA, Vol.III, p.1965[32].)

If it is admitted as a general rule that there is a right to demand prohibition of the emission by neighbouring properties of noxious fumes[33], the consequence must be drawn by an obvious analogy, that the Applicant is entitled to ask the Court to uphold its claim that France should put an end to the deposit of radio-active fall-out on its territory.

The question whether the deposit of radio-active substances on the Applicant's territory as a result of the French nuclear tests is harmful to the Applicant should only be settled in the course of proceedings on the merits in which the Court would consider whether intrusion or trespass into the territory of another is unlawful in itself or only if it gives rise to damage; in the latter hypothesis, it would still have to consider the nature of the alleged damage[34], its existence[35] and its relative importance[36], in order to pronounce on the claim for prohibition of the French nuclear tests[37].

5. A third complaint against France is based upon infringement of the principle of freedom of the high seas as the result of restrictions on navigation and flying due to the establishment of forbidden zones. This raises delicate legal questions.

Is the carrying out of nuclear tests over the sea, and the establishment of forbidden zones, part of the other freedoms "which are recognized by the general principles of international law" or is it contrary to the freedoms of other States? Are we dealing with a case analogous to that of the establishment of forbidden zones for firing practice or naval manoeuvres? The interpretation of Article 2, paragraph 2, of the Convention on the High Seas requires that in each case reasonable regard be had to the interests of other States in their exercise of their freedom of the high seas; the nature and the importance of the interests involved must be considered, as must the principle of non-harmful use (prodesse enim sibi unusquisque, dum alii non nocet, non prohibetur, D.39,

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[31] The Swiss Federal Tribunal laid down that, according to the rules of international law, a State may freely exercise its sovereignty provided it does not infringe rights derived from the sovereignty of another State; the presence of certain shooting-butts in Aargau endangered areas of Solothurn, and the Tribunal forbade use of the butts until adequate protective measures had been introduced (Judgements of the Swiss Federal Tribunal, Vol.XXVI, Part I, pp.449-451, Recital 3, quoted in Roulet, Le caractère artificiel de la théorie de l'abus de droit en droit international public, Neuchâtel 1958, p.121).

[32] The Award reaches that conclusion "under the principles of international law, as well as of the law of the United States". The award has been regarded as "basic for the whole problem of interference. Its bases are now part of customary international law", A. Randelzhofer, B. Simma, "Das Kernkraftwerk an der Grenze—Ein 'ultra-hazardous activity' im Schnittpunkt von internationalem Nachbarrecht und Umweltschulz", Festschrift fÜr Friedrich Berber, Munich, 1973, p.405. This award marks the abandonment of the theory of Harmon (absolute sovereignty of each State in its territory with regard to all others); Krakan, Die Harmon Doktrin: Eine These der Vereinigten Staeten zum internationalen Flussrecht, Hamburg, 1966, p.9.

[33] I.e., the continuance of the emission of harmful fumes, or the renewed emission of fumes if it is to be feared (ad metuendum) that harm will result. Damnum infeetum est damnum nondum factum, quod futurum veremur, D.39.2.2.

[34] It would have to say, for example, whether or not account should be taken of the fact that continuation of the nuclear tests causes injury, in particular by way of apprehension, anxiety and concern, to the inhabitants and Government of Australia.

[35] This raises the question of evidence (Arts. 48 and 50 of the Statute; Art. 62 of the Rules).

[36] The relative importance of the interests of the Parties must be assessed, and the possibility of reconciling them (question of proximity and innocent usage).

[37] In its Order of 22 June 1973, the Court alluded in the possibility that the tests might cause "irreparable damage" to the Applicant; this is a possibility which should be kept in mind in relation to the indication of interim measures (in view notably of their urgent character) but not where admissibility is concerned.

3, 1, para. 11), of the misuse of rights, and of good faith in the exercise of freedoms.

The question of nuclear tests was examined by the 1958 Conference on the Law of the Sea. A strong tendency to condemn nuclear testing was then apparent, yet the Conference accepted India's proposal; it recognized that there was apprehension on the part of many States that nuclear explosions might constitute an infringement of freedom of the high seas, and referred the matter to the General Assembly for appropriate action.

The complaint against France on this head therefore raises questions of law and questions of fact relating to the merits of the case, which should not be examined and dealt with at the preliminary stage of proceedings contemplated by the Order of 22 June 1973.

It seems to me that this third complaint is not admissible in the form in which it has been presented. The Applicant is not relying on a right of its own disputed by France, and does not base its Application on any material injury, responsibility for which it is prepared to prove lies upon France[36]. The Applicant has no legal title authorizing it to act as spokes-man for the international community and ask the Court to condemn France's conduct. The Court cannot go beyond its judicial functions and determine in a general way what France's duties are with regard to the freedoms of the sea.

(Signed) G. DE CASTRO

DISSENTING OPINION OF JUDGE SIR GARFIELD BARWICK

The Court, by its Order of 22 June 1973, separated two questions, that of its jurisdiction to hear and determine the Application, and that of the admissibility of the Application from all other questions in the case. It directed that "the written proceedings shall first be addressed" to those questions. These were therefore the only questions to which the Parties were to direct their attention. Each question related to the situation which obtained at the date the Application was lodged with the Court, namely 9 May 1973. The Applicant in obedience to the Court's Order has confined its Memorial and its oral argument to those questions. Neither Memorial nor argument has been directed to any other question.

Having read the Memorial and heard that argument, the Court has discussed those questions but, whilst the Parties await the Court's decision upon them, the Court of its own motion and without any notice to the Parties has decided the question whether the Application has ceased to have any object by reason of events which have occurred since the Application was lodged. It has taken cognizance of information as to events said to have occurred since the close of the oral proceedings and has treated it as evidence in the proceedings. It has not informed the Parties of the material which it has thus introduced into evidence. By the use of it the Court has drawn a conclusion of fact. It has also placed a particular interpretation upon the Application. Upon this conclusion of fact and this interpretation of the Application the Court has decided the question whether the Application has ceased to have any object. That question, in my opinion, is not embraced within either of the two questions on which argument has been heard. It is a separate, a different and a new question. Thus the Parties have had no opportunity of placing before the Court their submissions as to the proper conclusion to be drawn from events which have supervened on the lodging of the Application or upon the proper interpretation of the Application itself in so far as each related to the question the Court has decided or as to the propriety of deciding that question in the sense in which the Court has decided it or at all at this stage of the proceedings: for it may have been argued that that question if it arose was not of an exclusively preliminary character in the circumstances of this case. The conclusion of fact and the interpretation of the Application are clearly matters about which opinions differ. Further, the reasoning of the judgement involves important considerations of international law. Therefore there was ample room for argument and for the assistance of counsel. In any case the Applicant must have been entitled to make submissions as to all matters involved in the decision of the Court.

However, without notifying the Parties of what it was considering and without hearing them, the Court, by a Judgement by which it decides to proceed no further in the case, avoids deciding either of the two matters which it directed to be, and which have been argued.

This, in my opinion, is an unjustifiable course, uncharacteristic of a court of justice. It is a procedure which in my opinion is unjust, failing to fulfil an essential obligation of the Court's judicial process. As a judge I can have no part in it, and for that reason, if for no other, I could not join in the Judgement of the Court. However I am also unable to join in that Judgement because I do not accept its reasoning or that the material on which the

[38] Regarding the conditions on which a claim for damages can be entertained, check I.C.J. Reports 1974, pp.203-205, especially para.76, and see also ibid p.225.

Court has acted warrants the Court's conclusion. With regret therefore I dissent from the Judgement.

It may be thought quite reasonable that if France is willing to give to Australia such an unqualified and binding promise as Australia finds satisfactory for its protection never again to test nuclear weapons in the atmosphere of the South Pacific, this case should be compromised and the Application withdrawn. But that is a matter entirely for the sovereign States. It is not a matter for this Court. The Rules of Court provide the means whereby the proceedings can be discontinued at the will of the Parties (see Arts. 73 and 74 of the Rules of Court). It is no part of the Court's function to place any pressure on a State to compromise its claim or itself to effect a compromise.

It may be that a layman, with no loyalty to the law might quite reasonably think that a political decision by France no longer to exercise what it claims to be its right of testing nuclear weapons in the atmosphere, when formally publicized, might be treated as the end of the matter between Australia and France. But this is a court of justice, with a loyalty to the law and its administration. It is unable to take the layman's view and must confine itself to legal principles and to their application.

The Court has decided that the Application has become "without object" and that therefore the Court is not called upon to give a decision upon it. The term "without object" in this universe of discourse when applied to an application or claim, so far as relevant to the circumstances of this case, I understand to imply that no dispute exists between the Parties which is capable of resolution by the Court by the application of legal norms available to the Court or that the relief which is sought is incapable of being granted by the Court or that in the circumstances which obtain or would obtain at the time the Court is called upon to grant the relief claimed, no order productive of effect upon the Parties or their rights could properly be made by the Court in exercise of its judicial function.

To apply the expression "has become without object" to the present circumstances means in my opinion that this judgement can only be valid between France and Australia as regards their respective rights that are involved had ceased to exist, or if the Court in the circumstances now prevailing, cannot with propriety, within its judicial function, make any declaration or Order having effect between the Parties.

It should be observed that I have described the dispute between France and Australia as a dispute as to their respective rights. I shall at a later stage express my reasons for my opinion that that is the nature of their dispute. But it is proper to point out immediately that if the Parties were not in dispute as to their respective rights the Application would have been "without object" when lodged, and no question of its having no longer any object could arise. On the other hand if the Parties were in dispute as to their respective rights, it is that dispute which is relevant in any consideration of the question whether or not the Application no longer has any object.Of course, if the Court lacked jurisdiction or if the Application as lodged was inadmissible because the Parties were never in dispute as to their legal rights, the Court would be not required to go any further in the matter. But the Court has not expressed itself on those matters. The Judgement is not founded either on a lack of jurisdiction or on the inadmissibility of the Application when lodged, though it seems to concede inferentially that the Application was admissible when lodged.

In order to make my view in this matter as clear as I am able, it will be necessary for me in the first place to discuss the only two questions on which the Court has heard argument. Thereafter I shall express my reasons for dissenting from the Court's Judgement (see p.439 of this opinion). I shall first state my conclusions and later develop my reasons for them.

In my opinion, the Court has jurisdiction to hear a dispute between France and Australia as to their respective rights by virtue of Articles 36 (1) and 37 of the Statute of the Court and Article 17 of the General Act of Geneva of 26 September 1928. Further, I am of opinion that at the date the Application was lodged with the Court, France and Australia were, and in my opinion still are, in dispute as to their respective rights in relation to the consequences in the Australian territory and environment of the explosion by France in the South Pacific of nuclear devices.

Further, they were, and still are, in difference as to the lawfulness or unlawfulness according to customary international law of the testing of nuclear weapons in the atmosphere. Subject to the determination of the question whether the Applicant has a legal interest to maintain its Application in respect of this difference, I am of opinion that the Parties were, at the date of the Application, and still are, in dispute for their respective rights in respect of the testing of nuclear weapons in the atmosphere.

If it be a separate question in this case, I am of the opinion that the claim of Australia is admissible in respect of the bases upon which it is made, with the exception of the basis relating to the unlawfulness of the testing of nuclear weapons in the atmosphere. I am of the opinion that the question whether the Applicant has a legal interest to maintain its claim in respect of that basis is not a question of an exclusively preliminary character, , and that it cannot be decided at this stage of the proceedings.

The distinctions implicit in this statement of conclusions will be developed later in this opinion.

I approach the Court's Judgement therefore with the view that the Court is presently seized of an Application which to the extent indicated is admissible and which the Court is competent to hear and determine. I am of opinion that consistently under Article 38 the Court should have decided its jurisdiction and if it be a separate question the admissibility of the Application.

I am of opinion that the dispute between the Parties as to their legal rights was not resolved or caused to disappear by the communiqué and statements quoted in the Judgement and that the Parties remained at the date of the Judgement in dispute as to their legal rights. This is so, in my opinion, even if, contrary to the view I hold, the communiqué and statements amounted to an assurance by France that it would not again test nuclear weapons in the atmosphere. That assurance, if given, did not concede any rights in Australia in relation to nuclear explosions or the testing of nuclear weapons: indeed, it impliedly asserted a right in France to continue such explosions or tests. Such an assurance would of itself in my opinion be incapable of resolving a dispute as to legal rights.

I am further of opinion that the Judgement is not supportable on the material and grounds on which it is based.

I now proceed to express my reasons for the several conclusions I have expressed.

INDICATION OF INTERIM MEASURES

On 22 June 1973, the Court by a majority indicated by way of interim measures pending the Court's final decision in the proceedings that:

> "The Governments of Australia and France should each of them ensure that no action of any kind is taken which might aggravate of extend the dispute submitted to the Court of prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on Australian territory."

In its Order the Court recited that "whereas on a request from provisional measures the Court need not, as fora indicating therein, firstly satisfy itself that it has jurisdiction on the merits of the case, and yet ought not to indicate such measures unless the provisions invoked by the Applicant apply, *prima facie,* to afford a basis on which the jurisdiction of the Court might be founded." After indicating in paragraph 14 of the Order that the Government of Australia (the Applicant) claimed to found the jurisdiction of the Court to entertain its Application upon (1) Article 17 of the General Act of Geneva of 26 September 1928, read with Articles 36 (1) and 37 of the Statute of the Court, and (2) alternatively, on Article 36 (2) of the Statute of the Court and the respective declarations of Australia and France made thereunder, this Court concluded that:

> "Whereas the material submitted to the Court leads to the conclusion, at the present stage of the proceedings, that the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded; and whereas the Court will accordingly proceed to examine the Applicant's request for the indication of interim measures of protection ..."

In indicating summarily in my declaration of 22 June 1973 my reason for joining the majority indicating interim measures, I said:

> "I have voted for the indication of interim measures and the Order of the Court as to the further procedure in the case because the very thorough discussions in which the Court has engaged over the past weeks and my own researches have convinced me that the General Act of 1928 and the french Government's declaration to the compulsory jurisdiction of the Court with reservations each provide, prima facie, a basis on which the Court might have jurisdiction to entertain and decide the claims made by Australia in its Application of 9 May 1973."

I did so to emphasize the fact that the Court had at that time examined its jurisdiction in considerable depth and that it had not acted upon any presumptions nor upon any merely cursory considerations. Consistently with the Court's jurisprudence as a result of this examination there appeared, prima facie, a basis on which the Court's jurisdiction might be founded.

For my own part I felt, at the time, that it was probable that the General Act of Geneva of 26 September 1928 (the General Act) continued at the date of the Application to be valid as a treaty in force between Australia and France and that the dispute between those States, as evidenced in the material lodged with the Applicant, fell within the scope of Article 17 of the General Act.

Declarations by France and Australia to the compulsory jurisdiction of the Court under Article 36 (2) of the Court's Statute with the respective reservations, but particularly that of France of 20 May 1966, as a source of the Court's jurisdiction raised other questions which I had then no need to resolve but which did not ex face, in my opinion, necessarily deny the possibility of that jurisdiction.

In order to resolve as soon as possible the questions of its jurisdiction and the admissibility of the Application, the Court decided that the written proceedings should first be addressed to those questions.

WHETHER FIRST TO DECIDE JURISDICTION OR ADMISSIBILITY

In the reported decisions of the Court, and in the recorded opinions of individual judges, and in the literature of international law, I do not find any definition of admissibility which can be universally applied. A description of admissibility of great width was suggested in the dissenting opinion of Judge Petrén in this case (I.C.J. Reports 1973, p.126); in the dissenting opinion of Judge Gros, the suggestion was made that the lack of justiciable dispute, one which could be resolved by the application of legal norms, made the Application "without object" and thus from the outset inadmissible. In his declaration made at that time, Judge Jumènez de Aréchaga pointed to the expressions in paragraph 23 of the Court's Order as indicating that the existence of a legal interest of the Applicant in respect of its claims was one aspect of admissibility.

The Applicant confined its Memorial and its oral argument in relation to the question of admissibility substantially to the question whether it had a legal interest to maintain its Application. But the Court itself gave no approval to any such particular view of admissibility. Intervention by the President during argument indicated that the Court would decide for itself the ambit of the question of admissibility, that is to say, in particular that it would not necessarily confine itself to the view seemingly adopted by counsel. I shall need later to discuss the aspect of admissibility which, if it is a question in this case separate from that of jurisdiction, is appropriate for reconsideration.

The question may arise at the preliminary stage of a matter whether the admissibility of an application or reference ought first to be decided before any question of jurisdiction is determined. Opinion appears to be divided as to whether or not in any case jurisdiction should first be established before the admissibility of an application is considered, see for example on the one hand the views expressed in the separate opinion of Judge Sir Percy Spender, in the dissenting opinions of President Klaestrad, Judge Arman-Ugon and Judge Sir Hersch Lauterpacht in the *Interhandel Case (Switzerland v. United States of America, I.C.J. Reports 1959*, at p.6) and on the other hand, the views expressed by Judge Sir Gerald Fitzmaurice in his separate opinion in the case of the Northern Cameroons (*Cameroon v. United Kingdom*) (*I.C.J. Reports 1963 p.15)*. There is no universal rule clearly expressed in the decisions of the Court that the one question in every case should be determined before the other.

But granted that there can be cases in which this Court ought to decide the admissibility of a matter before ascertaining the existence or extent of its own jurisdiction, I am of the opinion that in this case the Court's jurisdiction ought first to be determined. There are two reasons for my decision in this sense. First, there is said to be a question of admissibility in this case which, even if it exists as a separate question, seems to me to be bound up with the question of jurisdiction and which, because of the suggested source of jurisdiction in Article 17 of the General Act, to my mind is scarcely capable of discussion in complete isolation from that question. Second, the Court has already indicated interim measures and emphasized the need for an early definitive resolution of its jurisdiction to hear the Application. It would not be judicially proper, in my opinion, now to avoid a decision as to the jurisdiction of the Court by prior concentration on the admissibility of the Application, treating the two concepts as mutually exclusive in relation to the present case.

THE QUESTIONS TO POSSESS AN EXCLUSIVELY PRELIMINARY CHARACTER

I should at this stage make some general observations as to the nature of the examination of jurisdiction and of admissibility which should take place in pursuance of the Court's Order of 22 June 1973. Though not so expressly stated in the Court's Order, these questions, as I understand the position, were conceived to be of a preliminary nature to be argued and decided as such. They are to be dealt with at this stage to the extent that each possesses "an exclusively preliminary character", otherwise their consideration must be relegated to the hearing of the merits.

In amending its Rules on 10 May 1972 and in including in them Article 67 (7) as it now appears, the Court provided for the possibility of a two-stage hearing of a case, in the first stage of which questions of jurisdiction and admissibility, as well as any other preliminary question, might be decided, if those questions could be decided as matters of an exclusively preliminary character. Textually, Article 67 as a whole depends for its operation upon an objection to the jurisdiction of the Court or to the admissibility of the Application by a respondent party in accordance with the Rules of Court. There has been no objection by the Respondent to the jurisdiction of the Court or to the admissibility of the Application in this case conformable to Article 67 of the Court's Rules. Thus, technically it may be said that Article 67 (7) does not control the proceedings at this stage. But though not formally controlling this stage of the case, Article 67 (7) and its very presence in the Rules of Court must have some bearing upon the nature of the examination which is to be made of these two questions. The Article is emphatic of the proportion that if such questions as to jurisdiction or admissibility are separated from the hearing of the merits they may only be decided apart from the merits if they possess an exclusively preliminary character; that is to say if they can be decided without tread-

ing on the merits of the case. The Court's division of this case into stages by its Order of 22 June 1973 must therefore be accommodated to the spirit of its Rules, so that only questions may be decided at this stage which possess an exclusively preliminary character. It was apparent from the contents of the Applicant's Memorial and from the course of the oral argument, that the Applicant understood the decision of each question depended on it being of such a preliminary kind. There has been no indication of any dissent from that view.

POSITION OF ARTICLE 53

Article 53 of the Statute of the Court is in the following terms:

> "1. 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.
>
> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Article 36 and 37, but also that the claim is well founded in fact and law."

Action pursuant to the Article may be called for by a party when the other is in default either of appearance or of defence. When the Court is required by a party to decide its claim notwithstanding such default of the other, the Court, before deciding the claim, must satisfy itself both of its own jurisdiction and of the validity of the claim both in fact and in law. Without the inclusion of this Article in the Statute of the Court, there would surely have been power in the Court, satisfied of its own jurisdiction and of the validity of the applicant State's claim, to give judgement for the applicant, notwithstanding the default of appearance or of defence by the respondent party. The Article is confirmatory of such a power and its inclusion in the Statute was doubtless prompted by the circumstance that the litigants before the Court are sovereign States, and that the presence of the Article would indicate consent to proceedings in default.

As expressed, the Article is dealing in my opinion exclusively with the stage of the proceedings at which the merits of the claim are to be considered and decided. For this reason, and because of the very nature of and of the occasion for the indication of interim measures, Article 53, in my opinion, can have no bearing on that phase of a case. The Court has so treated the Article when considering the indication of interim measures in the past, as, for example, in paragraph 15 of its Order indicating interim measures in the *Fisheries Jurisdiction (United Kingdom v. Iceland)* case (I.C.J. Reports 1972, p.15) and in paragraph 13 of the Order of 22 June, made in this case (I.C.J. Reports 1973, p.101). The Court expressed itself in these cases as to the extent to which it must be satisfied in relation to its own jurisdiction in a manner quite inconsistent with the view that Article 53 controlled the stage of the proceedings in which the indication of interim measures was being considered. These expressions of the Court were not inconsistent in my opinion with the views expressed by Sir Hersch Lauterpacht at page 118 of the Reports of the *Interhandel case (I.C.J. Reports 1957*, p. 105); but the Court has been unwilling to accept the exacting views of Judges Winiarski and Badawi Pasha, expressed in the *Anglo-Iranian Oil Co.* case (*I.C.J. Reports 1951*, pp. 96-98), views which were endorsed by Judge Padilla Nervo in the *Fisheries Jurisdiction* case (*I.C.J. Reports 1972*, at p.21).

Allowing the importance of the fundamental consideration that the Court is a court of limited jurisdiction founded ultimately on the consent of States, it is essential to observe that Article 41 of the Statute of the Court gives it express power to indicate interim measures if it considers that circumstances so require and that, unlike Article 53, Article 41 does not hedge round that power expressly or, as I think, impliedly, with any considerations of jurisdiction or of the merits of the case. Paragraph 2 of Article 41, in opening with the expression "pending the final decision" makes it apparent to my mind that Article 53 does not refer to or control consideration of the indication of interim measures. Consequently, I am unable, with respect, to agree with those who hold a contrary view. But although Article 41 does not refer to questions of jurisdiction or the merits, the Court will consider its jurisdiction to the extent already expressed before indicating interim measures, and an obvious lack of merit will no doubt be influential in deciding whether or not to indicate interim measures.

The Applicant has not yet called upon the Court to decide its claim. Indeed, the Court's direction of 22 June separating the two questions of jurisdiction and admissibility from the merits has precluded any such step on the part of the Applicant. Thus Article 53 has not been called into operation at this stage of the proceedings. The Court by its Order has directed consideration of its jurisdiction at this stage. If the examination by the Court of that jurisdiction results in an affirmance of its jurisdiction, that conclusion will of course satisfy part of the requirements of Article 53 when it is called into play. No doubt, having made its Order of 22 June, the Court, quite apart from the provisions of Article 53, could go no further in the case unless it was either satisfied of its jurisdiction and of the admissibility of the Application or concluded that in the circumstances of the case either of those questions failed to possess an exclusively preliminary character. In that event, that question could be decided at the stage of the merit, which Article 53 appears to contemplate. Neither Article 53 nor any other part of the Statute of the Court refers to the admissibility of the Application.

JURISDICTION

I turn then to the question of the Court's jurisdiction to hear and determine the Application. It was duly filed with the Court on 9 May 1973. This is the date by reference to which the questions of jurisdiction and of admissibility must be determined. The concluding paragraphs of the Application are as follows:

> "Accordingly, the Government of Australia asks the Court to adjudge and declare that, for the above-mentioned reasons or any of them or for any other reason that the Court deems to be relevant, the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law.
>
> And to Order
>
> that the French Republic shall not carry out any further such tests."

It is of importance that I emphasize at the outset that the Application seeks both a declaration and an Order. The request for the declaration is itself, in my opinion, clearly a matter of substantive relief and not merely a recital or reason put forward for the request for the making of the Order. Indeed, it is conceivable that in appropriate circumstances the declaration only should be made. The full significance of this fundamental observation as to the nature of the relief sought will be apparent at a later stage.

The Court duly notified France by telegramm of the filing of the Application, and a copy of the Application itself was duly transmitted to the French Government in due time.

Article 38 (3) of the Rules of Court requires that when acknowledging receipt of such a notification from the Court, the party against whom the Application is made and who is so notified shall, when acknowledging receipt of the notification, or failing this as soon as possible, inform the Court of the name of its Agent.

By a letter dated 16 May 1973 France, by its Ambassador to the Netherlands, acknowledged receipt of the notification of the filing of the Application, but France did not appoint an Agent. France informed the Court that in its view, that is to say, in France's view, the Court was manifestly without jurisdiction to hear and determine the Application, and that France did not propose to participate in the proceedings before the Court. It has not done so by any formal act according to the Rules of Court. France requested that the Application be summarily struck from the Court's General List, which in June 1973 the Court refused to do, an attitude confirmed by its final Judgement.

It is fundamental that the Court alone is competent to determine whether or not it has jurisdiction in any matter. This is provided by Article 36 (6) of the Statute of the Court. No State can determine that question. In its Rules, the Court has provided machinery whereby it can hear and consider the submissions of a State which claims that it has no jurisdiction in a particular matter (see Art.67 of the Rules of Court). France has made no use of this facility. The case has proceeded without any objection to jurisdiction duly made according to the Rules of Court.

Attached to the Ambassador's letter of 16 May 1973 was an annex comprising some 11 pages of foolscap typescript setting out France's reasons for its conclusion that the Court was manifestly incompetent to entertain the Application. This document, which has come to be referred to in the proceedings as "the French Annex", has occupied an ambiguous position throughout but has come to be treated somewhat in the light of a submission in a pleading, which, quite clearly, it is not. As I am but judge ad hoc, I will not express myself as to the desirability or undesirability of the reception of such a communication as the French Annex. I observe however that a somewhat similar happening occurred in connection with the Fisheries Jurisdiction case (I.C.J. Reports 1973, p.1), but whether or not the Court allows such "submissions" to be made outside its Rules, as a regular practice, is a matter with which naturally I cannot be concerned.

Of course, a court, in the absence of a party, will of its own motion search most anxiously for reasons which might legitimately have been put forward by the absent party in opposition to the Application. Consequently, it could not be said to be unreasonable for the Court to view the contents of the French Annex, if and when received, as indicative of some of such reasons. Those contents and that of the French White Paper on Nuclear Tests, published but not communicated to the Court during the hearing of the case, have in fact been fully considered.

I turn now to express my reasons for my conclusion that the General Act of Geneva of 26 September 1928 was a treaty in force between Australia and France at the date of the lodging of the Application, so as to found the jurisdiction of the Court under Article 36 (1) to decide a dispute between the Parties as to their respective rights.

The Applicant seeks to found the jurisdiction of the Court on two alternative bases; it does not attempt to cumulate these bases, as was done by Belgium in the case of the *Electricity Company of Sofia and Bulgaria, P.C.I.J., Series C*, 1938, page 64, with respect to the two bases which it put forward for the jurisdiction of the Court in that case. The Applicant does not attempt to make one basis assist or complement the other. It takes them, as in my opinion they are in the Statute of the Court, as two independent bases of jurisdiction or as may be more colour-

fully said, two independent avenues of approach to the Court. The Applicant's principal reliance is on the jurisdiction conferred on the Court by Article 36 (1) of its Statute, fulfilling that Article's specification of a "matter specially provided for in treaties and conventions in force", by resort to the combined operation of Article 17 of the General Act, Article 37 of the Court's Statute, and its dispute with France.

The alternative basis of jurisdiction is placed on Articles 36 (2) of the Court's Statute, both France and Australia having declared under that Article to the compulsory jurisdiction of the Court, though in each case with reservations and, in particular, in the case of France, with the reservation of 20 May 1966.

As I have reached a firm view as to the existence of the Court's jurisdiction in this case under Article 36 (1) and as each basis of jurisdiction is put forward in the alternative, I find it unnecessary to express my conclusions as to the alternative basis of jurisdiction under Article 36 (2), which for me on that footing becomes irrelevant. I will need to deal however with the suggestion that a declaration to the optional clause in Article 36 (2) is inconsistent with a continuance of the obligations under the General Act and indeed superseded it. I will also need to deal with the further alternative suggestion that the reservation of 20 May 1966 by France to its declaration to the compulsory jurisdiction of the Court, qualifies to the extent of the terms of that reservation, its obligations, if any existed, under the General Act. I may properly say, however, that I would not be prepared to accept the whole of the Applicant's submission as to the meaning and operation of the French reservation of 20 May 1966 to its declaration to the compulsory jurisdiction of the Court.

It is trite that the jurisdiction of the Court depends fundamentally on the consent of States: but that consent may be given generally by a treaty as well as ad hoc. Whether it is given by a multilateral treaty or by a compromissory clause in a bilateral treaty the consent to jurisdiction is irrevocable and invariable except as provided by the treaty, so long as the treaty remains in force in accordance with the law of treaties. Consent thus given endures as provided by the treaty and does not need reaffirmation at any time in order to be effective. Where a treaty stipulates the manner in which its obligations are to be terminated or varied they can only be terminated or varied in accordance with those provisions during the life of the treaty. Thus the consent given by entry into the treaty is insusceptible of withdrawal or variation by any unilateral act of either party except in conformity with the terms of the treaty itself. But there is the possibility of the due termination of the treaty by any of the circumstances, such as supervening impossibility of performance, fundamental change of circumstance, or entry into a later treaty between the same parties, which are referred to in the Vienna Convention on the Law of Treaties, as well as by termination by mutual consent or in conformity with the provisions of the treaties.

The General Act it would seem is properly classified as a multilateral treaty but by accession bilateral obligations were created. By Article 44 of the Act it was to come into force on the ninetieth day following the accession of not less than two States. Until then, to use an expression found in the travaux prépatoires it was "a convention in spe" (*Records of Ninth Ordinary Session of the Assembly, Minutes of First Committee,* p.70). In fact, conformably to this Article, the Act came into force on 16 August 1929. It was a great treaty, representing a most significant step forward in the cause of the pacific settlement of disputes. It had an initial term of five years, and was automatically renewed each five years dating from its original entry into force, unless denounced at least six months before the expiry of the current period of five years (Art. 45 (1)). Denunciation might be partial and consist of a notification of reservations not previously made (Art. 45 (5)). Denunciation was to be effected by a written notification to the Secretary-General of the League of Nations who was to inform all accessionaries to the Act (Art.45(3)). The Act covered conciliation of disputes of every kind which it had not been possible to settle by diplomacy (Chapt. I), the judicial settlement of all disputes with respect to legal rights (Chap. II), and arbitration in a dispute not being a dispute as to legal rights (Chap. III). Accession could be to the whole Act or only to parts thereof, for example to Chapters I and II along with appropriate portions of the general provisions in Chapter IV or to Chapter I only with the appropriate portions of Chapter IV (Art. 38). The principle of reciprocity of obligations was introduced by the concluding words of Article 38.

France and Australia acceded to the whole of the General Act on 21 May 1931. Each attached conditions to its accession, and to these conditions I shall need later to make a brief reference. At to the date of the Application neither France nor Australia had denounced the General Act. France lodged with the Secretary-General of the United Nations on 10 January 1974 a notification designed as a denunciation in conformity with Article 45 of the General Act, but this notification is of no consequence in connection with the present question. Article 45 (5) of the Act provides that all proceedings pending at the expiry of the current period of the Act are to be duly completed notwithstanding denunciation. Further, the Court's general jurisprudence would not allow its jurisdiction to be terminated by the denunciation of the Treaty subsequent to the commencement of the proceedings before the Court (*see Nottebohm case (Liechtenstein v. Guatemala), I.C.J. Reports 1953*, p.110 at p.122).

Article 17 in Chapter II of the General Act provides:

> "All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.
>
> It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice."

Both France and Australia became Members of the United Nations at its inception, thus each was bound by the Court's Statute (see Art. 93 of the Charter). Therefore each was bound by Article 37 of the Statute of the Court which effectively substituted this Court for the Permanent Court of International Justice wherever a treaty in force provided for reference of a matter to the Permanent Court of International Justice. Clearly Article 17 did provide for the reference to the Court of all disputes with regard to which the parties are in conflict as to their respective rights. Thus the provisions of Article 17 must be read as between France and Australia as if they referred to the International Court of Justice and not to the Permanent Court of International Justice.

Whatever doubts might therefore have been entertained as to the complete efficacy of Article 37 to effect such a substitution of this Court for the Permanent Court of International Justice as between Members of the United Nations were set at rest by the Judgement of this Court in the Barcelona Traction, Light and Power Company, Limited case (Belgium v. Spain, I.C.J. Reports 1964, pp.39 and 40). So unless the treaty obligations in Chapter II, which includes Article 17, of the General Act have been terminated or displaced in accordance with the law of treaties, the consent of France to the Court's jurisdiction to entertain and resolve a dispute between France and Australia as to their respective rights, subject to the effect of any reservations which may have been duly made under Article 39 of the General Act, would appear to be clear.

I have already mentioned that neither of the Parties had denounced the Act as of the date of the Application. The argument in the French Annex, to the contents of which I will need later to refer, is mainly that the General Act, by reason of matters to which the Annex calls attention, had lost its validity, but that if it had not, France's consent to the jurisdiction of the Court, given through Article 17 of the General Act, was withdrawn or qualified to the extent of the terms of its reservation of 20 May 1966 made to its declaration to the compulsory jurisdiction of the Court under Article 36 (2) of the Statute of the Court. It is therefore appropriate at this point to make some reference to the circumstances in which a treaty may be terminated.

The Vienna Convention on the Law of Treaties may in general be considered to reflect customary international law in respect of treaties. Thus, although France has not ratified this Convention, its provisions in Part V as to the invalidity, termination or suspension of treaties may be resorted to in considering the question whether the General Act was otherwise terminated before the commencement of these proceedings.

Taking seriatim those grounds of termination dealt with in Section 3 of Part V of the Convention which could possibly be relevant, there has been no consent by France and Australia to the termination of their obligations vis-à-vis one another under the General Act. I shall later point out in connection with the suggestion that the General Act lapsed by "desuetude" that there is no basis whatever in the material before the Court on which it could be held that the General Act had been terminated by mutual consent of these Parties as at the date of the Application (Art. 54 of the Convention). No subsequent treaty between France and Australia relating to the same subject-matter as that of the General Act has been concluded (Art. 59 of the Convention). Neither of these parties acceded to the amended General Act of 1949 to which I shall be making reference in due course. No material breach of the General Act by Australia has been invoked as a ground for terminating the General Act as between France and Australia. It will be necessary for me at a later stage to deal briefly with a suggestion that a purported reservation not made in due time by Australia in 1939 terminated the General Act as between France and Australia (Art. 60 of the Convention). There has been no supervening impossibility of performance of the General Act resulting from the permanent disappearance of an object indispensable for the execution of the Act, nor had any such ground of termination been invoked by France prior to the lodging of the Application (Art.61 of the Convention). The effect of the demise of the League of Nations was not the disappearance of an object indispensable to the execution of the General Act, as I shall indicate in a subsequent part of this opinion. There has been no fundamental change of any circumstances which constituted an essential basis of the Treaty, and no such change has radically transformed the obligations under the Act (Art. 62 of the Convention). No obligation of the General Act is in conflict with any jus cogens

(Art. 64 of the Convention). Article 65 of the Vienna Convention indicates that if any of these grounds of termination are to be relied upon, notification is necessary. In this case there has been no such notification.

On these considerations it would indeed be difficult not to conclude that the General Act was a treaty in force between France and Australia at the date of the Application and that the Parties had consented through the operation of Article 17 of the General Act and Article 37 of

the Statute of the Court to the jurisdiction of this Court to resolve any dispute between them as to their respective rights.

But the French Annex confidently asserts the unavailability of the General Act as a source of this Court's jurisdiction to hear and determine the Application: it is said that the Act lacks present validity. It will therefore be necessary for me to examine the arguments put forward in the French Annex for this conclusion.

However, before turning to do so it is proper to point out that no jurist and no writer on international law has suggested that the General Act ceased to be in force at any time anterior to the lodging of the Application. Indeed, many distinguished writers expressed themselves to the contrary. Professor O'Connell, in a footnote on page 1071 in the second volume of the second edition of his work on international law, says as to the General Act: "It is so connected with the machinery of the League of Nations that its status is unclear." The Professor was alone in making this observation: it suffices to say that the Professor's cogent advocacy on behalf of the Applicant in the present case seems to indicate that such a note will not appear in any further edition of his work.

No mention or discussion of the General Act in the Judgements of this Court has cast any doubt on its continued operation. Indeed, Judge Basdevant in the Certain Norwegian Loans case (France v. Norway, I.C.J. Reports 1957, at p. 74), refers to the General Act as a treaty or convention then in force between France and Norway. He points out that the Act was mentioned in the observations of the French Government and was explicitly invoked by the Agent of the French Government during the hearing. The distinguished judge said: "At no time has any doubt been raised as to the fact that this Act is binding as between France and Norway." No judge in that case dissented from that view. Indeed, the Court in its Judgement does not say anything which would suggest that the Court doubted the continued validity of the General Act. In its Judgement the Court said:

> "The French Government also referred ... to the General Act of Geneva of September 26th, 1928, to which both France and Norway are parties, as showing that the two Governments have agreed to submit their disputes to arbitration or judicial settlement in certain circumstances which it is unnecessary here to relate." (Emphasis added.)
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> France, for evident good reason (i.e., the applicability of Article 31 of the General Act in that case), did not seek to base the Court's jurisdiction in that case on the General Act, and as it had not done so the Court did not seek a basis for its jurisdiction in the General Act. The pertinent passage in the Judgement of the Court occurs at pages 24 and 25 of the Reports, where it is said:
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> "The French Government also referred to the Franco-Norwegian Arbitration Convention of 1904 and to the General Act of Geneva of September 26th, 1928, to which both France and Norway *are* parties, as showing that the two Governments have agreed to submit their disputes to arbitration or judicial settlement in certain circumstances which it is unnecessary here to relate.
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> These engagements were referred to in the Observations and Submissions of the French Government on the Preliminary Objections and subsequently and more explicitly in the oral presentations of the French Agent. Neither of these references, however, can be regarded as sufficient to justify the view that the Application of the French Government was, so far as the question of jurisdiction is concerned, based upon the Convention or the General Act. If the French Government had intended to proceed upon that basis it would expressly have so stated.
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> As already shown, the Application of the French Government is based clearly and precisely on the Norwegian and French Declarations under Article 36, paragraph 2, of the Statute. In these circumstances the Court would not be justified in seeking a basis for its jurisdiction different from that which the French Government itself set out in its Application and by reference to which the case has been presented by both Parties to the Court."

In paragraph 3A of the French Annex it is said that the Court in the case of *Certain Norwegian Loans* "had to settle" this point, that is to say the availability at that time of the General Act as between Norway and France. It is however quite plain from the Court's Judgement in that case that it did not have to settle the point but that it accepted that the General Act was a treaty in force at that time between Norway and France. It is not, as the French Annex suggests, "difficult to believe that the Court would have so summarily excluded this ground of its competence if it had provided a manifest basis for taking jurisdiction". The passage which I have quoted from the Court's Judgement clearly expresses the reason for which the Court did not seek to place its jurisdiction upon the General Act.

The Act was also treated as being in force in the arbitration proceedings and in the proceedings in this Court in connection with the Temple of Preah Vihear case Cambodia v. Thailand (see for example, I.C.J. Reports 1961, at pp. 19 and 23). The availability of the General Act in that case was disputed by Thailand and the Court found no occasion to pass upon that matter.

The General Act is included in numerous official and unofficial treaty lists as a treaty in force, and is spoken of by a number of governments who are parties to it as remaining in force. In 1964 the Foreign Minister of France, explaining in a written reply to a Deputy in the

National Assembly why France did not join the European Treaty for the Pacific Settlement of Disputes, pointed to the existence of, amongst other instruments, the General Act to which France was a party, though the Minister mistakenly referred to it as the revised General Act.

However, these matters are really peripheral in the present case. The central and compelling circumstance is that neither France nor Australia had denounced the Treaty in accordance with its provisions at the date of the Application, nor had any other event occurred which according to the law of treaties had brought the General Act, as between them to an end.

The various arguments put forward in the French Annex denying the Court's competence to entertain the Application now need consideration. It is said that the General Act disappeared with the demise of the League of Nations because "the Act of Geneva was integral part of the League of Nations system in so far as the pacific settlement of international disputes had necessarily in that system to accompany collective security and disarmament". If by the expression "an integral part of the League of Nations system" it is intended to convey that the General Act constitutionally or organically formed part of the Covenant of the League, or of any of its organs, the statement quite clearly is incorrect. Textually the General Act is not made to depend upon the Covenant, and the references to some of the functionaries of the League are not organic in any sense or respects, but merely provide for the performance of acts of an incidentally administrative kind. Contemporaneous expressions of those concerned with the creation of the General Act leave no doubt whatever in my mind that the General Act was not conceived as, nor intended to be, an integral or any part of the League's system, whatever might precisely be included in the use of the word "system" in this connection. See, for example, *Records of the Ninth Ordinary Session of the Assembly, Minutes of the First Committee (Constitutional and Legal Questions)*, pages 68-69 (*Tenth Meeting*) and pages 71 and 74 (*Eleventh Meeting*). At page 71 the relationship of the Act to the League, or, as it was expressed, "the constitutional role that that Act was going to fill under the League of Nations" was discussed. It was pointed out by a member of the sub-committee responsible for the draft that the Act "had been regarded as being of use in connection with the general work of the League, but it had no administrative or constitutional relation with it". Alteration, to this draft was made to ensure that the Act was not "an internal arrangement within the League". It was said:

> "Today the States were not proposing to create an organ of the League: the League was merely going to give those which desired them facilities for completing and extending their obligations in regard to arbitration."

> If the expression "an integral part" means that the continued existence of the League was an express condition of the continued validity of the Act, again it seems to me it would be plainly incorrect. Nothing in the text suggests such a situation. The use of the expression "idiological integration" in the Annex seems to suggest that, because the desire to maintain peace through the Covenant and through collective security, disarmament and pacific settlement of international disputes was the ideological mainspring of the creation of the General Act, all the manifestations of that philosophy, however expressed, must stand or fall together.

It is true that the General Act was promoted by the League, that its preparation in point of time was related to endeavours in the fields of collective security and disarmament. It is true that it was hoped that the cause of peace would be advanced by continuing action in each of the various fields. But in my view, quite clearly the General Act was conceived as a molded treaty outside the Covenant of the League, available to non-members of the League and, by accession of at least two States, self-operating.

It is perhaps worth observing at this point that the Statute of the Permanent Court of International Justice, not an organ of the League, at that time provided its own system of pacific settlement of legal disputes by means of the optional compulsory jurisdiction in Article 36 (2) of the Statute of the Permanent Court. No doubt, like the Covenant itself, the inception of the General Act owed much to the pervading desire in the period after the conclusion of World War 1 to prevent, if at all possible, the repetition of that event. Though conceived at, or about the same period, and though all stemmed from the overriding desire to secure international peace, these various means, the activities of the Council of the League, disarmament, collective security and the pacific settlement of disputes, were in truth separate paths thought to be leading to the same end, and thus in that sense complementary; but the General Act was not dependent upon the existence or continuance of any of the others.

Emphasis is laid in the French Annex on the use of the organs of the League by some of the Articles of the General Act.

It seems to me that what the Court said in the Barcelona Traction, Light and Power Company, Limited case (Belgium v. Spain) in relation to the Hispano-Belgian Treaty of 1927, a treaty comparable to the General Act, is quite applicable to the relationship of the reference to the functionaries of the League in the General Act to its validity:

> "An obligation of recourse to judicial settlement will, it is true, normally find its expression in terms of recourse to a particular forum. But it does not follow that this is the essence of the obligation. It was this fallacy which underlay the contention advanced during the hearings, that the alleged lapse of Article 17

> (4) was due to the disappearance of the 'object' of that clause, namely the Permanent Court. But that Court was never the substantive 'object' of the clause. The substantive object was compulsory adjudication, and the Permanent Court was merely a means for achieving that object. It was not the primary purpose to specify one tribunal rather than another, but to create an obligation of compulsory adjudication. Such an obligation naturally entailed that a forum would be indicated; but this was consequential.
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> If the obligation exists independently of the particular forum (a fact implicitly recognized in the course of the proceedings, inasmuch as the alleged extinction was related to Article 17 (4) rather than to Articles 2 or 17 (1), then if it subsequently happens that the forum goes out of existence, and no provision is made by the parties, or otherwise, for remedying the deficiency, it will follow that the clause containing the obligation will for the time being become (and perhaps remain indefinitely) inoperative, i.e. without possibility of effective application. But if the obligation remains substantively in existence, though not functionally capable of being implemented, it can always be rendered operative once more, if for instance the parties agree on another tribunal, or if another is supplied by the automatic operation of some other instrument by which both parties are bound. The Statute is such an instrument, and its Article 37 has precisely that effect." (I.C.J. Reports 1964, p.38.)

I make this quotation at length at this time because we are here concerned with the question as to the continued operation of Chapter II of the General Act. In that chapter the only reference to the League or to any of its functionaries is the reference to the Permanent Court of International Justice, itself not an organ of the League. But there are references in other chapters of the General Act to functionaries of the League. These, in my opinion, are merely in respect of incidentally administrative functions and not in any sense basic to the validity of the General Act itself. In Chapter I of the General Act the only references to the League or its functionaries are to be found in Articles 6 and 9. Reference to the Acting President of the League in Article 6 is in the alternative. Paragraph 2 of that Article provides further means of appointment of commissions. The place of meeting of commissions was in the hands of the parties, it not being obligatory or indispensable to sit at the seat of the League. Thus Articles 6 and 9 did not render Chapter I inoperative with the demise of the League. It should also be observed that though accession had been to Chapters I and II, Article 20 removed disputes as to legal rights from the operation of Chapter I.

So far as Chapter IV is concerned, the reference to the Permanent Court of International Justice in Articles 31, 33, 34 (b), 37 and 41 would be taken up as between France and Australia by means of Article 37 of the Statute of the Court; as far as the Registrar of the Permanent Court is concerned, by United Nations resolution 24 (1) of 12 February 1946 and the resolution of the League of Nations of 18 April 1946. Articles 43 and 44 of the General Act have been fulfilled and denunciation under Article 45 could always be effected by a direct communication between parties or by the use of the Secretary-General of the United Nations relying on the resolutions to which I have just referred, as France and the United Kingdom found no difficulty in doing in their communications to the Secretary-General in this year.

It can, however, properly be said that for lack of the personnel of the League, Chapter III of the General Act, relating to arbitration, may not have been capable of being fully operated after the demise of the League. But this inability to operate a part of the General Act did not render even that part, in my opinion, invalid.

The General Act itself indicates that specific parts or a combination of its parts of the Act were intended to be severable, and to be capable of validity and operation independently of other parts, or combinations of parts. States acceding to the General Act were not required to accede to the Act as a whole but might accede only to parts thereof (see Art.38).

I can find no warrant whatever for the view that in acceding to the General Act the States doing so conditioned their accession on the continued existence of the League, or of any of its organs or functionaries, however much for convenience in carrying out their major agreement as to pacific settlement of disputes it may have been found convenient to utilize the functionaries or organs of the League for incidental purposes.

In the language of the Court in the *Barcelona Traction, Light and Power Company, Limited* case (*I.C.J. Reports 1964*, p.38), "the end" sought by the Parties so far as Chapter II of the General Act was concerned was "obligatory judicial settlement" - all else was but means of effecting that major purpose.

Chapter II thus is in no way dependent on the continued availability of the Permanent Court of International Justice or of the Secretary or any other functionary of the League. As between Members of the United Nations, the resolutions of the United Nations and the League of Nations, to which I have previously referred, render the Secretary-General of the United Nations available.

I now turn to the suggestion that in some way the resolution of the General Assembly of 28 April 1949, 268A (III), instructing the Secretary-General to prepare a revised text of the General Act, including the amendments indicated in the resolution, and to hold that text open to accession by States under the title "Revised General Act for the Pacific Settlement of International Disputes", acknowledged the disappearance of the General Act as at that date or caused that Act at that time to cease to be valid.

It is important, I think, to indicate what effect in truth the disappearance of the League had on the General Act. In the first place, the General Act then became a closed treaty in the sense that it had been open for accession only by Members of the League and by such non-member States to whom the Council of the League had communicated a copy of the Act. Accepting the view that a State which had been a Member of the League would have been able to accede to the General Act after the demise of the League, nonetheless the General Act could properly then be called a closed treaty. There were many States who were either then, or could likely become, Members of the United Nations which could not qualify for accession to the General Act. In this way it lacked that possible universality, though not exclusivity, which had been one of its merits at the time of its creation. Also, some of the 20-odd States who were parties to the General Act were not members of the United Nations and thus did not have the benefit of Article 37 of the Court's Statute. Further, as I have already pointed out, Chapter III (Arbitration) was not capable of being fully operated for want of the functionaries of the League. Bearing in mind the severability of the parts of the General Act to which I have already referred, the precise terms of Chapters I, II and IV of the General Act and the effect of Article 37 of the Court's Statute, as its operative extent was fully disclosed by the decision of the Court in the *Barcelona Traction, Light and Power Company, Limited* case (supra), the demise of the League thus left the provisions for the judicial settlement of legal disputes fully operative between those who had acceded to the General Act and who were Members of the United Nations, but settlement of disputes by arbitration under its terms may not have been any longer available to those States.

This state of affairs is adequately and properly described in the recitals to the General Assembly's resolution of 28 April 1949:

> "The efficacy of the General Act of 26 September 1928 for the Pacific Settlement of International Disputes is impaired by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared."

This recital treats the settlement by conciliation, legal process and arbitration in the one description without differentiation. The choice of the word "efficacy" which is in contrast to "validity: and of the word "impaired" is accurate in the description of the effect of the demise of the League of Nations on the General Act. The language of this recital is closely akin to the language of this Court in the passage from the *Barcelona Traction, Light and Power Company, Limited* case (supra) which I have quoted earlier in this opinion.

It was to enable the substantive provisions of the General Act to be operated to their full efficacy that the Revised General Act was proposed. The General Assembly could not have destroyed the General Act: it had no authority so to do. That was a matter exclusively for the parties to the treaty. In any case the General Assembly was hardly likely to do so, there being more than 20 parties to the General Act and no certainty as to the extent of the accession to a new treaty. The problem before the Assembly, I think, was twofold. First of all, it wanted to have a General Act in the substantive terms of the 1928 Act, all the parts of which would be capable of being fully operated. Secondly, it wanted to enable an enlargement of accession to it. It desired to restore its possible universality whilst not making it an exclusive means of the settlement of disputes (see Art. 29). The enlargement of the area of accession to a multilateral treaty has given difficulty; and it has only been found possible to do so otherwise than by acts of parties in the case of a narrow group of treaties of a non-political kind. But by producing a new treaty, with its own accession clause, the Assembly was able to open a General Act to all Members of the United Nations or to such other States not members of the United Nations to whom a copy of the General Act should be communicated. Also those who had acceded to the General Act were enabled, if they so desired, to widen their obligations by acceding to the Revised Act and to obtain access to a fully operable provision as to arbitration. On the other hand, they could be content with the reduced efficacy (which relates only to Part III) but continuing validity of the Act of 1928.

The Revised Act was a new and independent treaty, though for drafting purposes it reverentially incorporated the provisions of the Act of 1928 with the stated amendments. These amendments included an express provision for the substitution of the International Court of Justice for the Permanent Court of International Justice. This is indicative of the fact that there may have been some doubt in the minds of some at the time as to the full efficacy of Article 37 of the Court's Statute, and that the Assembly was conscious that all the signatories to the General Act were not members of the United Nations, having the benefit of Article 37.

In my view, the resolution of the General Assembly of 28 April 1949 affirms the validity of the General Act of 1928 and casts no doubt upon it, though it recognized that portion of it may not be fully operable. It recognized that the General Act of 1928 remained available to the parties to it in so far as it might still be operative. These words, of course, when applied to an analysis of the General Act of 1928, clearly covered Chapter II as being an area in respect of which the General Act remained fully operative, in the case of Members of the United Nations, having regard to Article 37 of the Court's Statute and the resolutions of the League of Nations and the United Nations in 1946.

The question was raised as to why so few of those who had acceded to the General Act acceded to the Revised General Act. This consideration does not, of course, bear on the validity of the General Act: but as a matter of interest it may well be pursued. Two factors seem to me adequately to explain the circumstances without in any way casting doubt on the validity of the General Act. As I have pointed out, the General Act of 1928, after the demise of the League, became a closed treaty, that is to say, each State which had acceded to the Act then knew with certainty towards whom it was bound. The remote possibility that a former Member of the League might still accede to the General Act does not really qualify that statement. To accede to the Revised General Act opened up the possibility of obligations to a vastly increased and increasing number of States under the new General Act. This feature of a treaty such as the General Act was observed before in the travaux préparatoires (see p.67 of the Minutes to which I have already referred).

The second factor was that each State party to the General Act and not acceding to the new Act was to an extent freed of the demands of the arbitration procedure. It is one thing to be bound to litigate legal disputes before the Court: quite another to be bound to arbitrate other disputes on the relatively loose basis of arbitration under the General Act, aequo et bono.

The mood of the international community in 1949 was vastly different to the mood of the community in the immediately post-World War I period in relation to the pacific settlement of disputes. More hope was probably seen in the United Nations itself and the existence of the optional clause with its very flexible provisions as to reservations. The latter was no doubt seen by some as preferable to the more rigid formulae of a treaty such as the General Act.

I therefore conclude that so far from casting doubt on the continued validity of the General Act of 1928, the resolution of the General Assembly of 28 April 1949 confirmed the continuing validity of the General Act. The resolution did not, as the French Annex asserts, "allow for the eventuality of the Act's operating if the parties agreed to make use of it". It did not call for a reaffirmation of the treaty. The resolution makes it quite clear, to my mind, that it made no impact on the General Act of 1928, but by providing a new treaty it did afford a widened opportunity to a wider group of States to become bound by the same substantive obligations as formed the core of the General Act of 1928.

Some point is made in the Annex of the Australian reservations to its accession to the General Act. Of the reservations made by Australia upon its accession to the General Act the French Annex selects first that reservation which relates to the "non-application or suspension" of Chapter II of the General Act with respect to any dispute which has been submitted to, or is under consideration by, the Council of the League of Nations. It is said that with the disappearance of the League this reservation introduces such uncertainty into the extent of Australia's obligations under the Act as to give an advantage to Australia not enjoyed by other accessionaries to the Act. But in the first place it seems to me that the disappearance of the possibility that there should be a matter under the consideration of the Council of the League could have no effect, either upon validity of the Australian accession or upon the extent of the obligations of any other accessionary. The operation of the reservation is reciprocal and the disappearance of the Council of the League simply meant that there could be no case for resort to this reservation. The making of the reservation rather emphasized the independence of the General Act from the activities of the League. Only such a reservation would involve the one in the other: and then only to the extent of the subject-matter of the reservation.

The other reservation made by Australia upon which the French Annex fastens is the exclusion of disputants, parties to the General Act, who are not members of the League of Nations. This is said to have acquired quite an ambiguous value because no country can be said now to be a Member of the League of Nations, but it is clear from the decision of this Court in the *South West Africa* cases (Preliminary Objections, Judgement, I.C.J. Reports 1962) that the description "Members of the League of Nations" is adequate to describe a State which has been a Member of the League. Again the very making of these reservations by some accessionaries to the General Act emphasizes its independence of the League of Nations and of its "system". There can be no uncertainty in the matter because the Court exists and by its decision can remove any dubiety which might possibly exist, although I see none.

I find no substance in the suggestion that "unacceptable advantages" would result for Australia from a continuance in force of the General Act and in any case would not be willing to agree that any such result would affect the validity of the General Act.

It is then said that Australia had patently violated the General Act by attempting in 1939 to modify its reservations otherwise than in accordance with Article 45. This objection is based on the fact that on 7 September 1939 Australia notified the Secretary-General of the League of Nations that "it will not regard its accession to the General Act as covering or relating to any dispute arising out of events occurring during the present crisis. Please inform all States Parties to the Act". This notification could not be immediately operative because it was made at an inappropriate time; the current period of the duration of the General Act expired in August 1940. Thus the Australian notification would not operate instanter. It had effect if at all only at the end of the five-year pe-

riod next occurring after the date of the notification. What was thought to be the irregularity of giving this notification at the time it was given was observed upon by some States party to the General Act, but none, including France, made it the occasion to attempt to terminate the Act. However, nothing turns on the circumstance that there was no immediate operation of the notification and I cannot find any relevance to the problem with which the Court is now faced of the fact that Australia took the course it did in 1939.

It is next said that the conduct of the two States since the demise of the League is indicative of the lapse of the General Act. Neither have resorted to it. In the first place it is not shown that any occasion arose, as between France and Australia, for resort to the provisions of the General Act until the present dispute arose. Thus it is not the case of States having reason to resort to the provisions of the treaty and bypassing or ignoring its provisions by mutual consent or in circumstances from which a termination by mutual consent could be inferred. A treaty such as the General Act does not require affirmation or use to maintain its validity. It is denunciation which is the operative factor. Also it is not true to say that there has been utter silence on the part of States accessionary to the General Act, in the period since the demise of the League. I have already remarked for instance on the references to the Act by the representative of France. Not upon the material produced could it be said that France and Australia at any time, by inactivity, tacitly agreed to terminate the General Act as between themselves.I turn now to a different matter put forward in the Annex. The French Annex suggests either that the reservation of 20 May 1966 to the declaration by France to the optional compulsory clause (Art. 36 (2) operated as itself a reservation under the General Act or that though not such a reservation it superseded and nullified France's obligations under the General Act. These seem to be propositions alternative to the major statement in the Annex which was that the General Act because of non-use and, as it was said, desuetude was precluded from being allowed to prevail over the expression of France's will in the reservation of 20 May 1966.

I need not say more as to the argument as to desuetude than that there is in my opinion no principle that a treaty may become invalid by "desuetude" though it may be that the conduct of the parties in relation to a treaty, including their inactivity in circumstances where one would expect activity, may serve to found the conclusion that by the common consent of the parties the treaty has been brought to an end. But as I have said there is nothing whatever in the information before the Court in this case which in my opinion could found a conclusion that France and Australia mutually agreed tacitly to abandon the treaty. The French Annex concedes that lapse of time will not itself terminate a treaty, for the Annex says: "the antiquity of a text was clearly not regarded in itself as an obstacle to its (i.e., the treaty) being relied on ..." Also I have indicated the extent to which the treaty had in fact been called in aid by other parties including France and to the fact that there is no evidence of an occasion when the treaty could have been used between France and Australia and was not used.

I would now say something as to the effect claimed by France for the reservation of 20 May 1966. At the outset, it is to my mind clear that the system of optional declaration to the compulsory jurisdiction of the Permanent Court of International Justice, and latterly to the jurisdiction of this Court, was, and was always conceived to be, a completely independent system or avenue of approach to the Court for the settlement of legal disputes to that which may be provided by treaty - bilateral or multilateral. The jurisdiction under Article 36 (1), which included treaty obligations to accept the Court's jurisdiction, and that under Article 36 (2) are separate and independent. The General Act was in fact promoted by the League of Nations at a time when Article 36 (2) of the Statute of the Permanent Court was in operation. Thus the system of optional declaration to the compulsory jurisdiction is regarded as quite separate from, and independent of, the provisions of the General Act of 1928.

There are notable differences between the two methods of securing pacific settlement of legal disputes: and it must always be remembered that the General Act was not confined to the settlement of legal disputes by the Court. The General Act had a term or rather, recurrent terms, of years. In default of denunciation the treaty renewed automatically: it was tacitly renewed. Reservations might only be made on accession. If further reservations are subsequently notified, they may be treated as a denunciation or may be accepted by other States parties to the Act. Thus they become consensually based. Permissible reservations are exhaustively categorized and closely circumscribed in content. Reservations might be abandoned in whole or in part. The scope of the reservations, if in dispute, is to be determined by the Court (see Arts. 39, 40 and 41 of the General Act).

In high contrast a declaration to Article 36 (2) of the Statute of the Court (the text and the enumeration of the Article was the same in the Statute of the Permanent Court of International Justice) need not be made for any term of years. No limitation is placed by the Statute on the nature and extent of the reservations, which can be made, though the jurisprudence of the Court would seem to require them to be objective and not subjective in content. Reservations might be made at any time and be operative immediately even before their notification to States which had declared to the jurisdiction under the Article (cf. Right of Passage over Indian Territory, Preliminary Objections, Judgement, I.C.J. Reports 1957, p.125). Further, though by declaration to the compulsory jurisdiction under the Article, States might be

brought into contractual relationships with each other, such declarations do not create a treaty. Each declarant State becomes bound to accept the jurisdiction of the Court if invoked by another declarant State in a matter within the scope of Article 36 (2) and not excluded by reservation.

The jurisdiction under Article 36 (2) could only be invoked by a Member of the United Nations, whereas the General Act had been open to States which were not members of the League of Nations.

In the light of these notable differences between the two methods of providing for judicial settlement of international legal disputes, I can see many objections to the proposition that a declaration with reservations to the optional clause could vary the treaty obligations of States which were parties to the General Act. Bearing in mind the readiness with which reservations to the declaration to the compulsory jurisdiction of the Court under Article 36 (2) could be added, terminated or varied, acceptance of the proposition that such a reservation could carry or bring to an end the obligations in a treaty would mean that there would be little value as between Members of the United Nations in a treaty which could be varied or terminated at the will of one of the parties by the simple device of adding a destructive reservation operating instanter to its declaration to the compulsory jurisdiction of the Court. This would be a catastrophe on the accepted view of the law of treaties which does not permit a unilateral termination of a treaty except in accordance with its terms. Termination by occurrences which affect the mutual consent of the parties to the treaty, which include those on which a treaty is conceived by the mutual will of the parties to have been intended to come to an end, emphasizes the essentially consensual basis of termination or variation.

Also when the differences in the provisions of Article 36 and those of the General Act relating to the making of reservations are closely observed, it will be seen that, whilst given the same description "reservation", those for which the General Act provides appear to be of a different order to those which are permissible under the Article. The purpose of providing for reservations, it seems to me, is different in each case.

Reservations for which a treaty provides are essentially based on consent either because within the treaty provisions as permissible reservations, as for example, in Article 39 of the General Act or because they are accepted by the other party to the treaty - see generally Part 2, section 2, of the Vienna Convention on the Law of Treaties. In the case of the General Act the reservation falling within one of the classifications of Article 39, not made on accession, sought to be added by way of partial denunciation under Article 45 (4), can only be effective with respect to any accessionary to the General Act, if accepted by that State. It cannot in any case operate until at least six months from its notification (see Art. 45 (2)).

Again, in high contrast, a reservation to a declaration under the optional clause, is a unilateral act, can be made at any time, operate instanter, even before notification to other declarants to the optional clause and is not limited by the Statute as to its subject-matter, for the reason no doubt that the whole process under the article is voluntary. The State may abstain altogether or accept the jurisdiction to any extent and for any time. This "flexibility" of the system of optional compulsory jurisdiction may in due course increasingly bring that system into disfavour as compared with a more certain and secure régime of a treaty. But be that as it may, the brief comparison I have made, which is not intended to be exhaustive, emphasizes the irrelevance to the treaty of reservations made to a declaration under the optional clause.

I should also point out that the reservation of 20 May 1966 did not in any way conform to the requirements of the General Act. It is worth observing that Article 17 of the General Act requires submission to the Court of all disputes subject to any reservation which may be made under Article 39. The reservation of 20 May 1966 was not made under that Article: it was not made at a time when reservations could be made. It purported to operate immediately. It was not intended to be notified to members bound by the General Act. I doubt whether it is a reservation of a kind within any of the categories listed in Article 39 (2) of the General Act. It clearly could not fall within paragraphs (a) or (b) of that sub-clause, and it does not seem to me that it could fall within paragraph (c). Because of the complete independence of the two means of providing for the resolution of international legal disputes, I can see no reason whatsoever on which a reservation to a declaration to the optional compulsory jurisdiction under Article 36 (2) could be held to operate to vary the treaty obligations of such a treaty as the General Act.

Apparently realizing the unacceptable consequences of the proposition that the obligations of a treaty might be supplanted by a reservation to a declaration to the optional clause, the French Annex seeks to limit its proposition to the General Act which, it claims, is:

> "... not a convention containing a clause conferring jurisdiction on the Court in respect of disputes concerning the application of its provisions, but a text the exclusive object of which is the peaceful settlement of disputes, and in particular judicial settlement".

This statement seems to have overlooked the provisions of Article 41 of the General Act and, in any case, I am unable to see any basis upon which the position as to the effect of a reservation to a declaration to the optional clause can be limited as proposed.

It is also said that the declaration to compulsory jurisdiction under Article 36 (2) was an act in the nature of an agreement relating to the same matter as that of the General Act. As I have already pointed out, a declaration to compulsory jurisdiction is not an agreement though it can raise a consensual bond. In any case, the subject-matter of the General Act and that of declaration to the optional clause, are not identical.

There is a suggestion in the French Annex that because States bound by the General Act who have also declared to the optional compulsory jurisdiction of the Court from time to time have kept the text of their respective reservations under the Act and under the optional clause conformable to each other, a departure from this "parallelism" either indicates a disuse of the General Act or requires the absence of a comparable reservation to the General Act to be notionally supplied. But the suggested parallelism did not exist in fact, as the Australian Memorial clearly indicates (see paras 259-277). Further, there can be no validity in the proposition that because France did not make a partial denunciation of the Geneva Act in the terms of its reservation to its declaration under the optional clause, it should, by reason of former parallelism, be taken to have done so.

In sum, I am unable to accept the proposition that the reservation in the declaration of 20 May 1966 by France had any effect on the obligation of France under the General Act of 1928. Its consent to the Court's jurisdiction by accession on the General Act was untouched by the later expression of its will in relation to the optional clause. The reservation by France under Article 36 (2) is no more relevant to the jurisdiction of the Court under Articles 36 (1) than was such a reservation in the Appeal Relating to the Jurisdiction of the ICAO Council, India v. Pakistan (I.C.J. Reports 1972, p. 46). There an attempt to qualify the jurisdiction derived from a treaty, by the terms of a reservation to a declaration under the optional clause, was made. The attempt failed. The Court founded its jurisdiction exclusively on the treaty provision and regarded the reservation to the declaration of the optional cause as irrelevant. See the Judgement of the Court, pages 53 and 60 of the Reports.

There may well have been an explanation why there was no attempt either on the part of France or on the part of the United Kingdom to denounce the General Act when contemplating nuclear testing in the atmosphere of the South Pacific, whilst at the same time making what was considered an appropriate reservation to the declaration to the optional clause. I remarked earlier that the General Act had become a closed treaty. The identity of those to whom France and the United Kingdom were thereby bound was known. No doubt as of 1966 the then attitudes of those States to nuclear testing in the atmosphere of the South Pacific were known or at least thought to be known. On the other hand, there were States declarant to the optional clause from whom opposition to nuclear testing in the atmosphere at all, and particularly in the Pacific, might well have been expected. However there is not really any need for any speculation as to why denunciation was not attempted by France in 1966. It suffices from the point of view of international law that it did not do so.

Article 36 (1) of the Court's Statute erects the jurisdiction of the Court in respect of all matters specially provided for in treaties and conventions in force. I have so far reached the conclusion that the General Act of 1928 was a treaty of convention in force between France and Australia as at the date of the Application. I have already quoted Article 17 of the General Act, in Chapter II, dealing with judicial settlement. The second paragraph of the Article incorporates the text of Article 36 (2) of the Statute of the Permanent Court of International Justice in so far as it deals with the subject-matters of jurisdiction. Thus all "legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of international obligation; ..." are included in the scope of Article 17.

The question, then, in respect of Article 36 (1) is: what are the matters specially provided for in the General Act which are referred to the Court? They are in my view, so far as presently relevant, each dispute with regard to which the parties are in conflict as to their respective rights, and legal disputes concerning any question of international law or the existence of any fact, which, if established, would constitute a breach of an international obligation, subject, in any event, to, and, as I think, only to, any reservations which may have been made under Article 39 of the General Act.

It seems to me that there are two possible views as to the elements of the Court's jurisdiction derived under Article 36 (1) of the Court's Statute and drawn through the General Act, Article 17 and Article 37 of the Court's Statute.

On the one hand, it may be said that the jurisdiction is complete if the General Act is a treaty or convention in force between France and Australia at the date of the Application. The subject-matter of the Court's jurisdiction so established would then be described as matters referred to the Court by the General Act of 1928, that is to say, disputes between States bound by the Act as to their respective legal rights, etc. Such disputes are in that view treated as the general kind of matters which the Court has authority to resolve by its judicial processes because of the continued existence of the General Act. On that view, the question whether the dispute in fact existing now between France and Australia at the date of the Application is of that kind, becomes a matter of admissibility.

On the other hand, the view may be taken that the necessary elements of the Court's jurisdiction are not satisfied merely by the establishment of the General Act as a treaty or convention in force between France and Australia, but require the establishment of the existence of a dispute between them as to their respective rights, etc.: that is to say the matter referred by the General Act is not a genus of dispute but specific disputes as to the rights of two States vis-à-vis one another. The States in that view are taken as consenting to the jurisdiction to hear those particular disputes. To use the language used in the case of Ambatielos (Merits), Greece v. United Kingdom (I.C.J. Reports 1953, p.29), the dispute must fall under "the category of differences" in respect of which there is consent to the Court's jurisdiction. On this analysis, no separate question of admissibility arises; it is all one question of jurisdiction, the existence in fact and in law of the dispute between the two States as to their respective rights being a sine qua non of jurisdiction in the Court. It is that dispute which the Court has jurisdiction to decide.

This is the view of the matter which I prefer. But the Court's Order of 22 June 1973 was made, apparently, on the assumption that a distinct question of admissibility arose, or at any rate could be said to arise. Accordingly, notwithstanding the opinion I have just expressed, I am prepared for the purposes of this opinion to treat the question whether the dispute between France and Australia is a dispute as to their respective rights as a question of admissibility. However, I would emphasize that, whether regarded as a necessary element of the Court's jurisdiction or as a matter of admissibility, the question, to my mind, is the same, and the substantial consequence of an answer to it will be the same whichever view is taken as between the two views I have suggested of the necessary elements of the Court's jurisdiction. That question is whether the Parties are in dispute as to their respective rights, the word "right" connoting legal right.

There is therefore, in my opinion, jurisdiction to hear and determine a dispute between parties bound by the General Act as to their legal rights. As indicated I shall deal with the question of admissibility as if it were a separate question.

ADMISSIBILITY

A distinction has been drawn in the jurisprudence of the Court between its jurisdiction in a matter and the admissibility of the reference or application made to it. The Rules of Court maintain the separateness of the two concepts (see Art. 67) but the Statute of the Court makes no reference to admissibility. In particular the default provision, Article 53, does not do so. This might be significant in a case such as the present where there has been no preliminary objection to admissibility setting out the grounds upon which it is said the Application is not admissible. The result of a strict application of Article 53 in such a case, if there has been no special Order such as the Court's Order of 22 June 1973, may be that any question of admissibility where the respondent does not appear is caught up in the consideration either of jurisdiction or of the merits of the Application. However, the Court being in control of its own procedure can, as it has done in this case, direct argument on admissibility as a separate consideration, but no doubt only to the extent to which that question can properly be said in the circumstances to be of an exclusively preliminary character.

It may be said that the jurisdiction of the Court relates to the capacity of the Court to hear and determine matters of a particular nature, e.g., those listed in Article 36 (2) of the Statute of the Court, whereas admissibility relates to the competence, receivability, of the reference or application itself which is made to the Court.

It might be said that jurisdiction in the present case includes the right of the Court to enter upon the enquiry whether or not a dispute of the relevant kind exists and a jurisdiction, if the dispute exists, to grant the Applicant's claim for its resolution by declaration and Order. If such a dispute exists, the claim is admissible.

An examination as to admissibility is itself an exercise of jurisdiction even though a finding as to admissibility may be a foundation for the exercise of further jurisdiction in resolving the claim. The overlapping nature of the two concepts of jurisdiction and admissibility is apparent, particularly where, as here, the existence of a relevant dispute may be seen as a prerequisite to the right to adjudicate derived from Article 17 of the General Act.

I observed earlier that there is no universally applicable definition of the requirements of admissibility. The claim may be incompetent, that is to say inadmissible, because its subject-matter does not fall within the description of matters which the Court is competent to hear and decide; or because the relief which the reference or application seeks is not within the Court's power to consider or give; or because the applicant is not an appropriate State to make the reference or application, as it is said that the applicant lacks standing in the matter; or the applicant may lack any legal interest in the subject-matter of the application or it may have applied too soon or otherwise at the wrong time, or, lastly, all preconditions to the making or granting of such a reference of application may not have been performed, e.g. local remedies may not have been exhausted. Indeed it is possible that there may arise other circumstances in which the reference or application may be inadmissible or not receivable. Thus admissibility has various manifestations.

Of course all these elements of the competence of the reference of application will not necessarily be relevant in every case. Which form of admissibility arises in any

given case may depend a great deal on the source of the relevant jurisdiction of the Court on which reliance is placed and on the terms in which its jurisdiction is expressed. This, in my opinion, is the situation in this case.

IS THERE A DISPUTE BETWEEN THE PARTIES AS TO THEIR RESPECTIVE RIGHTS?

The Court labours under the disability that it has no formal objection to admissibility, particularizing the respect in which it is said that the Application in inadmissible. The Annex to the Ambassador's letter of 16 May 1973 in challenging the existence of jurisdiction in the Court under Article 36 (1) of the Statute, bases its objection on the lapse or qualification of the General Act and not on the absence of a dispute falling within Article 17 of the General Act. Further, there was no express reference to the admissibility of the Application.

It is, however, possible to construct out of the White Book an argument that the Application was "without object" in the sense that there were no legal norms by resort to which the dispute in fact existing between the Parties could be resolved, which is to say, though it is not expressly said, that there was no dispute between the Parties as to their respective rights (see the terms of Art. 17 of the General Act). This, it seems to me, was suggested in the White Book in relation to the claim that the testing of nuclear weapons had become unlawful by the customary international law. It was not, and in my opinion could not be, said that there were no legal norms by reference to which the claim for the infringement of territorial and decisional sovereignty could be determined - though important and difficult legal considerations arise in that connection, as was observed upon in the French Annex by its reference to a threshold of radio-active intrusion which should not be exceeded. In relation to the claim for breach of the freedom of the high seas and superincumbent air space, the French White Paper refers to international practice as justifying what was proposed to be done in relation to the area surrounding its atmospheric testing; but this contention is not related to admissibility.

An element of admissibility is the possession by the applicant State of a legal interest in the subject-matter of its Application. As it is, in my opinion, the existence of a dispute as to the respective legal rights of the Parties which must be the subject-matter of the Application in this case to satisfy Article 17, I think that upon the establishment of such a dispute each of the disputants to such a dispute must be held to have a legal interest in the resolution of the dispute. For my part, the matter of admissibility would end at the point at which it was decided that there was a dispute between France and Australia as to their respective legal rights, that is to say, that a dispute existed as to the right claimed by Australia as its right or of an obligation of France towards Australia which Australia claimed to be infringed. There is importance in the presence of the word **their** in the formular; it is to be a dispute to **their** respective rights. That possessive pronoun embraces in my opinion the need for a legal interest in the subject-matter.

Thus, in my opinion, the question to be resolved at this stage of the case is whether the Parties were, at the date of the Application, in dispute as to their respective rights.

That these Parties are in dispute is in my opinion beyond question. It is clear that there were political or merely diplomatic approaches by the Applicant for a time; and there are political aspects of the subject-matter of the correspondence which evidences their dispute. But so to conclude does not deny that the Parties may be in dispute nonetheless about their respective rights. That question will be determined by what in substance they are in difference about.

The source material upon which these questions are to be resolved is the correspondence between France and Australia set out at Annexes 2 of 14 inclusive of the Application instituting the present proceedings, as explained and amplified in the submissions to the Court. The contents of and the omissions from the French Annex, which raises arguments of law in opposition to the legal propositions in the Australian Notes, ought also to be considered in this connection. Nowhere is it suggested in the Annex that the dispute between France and Australia is no more than a political difference, a clash of interest incapable of resolution by judicial process, perhaps a not unimportant circumstance.

I have found it important in reading the Notes exchanged between France and Australia to differentiate the conciliatory language designed to secure, if possible, French abandonment of the proposal, and the language employed when claims of right are made. The dispute between the Governments up to the stage of the change of language might possibly be characterized as chiefly political, the desired end being sought to be attained by diplomacy alone, but the language does not certainly remain so. The changed tone of the Australian Note is visible in the Note of 3 January 1973, where it is said:

"The Australian Government, which has hitherto adopted a position of considerable restraint in this matter, wishes to make quite clear its position with respect to proposed atmospheric nuclear tests to be conducted in the Pacific by the French Government. In the opinion of the Australian Government, the conducting of such tests would not only be undesirable but would be unlawful - particularly in so far as it involves modification of the physical conditions of and over Australian territory; pollution of the atmosphere and of the resources of the seas; interference with freedom of navigation both on the high seas

and in the airspace above; and infraction of legal norms concerning atmospheric testing of nuclear weapons."

Having followed this statement with a request that the French Government refrain from further testing, the Australian Note proceeds:

> "The Australian Government is bound to say, however, that in the absence of full assurances on this matter, which affects the welfare and peace of mind not only of Australia but of the whole Pacific community, the only course open to it will be the pursuit of appropriate international legal remedies."

The Applicant thus raised claims of legal right.

In its Note in reply, the French Government first of all applied itself to a justification of its decision to carry out nuclear tests, and then proceeded:

> "Furthermore, the French Government, which has studied with the closed attention the problems raised in the Australian Note, has the conviction that its nuclear experiments have not violated any rule of international law. It hopes to make this plain in connection with the 'infractions' of this law alleged by the Australian Government in its Note above cited.
>
> The first of these are said to concern the pollution and physical modifications which the experiments in question are supposed to involve for Australian territory, the sea, the airspace above.
>
> In the first place, the French Government understands that the Australian Government is not submitting that it has suffered damage, already ascertained, which is attributable to the French experiments.
>
> If it is not to be inferred from damage that has occurred, then the 'infraction' of law might consist in the violation by France of an international legal norm concerning the threshold of atomic pollution which should not be crossed.
>
> But the French Government finds it hard to see what is the precise rule on whose existence Australia relies. Perhaps Australia could enlighten it on this point.
>
> In reality, it seems to the French Government that this complaint of the violation of international law on account of atomic pollution amounts to a claim that atmospheric nuclear experiments are automatically unlawful. This, in its view, is not the case. But here again the French Government would appreciate having its attention drawn to any points lending colour to the opposite opinion.
>
> Finally, the French Government wishes to answer the assertion that its experiments would unlawfully hamper the freedom of navigation on the high seas and in the airspace above.
>
> In this respect it will be sufficient for the French Government to observe that it is nowadays usual for areas of the high seas to be declared dangerous to navigation on account of explosions taking place there, including the firing of rockets. So far as nuclear experiments are concerned, the Australian Government will not be unaware that it was possible for such a danger-zone encroaching on the high seas to be lawfully established at the time of previous experiments".

This note disputes those claims of legal right.

The Australian Note of 13 February 1973 contains the following passages:

> "The Australian Government assures the French Government that the present situation, caused by an activity which the French Government has undertaken and continues to undertake and which the Australian Government and people consider not only illegitimate but also gravely prejudicial to the future conditions of life of Australia and the other peoples of the Pacific ..."

and again:

> "It is recalled that, in its Note dated 3 January 1973, the Australian Government stated its opinion that the conducting of atmospheric nuclear tests in the Pacific by the French Government would not only be undesirable but would be unlawful. In your Ambassador's Note dated 7 February 1973 it is stated that the French Government, having studied most carefully the problems raised in the Australian Note is convinced that its nuclear tests have violated no rule of international law. The Australian Government regrets that it cannot agree with the point of view of the French Government, being on the contrary convinced that the conducting of the tests violates rules of international law. It is clear that in this regard there exists between our two Governments a substantial legal dispute."

Was this conclusion of the Australian Government thus expressed warranted, and if it was does it satisfy the question as to whether there was a dispute of the required kind, the Application being in substance for a settlement of that dispute by means of a declaration by the Court that the rights which were claimed do exist and that they have been infringed?

It is quite evident from the correspondence that at the outset the hope of the Australian Government was that France might be deterred from making or from continuing its nuclear test experiments in the South Pacific by the pressure of international opinion and by the importance of maintaining the undiminished goodwill and the economic co-operation of Australia. In the period of this portion of the correspondence, and I set that period as between 6 September 1963 and 29 March 1972, the emphasis is upon the implications of the partial Nuclear Test Ban Treaty of 1963, the general international opinion in opposition to nuclear atmospheric tests and the importance of harmonious relations between Australia and France as matters of persuasion.

But in January 1973, when it is apparent that non of these endeavours have been or are likely to be successful, and it is firmly known that a further series of tests will be undertaken by France in the mid-year, that is to say, in the winter of the southern hemisphere, the passages occur which I have quoted from the Note of 3 January 1973 and the response of the French Government of 7 February 1973 which respectively raise and deny the Applicant's claim that its legal rights will be infringed by further testing of nuclear devices in the South Pacific.

Four Bases of Claim

It is apparent from the passages which I have quoted that the various bases of illegality which the Applicant has put before the Court in support of its present Application were then nominated. They can be extracted and listed as follows:

(1) unlawfulness in the modification of the physical conditions of the Australian territory and environment;

(2) unlawfulness in the pollution of the Australian atmosphere and of the resources of its adjacent seat;

(3) unlawfulness in the interference with freedom of navigation on sea and in air; and

(4) breach of legal norms concerning atmospheric testing of nuclear weapons.

None of these were conceded by France and indeed they were disputed.

It might be observed at this point that there is a radical distinction to be made between the claims that violation of territorial and decisional sovereignty by the intrusion and deposition of radio-active nuclides and of pollution of the sea and its resources thereby is unlawful according to international law, and the claim that the testing of nuclear weapons has become unlawful according to the customary international law, which is expressed in the Australian Note of 3 January 1973 as "legal norms concerning atmospheric testing of nuclear weapons".

In the first instance, it is the intrusion of the ionized particles of matter into the air, sea and land of Australia which is said to be in breach of its rights sustained by international law. It is not fundamentally significant in this claim that the atomic explosions from which the ionized particles have come into the Australian environment were explosions for the purpose of developing nuclear weapons, though in fact that is what happened.

But in the second instance, the customary law is claimed now to include a prohibition on the testing of nuclear weapons. The particular purpose of the detonations by France is thus of the essence of the suggested prohibition. Though, as I will mention later, the Applicant points to the resultant fall-out in Australia, these consequences are not of the essence of the unlawfulness claimed: it is the testing itself which is claimed to be unlawful.

It might be noticed that the objection to the testing of nuclear weapons in international discussions is placed on a twofold basis: there is the danger to the health of this and succeeding generations of the human race from the dissemination of radio-active fall-out, but there is also the antipathy of the international community to the enlargement of the destructive quality of nuclear armaments and to the proliferation of their possession. Thus, it is not only nuclear explosions as such which are the suggested objects of the prohibition, but the testing of nuclear weapons as an adjunct to the increase in the extent of nuclear weaponry.

The order in which these four bases of claim were argued and the emphasis respectively placed upon them has tended to obscure the significance of the Applicant's claim for the infringement of its territorial and decisional sovereignty. Because of this presentation and its emotional overtones it might be thought that the last of the above-enumerated bases of claim which, I may say, has its own particular difficulties, was the heartland of the Australian claim. But as I understand the matter, the contrary is really the case. It is the infraction of territorial sovereignty by the intrusion and deposition of nuclides which is the major basis of the claim.

A dispute about respective rights may be a dispute between the Parties as to whether a right exists at all, or it may be a dispute as to the extent of an admitted right, or it may be a dispute as to the existence of a breach of an admitted right, or of course it may combine all these things, or some of them, in the one dispute. The claim on the one hand and the denial on the other that a right exists or as to its extent or as to its breach constitute, in my opinion, a dispute as to rights. If such a dispute between the Parties is as to their respective rights it will in my opinion satisfy the terms of Article 17 of the General Act which, in my opinion, is the touchstone of jurisdiction in this case or, if the contrary view of jurisdiction is accepted, the touchstone of admissibility.

If the dispute is not a dispute as to the existence of a legal right, it will not satisfy Article 17 and it may be said to be a dispute "without object" because, if it is not a dispute as to a legal right, the Court will not be able to resolve it by the application of legal norms: the dispute will not be justiciable.

But such a situation does not arise merely because of the novelty of the claim of right or because the claimed right is not already substantiated by decisions of the Court, or by the opinions of learned writers, or because to determine its validity considerable research and considera-

tion must be undertaken.

In his separate opinion in the case of the Northern Cameroons (supra), Sir Gerald Fitzmaurice adopted as a definition of a dispute which was necessary to found the capacity of this Court to make a judicial Order the definition which was given by Judge Morelli in his dissenting opinion in the *South West Africa* case (Jurisdiction, I.C.J. Reports 1962, between pp.566 and 588), Sir Gerald, adding an element thereto drawn from the argument of the Respondent in the case of the *Northern Cameroons* (*see pp. 109-110 of I.C.J. Reports 1963*).

Sir Gerald thought that there was no dispute in that case (though the Court, including Judge Morelli, considered there was) because the Court could not in that case make any effective judicial Order about the matter in respect of which the Parties to the case were in difference. On page 111 of the Reports of the case, Sir Gerald said:

> "In short, a decision of the Court neither would, nor could, affect the legal rights, obligations, interests or relations of the Parties in any way; and this situation both derives from, and evidences, the non-existence of any dispute between the Parties to which a judgement of the Court could attach itself in any concrete, or even potentially realizable, form. The conclusion must be that there may be a disagreement, contention or controversy, but that there is not, properly speaking, and as a matter of law, any dispute.
>
> To state the point in another way, the impossibility for a decision of the Court in favour of the Applicant State to have any effective legal application in the present case (and therefore the incompatibility with the judicial function of the Court that would be involved by the Court entertaining the case) is the reverse of a coin, the obverse of which is the absence of any genuine dispute.
>
> Since, with reference to a judicial decision sought as the outcome of a dispute said to exist between the Parties, the dispute must essentially relate to what that decision ought to be, it follows that if the decision (whatever it might be) must plainly be without any possibility of effective legal application at all, the dispute becomes void of all content, and is reduced to an empty shell."

The nub of these remarks was that, because the trusteeship agreement had come to an end, the Court could not by a decision confer or impose any right or obligation on either Party in respect of that agreement: and it was only this interpretation or application of that agreement which the Application sought. The qualification of a dispute which Sir Gerald imported into his definition is present, in my opinion, in the very formulation of the nature of the dispute which is relevant under Article 17, that is to say, a dispute as to the respective rights of the Parties. If the dispute is of that kind, it seems to me that the Court must be able both to resolve it by the application of legal norms because legal rights of the Parties are in question and to make at least a declaration as to the existence or non-existence of the disputed right or obligation.

It is essential, in my opinion, to observe that the existence of a dispute as to legal rights does not depend upon the validity of the disputed claim that a right exists or that it was of a particular nature or of a particular extent. In order to establish the existence of a dispute it is not necessary to show that the claimed right itself exists. For example, a party who lost a contested case in a court of law on the ground that in truth he did not have the right which he claimed to have had against the other party, was nonetheless at the outset in dispute with that other party as to their respective rights, that is to say, the right on the one hand and the commensurate obligation on the other. The solution of the dispute by the court did not establish that the parties had not been in dispute as to their rights, though it did determine that what the plaintiff party claimed to be his right was not validly so claimed. To determine the validity of the disputed claim is to determine the merits of the application.

It is conceivable that a person may claim a right which, being denied, gives the appearance of a dispute, but because the claim is beyond all question and on its face baseless, it may possibly be said that truly there is no dispute because there was in truth quite obviously nothing to dispute about, or it may be said that the disputed claim is patently absurd or frivolous. But these things, in my opinion, cannot be said as to any of the bases of claim which are put forward in the Application and which were present in the correspondence which attenuated it.

Consideration of Bases of Claim

I turn now to consider whether the several bases of claim which I have listed above are claims as to legal rights possessed by Australia, in other words, whether these bases of claim being disputed are capable of resolution by the application of legal norms and whether the Applicant has a legal interest to maintain its claim in respect of those rights.

In considering these questions, it must be recalled that if they are to be decided at this stage, they must be questions of an exclusively preliminary character. If, to resolve either of them, it is necessary to go into the merits, then that question is not of that character.

It is not disputed in the case that the deposition of radioactive particles of matter (nuclides) on Australian territory and their intrusion into the Australian environment of sea and air occurs in a short space of time after a nuclear explosion takes place in the French Pacific territory of Mururoa, due to the inherent nature and consequences of such explosions and the prevailing movements

of air in the southern hemisphere. Thus it may be taken that that deposition and intrusion is caused, and that it is known that it will be caused, by those explosions.

First and Second Bases

I can take bases 1 and 2 together. Each relates to the integrity of territory and the territorial environment. The Applicant's claim is that the deposition and intrusion of the nuclides is an infringement of its right to territorial and, as it says, decisional sovereignty. It is part of this claim that the mere deposition and intrusion of this particular and potentially harmful physical matter is a breach of Australia's undoubted sovereign right to territorial integrity, a right clearly protected by international law.

France, for its part, as I understand the French Annex, asserts that the right to territorial integrity in relevant respects is only a right not to be subjected to actual and demonstrable damage by matter intruded into its territory and environment. Hence the reference to a threshold of nuclear pollution. Put another way, it is claimed that France's right to do as she will on her own territory in exercise of her own sovereign rights is only qualified by the obligation not thereby to cause injury to another State; that means, as I understand the French point of view, not to do actual damage presently provable to the Australian territory or environment of air and sea. In such a formulation it would seem that French claims that although the nuclides were inherently dangerous, their deposition and intrusion into the Australian territory and environment did not relevantly cause damage to Australia or people within its territory. Damage in that view would not have been caused unless some presently demonstrable injury had been caused to land or persons by the nuclear fall-out.

Such a proposition is understandable, but it is a proposition of law. It is disputed by Australia and is itself an argument disputing the Australian claim as to the state of the relevant law. So far as the question of French responsibility to Australia may depend upon whether or not damage has been done by the involuntary reception in Australia of the radio-active fall-out, it should be said that the question whether damage has in fact been done has not yet been fully examined. Obviously such a question forms part of the merits. Again, if there is no actual damage presently provable, the question remains whether the nuclides would in future probably or only possibly cause injury to persons within Australian territory; and in either case, there is a question of whether the degree of probability or possibility, bearing in mind the nature of the injuries which the nuclides are capable of causing, is sufficient to satisfy the concept of damage if the view of the law put forward by the French Annex were accepted. The resolution of such questions, which in my opinion are legal questions, partakes of the merits of the case.

The **French White Book** appears to me to attribute to the Applicant and to New Zealand in its case, a proposition that:

> "... they have the right to decline to incur the risks to which nuclear atmospheric tests would expose them, and which are not compensated for by advantages considered by them to be adequate, and that a State disregarding this attitude infringes their sovereignty and thus violates international law".

I do not apprehend that the Applicant did put forward that view of the law; and as phrased by the **French White Book,** it is a proposition of law. My understanding of the Applicant's argument was that the Applicant claimed that in the exercise of its sovereignty over its territory it had to consider, in this technological age, whether it would allow radio-active material to be introduced into and used in the country. It claims that it alone should decide that matter. As some uses of such material can confer benefit on some persons, it was said that Australia had established for itself a role that it would not allow the introduction into, or the use of radio-active material in Australia unless a benefit, compensating for any harmful results which could come from such introduction or use, could be seen. In assessing the benefit and the detriment, account had to be taken of the level of radio-activity, natural and artificial, which existed at any time in the environment. It was said, as I followed the argument, that the involuntary receipt into the territory and environment of radio-active matter infringed Australian sovereignty and compromised its capacity to decide for itself what level of radio-activity it would permit in the territory under its sovereignty. As the introduction was involuntary, no opportunity was afforded of considering whether the introduction of the radio-active matter had any compensating benefits. This was the infringement of what the Applicant called its decisional sovereignty. But if I be wrong in my understanding of the Australian position in this respect, and the French view is the correct one, the Parties are in dispute about a further aspect of international law affecting their relations with one another.

Thus France and Australia are, in my opinion, in difference as to what is the relevant international law regulating their rights and obligations in relation to the consequences on Australian territory or in its environment of nuclear explosions taking place on French territory. To borrow an expression from municipal law, one, but not the only, aspect of the dispute is whether actual and demonstrable damage is of the "gist" of the right to territorial integrity or is the intrusion of radio-active nuclides into the environment per se a breach of that right.

In resolving the question whether damage is of the essence of the right to territorial integrity in relation to the intrusion of physical matter into territory, there may arise what is a large question as to the classification of sub-

stances which may not be introduced with impunity by one State on to and into the territory and environment of another. Is there a possible limitation or qualification of the right to territorial and environmental integrity which springs from the nature of the activity which generates the substance which is deposited or intruded into the State's territory and environment? There are doubtless uses of territory by a State which are of such a nature that the consequences for another State and its territory and environment of such a use must be accepted by that other State. It may very well be that a line is to be drawn between depositions and intrusions which are lawful and must be borne and those which are unlawful; on the other hand it may be that because of the unique nature of nuclides and the internationally unnecessary and internationally unprofitable activity which gives rise to their dissemination, no more need be decided than the question whether the intrusion of such nuclides so derived is unlawful.

It is important, in my opinion, to bear in mind throughout that we are here dealing with the emission and deposit of radio-active substances which are in themselves inherently dangerous. There may be differences of opinion as to how dangerous they may prove to be, but no dissent from the view that they are intrinsically harmful and that their harmful effect is neither capable of being prevented nor, indeed, capable of being ascertained with any degree of certainty. I mention these possibilities merely as indicating the scope of the legal considerations which the dispute of the parties in relation to territorial sovereignty evokes.

In my opinion, it cannot be claimed, and I do not read the French Annex as claiming, that this difference between France and Australia as to whether or not there has been an infringement of Australian sovereignty is other than a legal dispute, a dispute as to the law and as to the legal rights of the Parties. It is a dispute which can be resolved according to legal norms and by judicial process. Clearly the Applicant has a legal interest to maintain the validity of its claim in this respect.

Third Basis of Claim

The third basis of the claim is that Australia's rights of navigation and fishing on the high seas and of oceanic flight will be infringed by the action of the French Government not limited to the mere publication of **NOTAMS** and **AVROMARS** in connection with its nuclear tests in the atmosphere of the South Pacific. Here there is, in my opinion, a claim of right. The claim also involves an assertion that a situation will exist which would be a breach of that right. It seems also to be claimed that pollution of the high seas, with resultant effects on fish and fishing, constitutes an infringement of the Applicant's rights in the sea.

France disputes that what it proposes to do would infringe Australia's rights in the high seas and super-incumbent air, bearing in mind established international practice. Thus the question arises as to the extent of the right of the unimpeded use of the high seas and superincumbent air, and of the nature and effect of international practice in the closure of areas of danger during the use of the sea and air for the discharge of weapons or for dangerous experimentation.

Again, in my opinion, there is, in connection with the third basis of claim, a dispute as to the existence and infringement of rights according to international law: there is a dispute as to the respective rights of the Parties. On that footing, the interest of the Applicant to sustain the Application is, in my opinion, apparent.

Fourth Basis of Claim

The claim in relation to the testing of nuclear weapons in the atmosphere stands on a quite different footing from the foregoing. It is a claim that Australia's rights are infringed by the testing of nuclear weapons by France in the atmosphere of the South Pacific. I have expressed it in that fashion, emphasizing that it is Australia's rights which are said to be infringed, though I am bound to say that the claim is not so expressed in the Australian Note of 3 January 1973. However, the expression of the relevant claim in paragraph 49 of the Application is susceptible of that interpretation. The relevant portion of that paragraph reads:

> "The Australian Government contends that the conduct of the tests as described above has violated and, if the tests are continued, will further violate international law and the Charter of the United Nations, and, inter alia, Australia's rights in the following respects:
>
> (i) The right of Australia and its people, in common with other States and their peoples, to be free from atmospheric nuclear weapon tests by any country is and will be violated ..."It is clear enough, in my opinion, that the Applicant has claimed that international law now prohibits any State from testing nuclear weapons, at least in the atmosphere. Of course, Australia would have no interest to complain in this case of any other form of testing, the French tests being in the atmosphere. The claim is not that the law should be changed on moral or political grounds, but that the law now is as the Applicant claims it to be. France denies that there is any such prohibition. It can readily be said, in my opinion, that this is a dispute as to the present state of international law. It is not claimed that that law has always been so, but it is claimed that it has now become so.

It is said that there has been such a progression of general opinion amongst the nations, evidenced in treaty, resolution and expression of international opinion, that the stage has been reached where the prohibition of the testing of nuclear weapons is now part of the customary international law.

It cannot be doubted that that customary law is subject to growth and to accretion as international opinion changes and hardens into law. It should not be doubted that the Court is called upon to play its part in the discernment of that growth and in the authoritative declaration that in point of law that growth has taken place to the requisite extent and that the stretch of customary law has been attained. The Court will, of course, confine itself to declaring what the law has already become, and in doing so will not be altering the law or deciding what the law ought to be, as distinct from declaring what it is.

I think it must be considered that it is legally possible that at some stage the testing of nuclear weapons could become, or could have become, prohibited by the customary international law. Treaties, resolutions, expressions of opinion and international practice, may all combine to produce the evidence of that customary law. The time when such a law emerges will not necessarily be deferred until all nations have acceded to a test ban treaty, or until opinion of the nations is universally held in the same sense. Customary law amongst the nations does not, in my opinion, depend on universal acceptance. Conventional law limited to the parties to the convention may become in appropriate circumstances customary law. On the other hand, it may be that even a widely accepted test ban treaty does not create or evidence a state of customary international law in which the testing of nuclear weapons is unlawful, and that resolutions of the United Nations and other expressions of international opinion, however frequent, numerous and emphatic, are insufficient to warrant the view that customary law now embraces a prohibition on the testing of nuclear weapons.

The question raised by the Applicant's claim in respect of the nuclear testing of weapons and its denial by France is whether the stage has already been reached where it can be said as a matter of law that there is now a legal prohibition against the testing of nuclear weapons, particularly the testing of nuclear weapons in the atmosphere. If I might respectfully borrow Judge Petrén's phrase used in his dissenting opinion at an earlier stage in this case, the question which arises is whether:

> "... atmospheric tests of nuclear weapons are, generally speaking, already governed by norms of international law, or whether they do not still belong to a highly political domain where the norms concerning their international legality or illegality are still at the gestation stage" (I.C.J. Reports 1973, p.126),

which is, in my opinion, a description of a question of law.

The difficulties in the way of establishing such a change in the customary international law are fairly obvious, and they are very considerable, but, as I have indicated earlier, it is not the validity of the claim that is in question at this stage. The question is whether a dispute as to the law exists. However much the mind may be impressed by the difficulties in the way of accepting the view that customary international law has reached the point of including a prohibition against the testing of nuclear weapons, it cannot, in my opinion, be said that such a claim is absurd or frivolous, or ex facie so untenable that it could be denied that the claim and its rejection have given rise to a dispute as to legal rights. There is, in my opinion, no justification for dismissing this basis of the Applicant's claim as to the present state of international law out of hand, particularly at a stage when the Court is limited to dealing with matters of an exclusively preliminary nature. Nor is it the case that the state of the customary law could not be determined by the application of legal considerations.

There remains, however, another and a difficult question, namely whether Australia has an interest to maintain an application for a declaration that the customary law has reached the point of including a prohibition against the testing of nuclear weapons.

In expressing its claim, it is noticeable that the Applicant speaks of its right as being a right along with all other States. It does not claim an individual right exclusive to itself. In its Memorial, it puts the obligation not to test nuclear weapons as owed by each State to every other State in the international community; thus it is claimed that each State can be held to have a legal interest in the maintenance of a prohibition against the testing of nuclear weapons. The Applicant, in support of this conclusion, relies upon the obiter dictum in the *Barcelona Traction, Light and Power Company, Limited* case (*Belgium v. Spain,* supra, *I.C.J. Reports 1970*, at p.32):

> "When a States admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection: they are obligations erga omnes.
>
> Such obligations derive, for example, in contemporary international law, from outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law *(Reservations to the Convention on the Prevention and Punishment of the*

> *Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p.23); others are conferred by international instruments of a universal or quasi-universal character."

The Applicant says that the prohibition it claims now to exist in the customary international law against the testing of nuclear weapons is of the same kind as the instances of laws concerning the basic rights of the human person as are given in paragraph 34 of the Court's Judgement in the *Barcelona Traction, Light and Power Company, Limited* case, and that therefore the obligation to observe the prohibition is erga omnes. The Applicant says that in consequence the right to observance of the prohibition is a right of each State corresponding to the duty of each State to observe the prohibition, a duty which the Applicant claims is owed by each State to each and every other State.

It this submission were accepted, the Applicant would, in my opinion, have the requisite legal interest, the locus standi to maintain this basis of its claim. The right it claims in its dispute with France would be its right: the obligation it claims France to be under, namely an obligation to refrain from the atmospheric testing of nuclear weapons, would be an obligation owed to Australia. The Parties would be in dispute as to their respective rights.

But in my opinion the question this submission raises is not a matter which ought to be decided as a question of an exclusively preliminary character. Not only are there substantial matters to be considered in connection with it, but if a prohibition of the kind suggested by the Applicant were to be found to be part of the customary international law, the precise formulations of, and perhaps limitations upon, that prohibition may well bear on the question of the rights of individual States to seek to enforce it. Thus the decision and question of the admissibility of the Applicant's claim in this respect may trench upon the merits.

There is a further aspect of the possession of the requisite legal interest to maintain this basis of the Applicant's claim which has to be considered. The Applicant claims to have been specially affected by the breach of the prohibition against atmospheric testing of nuclear weapons. Conformably with its other bases of claim the Applicant says that there has been deleterious fall-out on to and into its land and environment from what it claims to be the unlawful atmospheric testing of nuclear weapons. It may well be that when the facts are fully examined, this basis of a legal interest to maintain the Application in relation to the testing of nuclear weapons may be made out, both in point of fact and in point of law, but again the matter is not, in my opinion, a question of an exclusively preliminary nature.

In the result, I am of opinion that the Applicant's claim is admissible in relation to the first three of the four bases which I have enumerated at an earlier part of this opinion. But I am not able to say affirmatively at this stage that the Application is admissible, as to the fourth of those bases of claim. In my opinion, the question whether the Application is in that respect admissible is not a question of an exclusively preliminary nature, and for that reason it cannot be decided at this stage of the proceedings.

I shall add that, if it were thought, contrary to my own opinion, that the question of admissibility involved to any extent an examination of the validity of the claims of right which are involved in the dispute between the Parties, it would be my opinion that the question of admissibility so viewed could not be decided as a question of an exclusively preliminary character.

To sum up my opinion to this point, I am of opinion that at the date of the lodging of the Application the Court had jurisdiction and that it still has jurisdiction to hear and determine the dispute between France and Australia which at that time existed as to the claim to the unlawfulness, in the respects specified in the first three bases of claim in my earlier enumeration, of the deposition and intrusion of radio-active particles of matter on to and into Australian land, air and adjacent seas resulting from the detonation by France in its territory at Mururoa in the South Pacific of nuclear devices, and as to the unlawfulness of the proposed French activity in relation to the high seas and the super-incumbent air space. I am of opinion that there is a dispute between the Parties as to a matter of legal right in respect of the testing by France of nuclear weapons in the atmosphere of the South Pacific. If it should be found that the Applicant has a legal right to complain of that testing and thus a legal interest to maintain this Application in respect of such testing, the Court has jurisdiction, in my opinion, to hear and determine the dispute between the Parties as to the unlawfulness of the testing by France of nuclear weapons in the atmosphere of the South Pacific. It will in that event, in relation to this basis of claim also, be a dispute as to their respective rights within Article 17 of the General Act.

In so far as the admissibility of the Application may be a question separate from that of jurisdiction in this case, I am of opinion that the Application is admissible in respect of all the bases of claim other than that basis which asserts that the customary international law now includes a prohibition against the testing of nuclear weapons. In my opinion, it cannot be said, as a matter of an exclusively preliminary character, that the Application in respect of this basis of claim is inadmissible, that is to say, it cannot now be said that the Applicant certainly has no legal interest to maintain its Application in that respect. In my opinion, the question of admissibility in respect of this basis of claim is not a question of an exclusively preliminary character and that it ought to be decided at a

later stage of the proceedings.

Dissent from Judgement

I have already expressed myself as to the injustice of the procedure adopted by the Court. I regret to find myself unable to agree with the substance of the Judgement, and must comment thereon in expressing my reasons for dissenting from it.

Explanation for not Notifying and Hearing Parties

The first matter to which I direct attention in the Judgement is that part of it which expresses the Court's reason for not having notified the Parties and for not having heard argument (e.g., see Judgement, para.33).

The Judgement in this connection begins with the circumstance that a communiqué from the Office of the President of France dated 8 June 1974, which had been communicated to Australia, was brought to the attention of the Court by the Applicant in the course of the oral hearing on the preliminary questions. The Judgement then refers to a number of statements which it designates as acts of France and which it says are "consistent" with the communiqué of 8 June 1974; the Court says it would be proper to take cognizance of these statements (paras. 31 and 32 of the Judgement). I may remark in passing that the question is not whether these statements were matters which might properly be considered by the Court if appropriate procedures were adopted. The question is whether this evidentiary matter ought to be acted upon without notice to the Parties and without hearing them. The Court in its Judgement says:

> "It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings. Such a course however would have been fully justified only if the matter dealt with in those statements had been completely new, had not been raised during the proceedings, or was unknown to the Parties. This is manifestly not the case. The essential material which the Court must examine was introduced into the proceedings by the Applicant itself, by no means incidentally, during the course of the hearings, when it drew the Court's attention to a statement by the French authorities made prior to that date, submitted the documents containing it and presented an interpretation of its character, touching particularly upon the question where it contained a firm assurance. Thus both the statement and the Australian interpretation of it are before the Court pursuant to action by the Applicant. Moreover, the Applicant subsequently publicly expressed its comments (see paragraph 28 above) on statements made by the French authorities since the closure of the oral proceedings. The Court is therefore in possession not only of the statements made by French authorities concerning the cessation of atmospheric nuclear testing, but also of the views of the Applicant on them. Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim audi alteram partem, it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings, and which merely supplement and reinforce matters already discussed in the course of the proceedings, statements with which the Applicant must be familiar. Thus the Applicant, having commented on the statements of the French authorities, both that made prior to the oral proceedings and those made subsequently, could reasonably expect that the Court would deal with the matter and come to its own conclusion on the meaning and effect of those statements. The Court, having taken note of the Applicant's comments and feeling no obligation to consult the Parties on the basis for its decision, finds that the reopening of the oral proceedings would serve no useful purpose." (Para. 33.)

It is true that the communiqué of 8 June 1974 which was issued from the Office of the President of France was brought to the Court's attention by the Applicant in the course of the oral hearing. Indeed, I should have thought the Applicant would have been bound to do so. But it seems to me that it was to introduced in relation to some further question beyond the two questions mentioned in the Order of 22 June 1973. It is true that a comment was made on the communiqué by the Applicant's counsel of which the terms are recited in the Judgement. But in my opinion it cannot truly be said that the reference to the communication was made to introduce and argue the questions the Court has decided. Counsel for the Applicant when making his comment thereon, as appears from the verbatim record of the proceedings, was reviewing developments in relation to these proceedings since he last addressed the Court, that is to say, since he did so in connection with the indication of interim measures. He referred to the failure of France to observe the Court's indication of interim measures and to certain further resolutions of the General Assembly and of UNSCEAR. As indicative of what, from the Applicant's point of view, was continued French obduracy, he referred to the communiqué from the President's Office criticizing its factual inaccuracy and emphasizing that it did not contain any firm indication that atmospheric testing was to come to an end. He pointed out that a decision to test underground did not carry any necessary implication that no further atmospheric testing would take place. He asserted that the Applicant had had scientific advice that the possibility of further atmospheric testing taking place after the commencement of underground tests could not be excluded. He indicated that the communiqué had not satisfied the Applicant to the point that the Applicant desired to discontinue the legal proceedings. On the contrary, he indicated that the Applicant proposed to pursue its Application, as in fact it did, continuing the argument on the two questions mentioned int he Order of 22 June

1973. I might interpolate that that argument continued without any intervention by the Court.

But in my opinion this comment of counsel for the Applicant was in no sense a discussion of the question as to whether the claim had become "without object", either because the dispute as to the legal right had been settled, or because no opportunity remained for making a judicial Order upon the Application. It was not directed to that question at all. Nor was it directed to the question whether the communiqué was intended to undertake an international obligation. In no sense did it constitute in my opinion a submission with respect to those questions or either of them. In my opinion it cannot be made the basis for the decision without hearing the Parties. It cannot provide in my opinion any justification for the course the Court has taken. In my opinion it cannot justly be said, as it is said in the Judgement, that the Applicant "could reasonably expect that the Court would ... come to its own conclusion" from the document of 8 June 1974 (see para. 33), i.e., as to whether or not the application had become "without object". Apart from all else, the Applicant was not to know that the Court would receive the further statements and use them in its decision.

I have said that in my opinion the question whether the Application has, by reason of the events occurring since the Application was lodged, become "without object" is not in any sense embraced by or involved in the questions mentioned in the Order of 22 June 1973. They related, and in my opinion related exclusively, to the situation which obtained at the date of the lodging of the Application. They could not conceivably have related to facts and events subsequent to 22 June 1973. But, of course, events which occurred subsequent to the lodging of the Application might provoke further questions which might require to be dealt with in a proper procedural manner and decided by the Court after hearing the Parties with respect to them.

If there is a question at this stage of the proceedings whether the Application has become "without object", either because the dispute which is before the Court had been resolved, or because the Court cannot in the present circumstances, within its judicial function, now make an Order having effect between the Parties, the Court ought, in my opinion, first to have decided the questions then before it and to have fixed times for a further hearing of the case at which the question whether the Application had become "without object" could be examined in a public hearing at which the Parties could place before the Court any relevant evidence which they desired the Court to consider, for it cannot be assumed that the material of which the Court has taken cognizance is necessarily the whole of the relevant material, and at which counsel could have been heard.

The decision of the questions of jurisdiction and of admissibility would in no wise have compromised the consideration and decision on the question which the Court has decided. Indeed, as I think, to have decided what was the nature of the Parties' dispute would have greatly clarified the question whether an admissible dispute had been resolved. Further the failure to decide these questions really saves no time or effort. As I have mentioned, the Memorial and argument of the Applicant have been presented and the questions have been discussed by the Court.

It is of course for the Court to resolve all questions which come before it: the Court is not bound by the views of one of the parties. But in this a sufficient or any reason for not notifying the parties of an additional question which the Court proposes to consider and for not affording the parties an opportunity to put before the Court their views as to how the Court should decide the question, whether it be one of fact or one of law? The Court's procedure is built on the basis that the parties will be heard in connection with matters that are before it for decision and that the Court will follow what is commonly called the "adversary procedure" in its consideration of such matters. See, e.g., Article 42, 43, 46, 48 and 54 of the Statute of the Court. The Rules of Court passim are redolent of that fact. Whilst it is true that it is for the Court to determine what the fact is and what the law is there is to my mind, to say the least, a degree of judicial novelty in the proposition that, in deciding matters of fact, the Court can properly spurn the participation of the parties. Even as to matters of law, a claim to judicial omniscience which can derive no assistance from the submissions of learned counsel would be to my mind an unfamiliar, indeed, a quaint but unconvincing affecta

I find nothing in the Judgement of the Court which, in my opinion, can justify the course the Court has taken. It could not properly be said, in my opinion, consistently with the observance of the Court's judicial function, that the Court could feel no obligation to hear the Parties' oral submissions or that "the reopening of the oral proceedings would serve no useful purpose" (see para. 33 of the Judgement).

Elements of Judgement

The Judgement is compounded of the following elements: first, an interpretation of the claim in the Application. It is concluded that the true nature of the claim before the Court is no more than a claim to bring about the cessation of the testing of nuclear weapons in the South Pacific; second, a finding that the Applicant, in pursuit of its goal or objective to bring about that cessation would have been satisfied to accept what could have been regarded by it as a firm, explicit and binding undertaking by France no longer to test nuclear weapons in the atmosphere of that area. Such an assurance would have been accepted as fulfilling that purpose or objective; third, a finding that France by the communiqué of 8 June 1974, when viewed in the light of the later statements which

are quoted in the Judgement intentionally gave an assurance, internationally binding, and presumably therefore binding France to Australia, that after the conclusion of the 1974 series of tests France would not again test nuclear weapons in the atmosphere of the South Pacific; and lastly, a conclusion that the giving of that assurance, though not found satisfactory and accepted by Australia, ended the dispute between Australia and France which had been brought before the Court, so that the Application lodged on 9 May 1973 no longer had any object, had become "without object".

Each of these elements of the Judgement has difficulties for me. The Judgement says that the "objective" of the Applicant was to obtain the termination of the atmospheric tests, "the original and ultimate objective of the Applicant was and has remained to obtain a termination of: the atmospheric nuclear tests (see paras. 26 and 30 of the Judgement). Paragraph 31 of the Judgement refers to "the object of the Applicant's claim" as being "to prevent further tests". Thus the objective or object is at times said to be that of the Applicant, at other times it is said to be the objective of the Application or of the claim.

The Judgement, in seeking what it describes as the true nature of the claim submitted by the Applicant, ought to have regarded the Application, which by the Rules of Court must state the subject of the dispute, as the point of reference for the consideration by the Court of the nature and extent of the dispute before it (see Art. 35 of the Rules of Court). The Applicant at no stage departed from the Application and the relief it claimed.

By the Application the Applicant seeks two elements in the Court's Judgement, that is to say, a declaration of the illegality of further tests and an Order terminating such tests. The Applicant's requests are directed to the future. But the future to which the Application in seeking a declaration relates begins as from 9 May 1973, the date of the lodging of the Application, and not, as from the date of the Judgement or from some other time in 1974. The Judgement proceeds as I think, in direct contradiction of the language of the Application and of its clear intent, to conclude that the request for a declaration in the Application is no more than a basis for obtaining an Order having the effect of terminating atmospheric tests. The Judgement further says that a finding that further tests would not be consistent with international law would only be a means to an end and not an end in itself (see para. 30 of the Judgement). The Judgement overlooks the terms of paragraph 19 of the Application which is in part in the following terms:

> "The Australian Government will seek a declaration that the holding of further atmospheric tests by the French Government in the Pacific Ocean is not in accordance with international law and involves an infringement of the rights of Australia. The Australian Government will also request that, unless the French Government should give the Court an undertaking that the French Government will treat a declaration by the Court in the sense just stated as a sufficient ground for discontinuing further atmospheric testing, the Court should make an order calling upon the French Republic to refrain from any further atmospheric tests."

I might interpolate here the observation that it just could not be said, in my opinion, that a declaration, made now, that the tests carried out in 1973 and 1974 (which as of 9 May 1973, were "future tests") were unlawful, would do no more than provide a reason for an injunction to restrain the tests which might be carried out in 1975. In my opinion the obvious incorrectness of such a statement is illustrative of the fact that the request in the Application for a declaration was itself a request for substantive relief. Apart from a claim for compensatory relief in relation to them - a matter to which I later refer - a declaration of unlawfulness is all that could be done as to those tests. Obviously there could be no order for an injunction.

In concluding that the nature of the Application was no more than that of a claim for the cessation of the nuclear tests, two related steps are taken, the validity of neither of which I am able to accept. First of all, the purpose with which the litigation was commenced, the goal or objective sought thereby to be attained, is identified in the Judgement with the nature of the claim made in the Application and the relief sought in the proceedings. But it seems to me that they are not the same. They are quite different things. To confuse them must lead to an erroneous conclusion as in my opinion has happened.

Undoubtedly, the purpose of the Applicant in commencing the litigation was to prevent further atomic detonations in the course of testing nuclear weapons in the atmosphere of the South Pacific as from the date of the lodgment of its Application. Apparently it desired to do so for two avowed reasons, first to prevent harmful fallout entering the Australian environment and, secondly, to prevent the proliferation of nuclear armament. I have already called attention to the different bases of the Applicant's claim which reflect those different reasons. Diplomatic approaches having failed, the means of achieving that purpose was the creation of a dispute as to the legal rights of the Parties and the commencement of a suit in this Court founded on that dispute in which relief of two specific kinds was claimed, the principal of which in reality, in my opinion, is the declaration as to the matter of right. The injunctive relief was in truth consequential. The attitude of the Applicant expressed in paragraph 19 of its Application is consistent with the practice of international tribunals which deal with States and of municipal tribunals when dealing with governments. It is generally considered sufficient to declare the law expecting that States and governments will respect the Court's declaration and act accordingly. That I un-

derstand has been the practice of this Court and of its predecessor. Thus the request for a declaration of unlawfulness in international law is, in my opinion, not merely the primary but the principal claim of the Application. It is appropriate to the resolution of a dispute as to legal rights.

The second step taken by the Judgement not unrelated to the first is to identify the word "object" or "objective" in the sense of a goal to be attained or a purpose to be pursued, with the word "object" in the expression of art "without object" as used in the jurisprudence of this Court. This in my opinion is to confuse two quite disparate concepts. The one relates to motivation and the other to the substantive legal content of an Application. Motivation, unless the claim or dispute involved some matter of good faith, would in my opinion be of no concern to the Court when resolving a dispute as to legal right.

It is implicit in the Judgement, in my opinion, that the Parties at the date of the lodgement of the Application were in dispute and presumably in dispute as to their legal rights. But the Judgement does not condescend to an express examination of the nature of the dispute between the Parties which it decides has been resolved and has ceased to exist. I have expressed my views of that dispute in an earlier part of this opinion. If the Court had come to the same conclusion as I have, it would in my opinion have been immediately apparent that the goal or objective of the Applicant in commencing the litigation could not be identified with its claim to the resolution of the dispute as to the respective legal rights of the Parties. It would further have been apparent, in my opinion, that for a court called upon to decide whether such a dispute persisted, the motives, purposes or objective of the Applicant in launching the litigation were irrelevant. It would also have been seen that a voluntary promise given without admission and whilst maintaining the right to do so, not to test atmospherically in the future could not resolve a dispute as to whether it had been or would be unlawful to do so. I add "had been" because of the 1973 series of tests which had taken place before the issue of the communiqué of 8 June 2974.

If, on the other hand, the Court on such an examination of the nature of the dispute, had decided that the dispute between the Parties was not a dispute as to their respective legal rights, the Court would have decided either that it had no jurisdiction to hear and determine the Application or that the Application was inadmissible. In that event no question of the dispute having been resolved would have emerged.

Although the matter receives no express discussion and although I think it is implicit in the Judgement that the Parties were relevantly in dispute when the Application was lodged, the Judgement, it seems to me, treats the Parties as having then been in dispute as to whether or not France should cease tests in the Pacific. But if the Parties had only been in dispute as to whether or not France should do so or should give an assurance that it would do so, the dispute would not have been justiciable; in which case, no question as to the Application having become without object would arise. Whether the Application when lodged was or was not justiciable was in my opinion part of the questions to which the Order of 22 June 1973 was directed and I have so treated the matter in what I have so far written. It seems to me that in that connection some have thought that the dispute between France and Australia was no more than a dispute as to whether France ought or ought not in comity to cease to test in the atmosphere of the South Pacific. If that were the dispute the Court could have had no function in its resolution: it could properly have been regarded as an exclusively political dispute. The Application could properly have been said to be "without object" when lodged. I have found myself and I find myself still unable to accept that view. The dispute which is brought before the Court by the Application is claimed to be, and as I have said in my opinion it is, a dispute as to the legal rights of the Parties. The question between them which the Application brings for resolution by the Court in my opinion is not whether France of its own volition will not, but whether lawfully it cannot, continue to do as it has done theretofore at Mururoa with the stated consequences for Australia. The importance of the Court first deciding whether or not the dispute between the Parties was a dispute as to their respective rights is thus quite apparent. But in any case it seems to me that the Applicant's purpose in commencing the litigation is irrelevant to the question whether the claim which is made is one the Court can entertain and decide according to legal norms, and the relief which is sought is relief which the Court judicially can grant.

The confusion of motivation with the substance of the Application permeates the Judgement in the discussion of the nature of the claim Application makes. The Judgement refers to statements of counsel in the course of the oral hearing and proceeds in paragraph 27:

> "It is clear from these statements that if the French Government had given what could have been construed by Australia as "a firm, explicit and binding undertaking to refrain from further atmospheric tests', the applicant Government would have regarded its objective as having been achieved."

In this passage there is again implicit an identification of the Applicant's ultimate purpose in bringing the proceedings with the claim which it makes in the Application before the Court. If it were to be assumed that the Applicant would in fact have treated such an undertaking as the Court describes as sufficient for its purposes in commencing the litigation, the Applicant, in my opinion, could not have regarded that undertaking as having resolved the matter of right which in my opinion was the

basis of its claim in the Application before the Court. It could not have regarded its dispute as to legal rights as having been resolved. The assurance which the Court finds to have been given was in no sense an admission of illegality of the French testing and of its consequences. France throughout continued to maintain that its nuclear tests "do not contravene any subsisting provision of international law" (French White Book). All the Applicant could have done would have been to accept the assurance as in the nature of a settlement of the litigation and thereupon to have withdrawn the Application in accordance with the Rules of Court. It would not do so in my opinion, because the dispute as to the respective rights of the Parties had been resolved, nor because its claim in the Application "had been met", but because as a compromise the Applicant had been prepared to accept the assurance as sufficient for its purposes.

The question whether a litigant will accept less than that which it has claimed in the Court as a satisfaction of its purpose in commencing a litigation is essentially a matter for the litigant. It is not a matter, in my opinion, which can be controlled by the Court directly or indirectly. Indeed, it is not a matter into which the Court, if it confines itself to its judicial function, ought to enter at all. Even if it be right that the Applicant would have accepted what the Applicant regarded as a firm, explicit and binding undertaking to refrain from further atmospheric tests, the Court is not warranted in deciding what the Applicant ought to accept in lieu of its claim to the Court's Judgement. So to do is in effect to compromise the claim, not to resolve the dispute as to a matter of right. There is in any case, to my mind, obvious incongruity in regarding a voluntary assurance of future conduct which makes no admission of any legal right as the resolution of a dispute as to the existence of the legal right which, if upheld, would preclude that conduct.

The departure from the language of the Application and the identification of the claim which it makes with the object, objective or goal of the Application in making the Application thus provided, in my opinion, an erroneous base upon which to build the Judgement.

Further, the Judgement, it seems to me, overlooks the fact that in all the references to assurances in the correspondence and in the oral hearings the Applicant referred to an assurance with the nature and terms of which it was satisfied. These references cannot be read in my opinion as indicating such an assurance as might be regarded as sufficient for Australia's purposes by any other judgement than its own.

The Judgement proceeds to hold that France by the communiqué of 8 June 1974, as confirmed by the subsequent Presidential and Ministerial statements to the press, did give to the international community and thus to Australia an undertaking, binding internationally, not on any occasion subsequent to the conclusion of the 1974 series of tests to test nuclear weapons in the atmosphere of the South Pacific.

My first observation is that this is a conclusion of fact. It is not in my opinion a conclusion of law. The interferences to be drawn from the issuing and the terms of the communiqué of 8 June 1974 are, in my opinion, inferences of fact, including the critical fact of the intention of France in the matter. So also, in my opinion, is the meaning to be given to the various statements which are set out in the Judgement. A decision as to those inferences and those meanings is not in my opinion an exercise in legal interpretation; it is an exercise in fact-finding.

But whether the conclusion be one of fact or one of law, my comments as to the judicial impropriety of deciding the matter without notice to the Parties of the questions to be considered, and without affording them an opportunity to make their submissions, are equally applicable.

This is a very important conclusion purporting to impose on France an internationally binding obligation of a far-reaching kind. Nothing is found as to the duration of the obligation although nothing said in the Judgement would suggest that it is of a temporary nature. There are apparently no qualifications of it related to changes in circumstances or to the varying needs of French security. Apparently it is restricted to the South Pacific area, a limitation implied from the fact that the source of the obligation is the communiqué of 8 June 1974 issued in the context of the imminence of the 1974 series of tests.

The purpose and intention of issuing the communiqué and subsequently making the various statements is to my mind far from clear. The Judgement finds an intention to enter into a binding legal obligation after giving the warning that statements limiting a State's freedom of action should receive a restrictive interpretation. The Judgement apparently finds the clear intention in the language used. I regret to say that I am unable to do so. There seems to be nothing, either in the language used or in the circumstances of its employment, which in my opinion would warrant, and certainly nothing to compel, the conclusion that those making the statements were intending to enter into a solemn and far-reaching international obligation rather than to announce the current intention of the French Government. I would have thought myself that the more natural conclusion to draw from the various statements was that they were statements of policy and not intended as undertaking to the international community such a far-reaching obligation. The Judgement does not seem to my mind to offer any reason why these statements should be regarded as expressing an intention to accept an internationally binding undertaking rather than an intention to make statements of current government policy and intention.

Further, it seems to me strange to say the least that the French Government at a time when it had not completed its 1974 series of tests and did not know that the weather conditions of the winter in the southern hemisphere would permit them to be carried out, should pre-empt itself from testing again in the atmosphere, even if the 1974 series should, apart from the effects of weather, prove inadequate for the purposes which prompted France to undertake them. A conclusion that France has made such an undertaking without any reservation of any kind, such, for example, as is found in the Moscow Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, to which France is not a party, is quite remarkable and difficult to accept.

It is noticeable that the communiqué itself as sent to Australia makes no express reference to atmospheric testing. The message sent by the French Embassy in Wellington to the Government of New Zealand with respect to the communiqué, drew a conclusion not expressed in the communiqué itself. Somewhat guardedly the Embassy added the words "in the normal course of events" which tended to weaken the inference which apparently the Embassy had drawn from the terms of the communiqué.

In this connection it may be observed that both the Government of Australia and the Government of New Zealand in responding to the communiqué of 8 June 1974, virtually challenged France to give to them an express undertaking that no further tests would be carried out in the South Pacific. There has been ample opportunity for France to have unequivocally made such a statement: but no such express statement has been communicated to either Applicant. Without entering further into detailed criticism of the finding of fact of which personally I am not convinced, it is enough to say that there is, in my opinion, much room for grave doubt as to the correctness of the conclusion which the Court has drawn. That circumstance underlines the essential need to have heard argument before decision.

There is a further substantial matter to be mentioned in this connection. The Court has purported to decide that France has assumed an international obligation of which Australia has the benefit. It is this circumstance which the Judgement holds has resolved the dispute between France and Australia and caused it to cease to exist. But the Court has not decided its jurisdiction as between these Parties. France has steadfastly maintained that the Court has no jurisdiction. The Court's finding that France has entered into an international obligation is intended to be a finding binding both Parties to the litigation, France as well as Australia. But I am at a loss to understand how France can be bound by the finding if the Court has not declared its jurisdiction in the matter.

The Judgement seems to call in aid what it calls an inherent jurisdiction to provide for the orderly settlement of all matters in dispute, to ensure the observance of the inherent limitations on the exercise of the judicial function of the Court and to maintain its judicial character. I do not wish to enter into a discussion of this very broadly stated and, as I think, far-reaching claim to jurisdiction. Let it be supposed that the so-called inherent or incidental jurisdiction as some writers call it would enable the Court to decide that it had no jurisdiction or that an application was not admissible where this could be done without deciding matters of fact; where the matter could be decided upon the face of an admitted or uncontested document. In such a case the Court may be able to find a lack of jurisdiction or of admissibility. But that is not the position here. The Judgement does not merely deny the Applicant a hearing of the Application because of the disappearance of the Applicant's case. The Court purports to decide a matter of fact whereby to bind France to an international obligation. Assuming without deciding that the claim to jurisdiction made in paragraph 23 of the Judgement is properly made, that jurisdiction could not extend in my opinion to give the Court authority to bind France, which has stoutly and consistently denied that it has consented to the jurisdiction.

It may well be that even if the Court decided that it has jurisdiction under Article 36 (1) and the General Act to settle a dispute between Australia and France as to their respective rights in relation to nuclear testing, the consent of France given through Article 17 may not extend to include or involve a consent by France to the determination by the Court that France had accepted a binding obligation to the international community not to test in the atmosphere again, a fact not involved in settling the dispute as to their respective rights. But I have no need to examine that question for the Court has not even decided that it has jurisdiction to settle the dispute between the Parties. I am unable to accept that France is bound by the Court's finding of fact that it has accepted an internationally binding obligation not again to test in the atmosphere of the South Pacific. This is an additional reason why the dispute between Australia and France should not be regarded as resolved.

For all these reasons, I am unable to accept the conclusion that, by reason of the communiqué of 8 June 1974 and the statements recited in the Judgement, the dispute between Australia and France has been resolved and has ceased to exist.

Could the Court Properly Make an Order?

I would now consider the other reason for which a case may become "without object", namely that in the existing circumstances no judicial Order capable of effect between the Parties could be made.

Since the Application was lodged, France has conducted

two series of atmospheric nuclear tests in the South Pacific Ocean, one in 1973 and another in 1974. It has done so in direct breach of this Court's indication of interim measures. It would seem to be incontestable that as a result thereof radio-active matter, "fall-out", has entered the Australian territory and environment. From the information conveyed by the Applicant to the Court during the hearings, it seems that the Applicant has monitored its land and atmosphere following upon such nuclear tests in order to determine whether they were followed by fall-out and in order to determine the precise extent of such fall-out. I have already indicated that these were future tests within the meaning of the Application.

Australia has not yet been required to make its final submissions in this case. These two series of tests and their consequences were clearly not events which the Applicant had to make provision in its Application. It seems to me, therefore, that in the situation that now obtains nothing said in or omitted from the Application or in its presentation to the Court could preclude the Applicant from asking in its final submissions for some relief appropriate to the fact that these nuclear tests, carried out in breach of the Court's indication of interim measures, caused harm to Australia and its population and indeed involved the expenditure of money; for though perhaps a minor matter, it can scarcely be doubted that the monitoring to determine fall-out, if any, and its extent has involved considerable expenditure, expenditure that would appear to me to be causally related to the explosions carried out by France during the 1973 and 1974 series of tests.

It is observable that the request in the Application is not for a declaration that tests which have already been carried out prior to 9 May 1973 were unlawful, though of course in the nature of things a declaration that further tests after 9 May 1973 would be unlawful would carry in this case the conclusion that those which had already taken place were also unlawful. In the presentation of its case the Applicant said that "at the present time" it did not seek any compensatory Order in the nature of damages. In truth such a claim for damages made in the Application would not easily have been seen to be consistent with the nature of the claims actually made in the Application. They, as I have pointed out, are for a declaration of right and an Order to prevent any tests occurring after 9 May 1973; hence the request for the indication of interim measures made immediately upon the lodging of the Application. Any claim to be paid damages if made in the Application itself would in the circumstances necessarily have been a claim in respect of past tests carried out by France, which were not directly embraced in the claim made in the Application. Further, a claim for damages could scarcely relate to tests which might yet, as of 9 May 1973, be carried out by France. If the Applicant were to succeed there would be none, for the Applicant seeks to restrain them as from the date of the lodgement of the Application. Further, the case was not one in which the Applicant could ask for compensation as a substitute for an injunction, that is to say on the assumption that the Applicant succeeded in obtaining a declaration and failed to get an Order for injunction.

A claim, therefore, by the Applicant in its final submissions for relief appropriate to the events of 1973 and 1974 would not be inconsistent with what has been said so far. Indeed, such a claim would be related to the dispute on which the Application was founded. Assuming the Applicant to be right in its contentions, the tests of 1973 and 1974 and their consequences in Australia constitute a breach of Australia's rights. Thus, as I said earlier, it could not properly be said that a declaration made now in conformity with the Application, would be doing no more than affording a reason for an Order of injunction. A claim for relief related to what has occurred since the Application was lodged and to the consequences of the tests of 1973 and 1974 would not transform the dispute which existed at the date of the lodgement of the Application into another dispute different in character: nor would it be a profound transformation of the character of the case by amendment, to use the expression of the Court in the Société Commerciale de Belgique case (P.C.I.J., Series A/B, No.78, at p. 173). Rather it would attract the observations of the Court in that case to the effect that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably but without infringing the terms of the Statute or the Rules of Court (op. cit.).

This ability of the Applicant to include in its final submissions to the Court a claim for relief of the kind I have suggested indicates that a declaration by the Court in terms of the Application, but made more specific by a reference to those nuclear tests which took place in 1973 and 1974 and their consequences, is capable of affecting the legal interests or relationship of the Parties. It could not properly, in my opinion, be said that to make such a declaration would be an exercise outside the judicial function or that it would be purposeless. It would be dealing with a matter of substance. The Court, in my opinion, could also make an Order for some form of compensatory relief if such an Order were sought. Indeed, if the Applicant succeeded on the merits of its claim, some Order with respect to the conduct and consequences of the tests of 1973 and 1974 might well be expected.

In any case, and quite apart from any question of any additional claim for relief contained in the Applicant's final submission, should the Applicant succeed on the merits of its Application in respect of any of the first three bases of its claim, a declaration by the Court in relation to that basis or those bases of claim, with possibly a specific reference to the results in Australia of the carrying out by France of the 1973 and 1974 series of tests, would, in my opinion, be properly made within the

scope of the Court's judicial function. Quite apart from any damage caused by the 1973-1974 series of tests, such a declaration could found subsequent claims by Australia upon France in respect of past testing by France of nuclear weapons in the South Pacific.

It was said by the Court in the case of the *Northern Cameroons* (*supra*):

"The function of the Court is to state the law, but it may pronounce judgement only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgement must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations." (I.C.J. Reports 1963, pp. 33-34.)

The Court also said:

"Moreover the Court observes that if in a declaratory judgement it expounds a rule of customary law or interprets a treaty which remains in force, its judgement has a continuing applicability."

Success of the Applicant in respect of one or more of the first three bases of its claim would establish that it had been in dispute with France as to their respective legal rights, that its claims of right to which the Court's declaration related was or were valid, and that France had been in breach of that right or those rights. To declare this situation, the Judgement, in my opinion, would satisfy what the Court said in the quotations I have made. The judgement would be stating the law in connection with a concrete case, where the Parties remained in dispute as to their respective legal rights. The Court's declaration would affect their existing legal rights and obligations. In addition, the Court would be expounding a rule of customary law in relation to the territorial sovereignty of the Applicant as a State in the international community.

A judgement affirming the Court's jurisdiction would involve a decision that the General Act remained in force and a decision that the Parties were in dispute as to their respective rights within the meaning of Article 17 of the General Act. Thus an interpretation would be placed on Article 17. Therefore a declaration could properly be made and would have legal effect.

If the Applicant were also to succeed upon the fourth basis of its claim, again the Court would be stating the law in concrete case where the Parties remained in dispute, and it would be expounding a rule of customary law, and the other comments I have made would be applicable.

These results would follow, in my opinion, even if the Court, in its discretion, refrained from making any immediate Order of injunction. It might do so because it was satisfied that France would not again explode nuclear devices or test weapons in the atmosphere of the South Pacific, either because the Court was satisfied that France had already resolved not to do so, or because the Court was satisfied that France would respect the declaration of right which the Court had made in the matter. But the Court, if it saw fit, could in my opinion, with legal propriety, make an Order for injunction nonetheless. It is a matter of discretion for a court whether or not to make an order of injunction where it is satisfied that without the making of the order the conduct sought to be restrained will not occur.

Lastly, for the course the Judgement takes there is no precedent. The case of the Northern Cameroons (supra), in my opinion, cannot be called in aid to justify the Judgement. In that case, what the Applicant claimed in its Application, the Court at the time of giving Judgement held that it could not do. The Court was asked to declare the breach of a trusteeship agreement which had ceased to be operative within a day or so of the lodging of the Application. The Court held that a declaration of its breach during the period of its operation could have no effect whatever between the Parties, there being no claim for compensation for the breach.

Judge Sir Gerald Fitzmaurice, in his separate opinion, expressed the view that from the outset of the case there was no justiciable dispute. Sir Gerald held that from the terms of the Application it was clear that the Court was not able to make an Order in the case affecting the legal relations of the Parties; therefore, in conformity with the definition he adopted in the case, there was no relevant dispute. He expressed himself at page 111 of his opinion (I.C.J. Reports 1963) in terms which I have already quoted.

The contrast between the situation of the present case and that of the Northern Cameroons is apparent. Even for those who accept the validity of the Court's decision in the case of the Northern Cameroons, that case affords, in my opinion, no support for the present Judgement.

In my opinion, there is no discretion in this Court to refuse to decide a dispute submitted to it which it has jurisdiction to decide. Article 38 of its Statute seems to lay upon this Court a duty to decide. The case of Northern Cameroons at best covers a very narrow field in which no Order at all can properly be made by the Court.

Of course, if the dispute upon which it is sought to found jurisdiction has been resolved, no Order settling it can be made. Thus, the Judgement in this case can only be justified if the dispute between the Parties as to their legal rights has been resolved and ceased to exist.

However, for all the reasons I have expressed, I can find

no ground upon which it can properly be held that the dispute between the Parties as to their respective rights has been resolved or has ceased to exist, or that the Court could not, in the circumstances of the case, properly make a judicial Order having effect between the Parties. The Application, in my opinion, has not become "without object".

(Signed) G.E. BARWICK

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS, AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ESSAIS NUCLÉAIRES

(NOUVELLE-ZÉLANDE c. FRANCE)

ARRÊT DU 20 DÉCEMBRE 1974

AFFAIRE DES ESSAIS NUCLÉAIRES

(NOUVELLE-ZÉLANDE c. FRANCE)

COUR INTERNATIONALE DE JUSTICE

AFFAIRE DES ESSAIS NUCLÉAIRES

(NOUVELLE-ZÉLANDE c. FRANCE)

REQUÊTE DE FIDJI À FIN D'INTERVENTION

ORDONNANCE

Présents: M. LACHS, *President;* M. M. FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, sir Humphrey WALDOCK, M. M. NAGENDRA SINGH, RUDA, *juges;* sir Garfield BARWICK, *juge* ad hoc; M. AQUARONE, *Greffier*.

La Cour internationale de Justice,

Ainsi composée,

Après délibéré en chambre du conseil,

Vu les articles 48 et 62 du Statut de la Cour,

Vu la requête en date du 18 mai 1973 par laquelle le Gouvernement fidjien a demandé à être autorisé à intervenir dans l'instance,

Vu l'ordonnance rendue par la Cour en l'espèce le 12 juillet 1973,

Rend l'ordonnance suivante:

1. Considérant que, par un arrêt du 20 décembre 1974 en l'espèce, la Cour dit que la demande de la Nouvelle-Zélande est désormais sans objet et qu'il n'y a dès lors pas lieu à statuer,

2. Considérant qu'en conséquence il n'existe désormais plus d'instance sur laquelle la requête à fin d'intervention puisse se greffer,

LA COUR,

A l'unanimité,

Dit que la requête par laquelle le Gouvernement fidjien demande à intervenir dans l'instance introduite par la Nouvelle-Zélande contre la France tombe et que la Cour n'a plus aucune suite à lui donner.

Fait en anglais et en français, le texte anglais faisant foi, au palais de la Paix, à La Haye, le vingt décembre mil neuf cent soixante-quatorze, en quatre exemplaires, dont l'un restera déposé aux archives de la Cour et dont les autres seront transmis respectivement au Gouvernement fidjien, au Gouvernement néo-zélandais et au Gouvernement de la République française.

Le Président,

(Signé) Manfred LACHS.

Le Greffier.

(Signé) S. AQUARONE.

M. GROSS, juge, fait la déclaration suivante:

[Translation]

I voted in favour of the present decision for reasons other than those stated in the Order. The document filed by the Government of Fiji on 18 May 1973 could not in any way be regarded as a request to be permitted to intervene within the meaning of Article 62 of the Statute, and the request should have been dismissed *in limine.*

M. ONYEAMA, juge, fait la déclaration suivante:

[Traduction]

J'ai voté pour l'ordonnance, bien que, selon moi, le motif sur lequel elle repose, à savoir que la demande de l'Etat requérant est désormais sans objet et qu'en conséquence il n'existe désormais plus d'instance sur laquelle l'intervention puisse se greffer, implique une prémisse que je ne suis pas en mesure d'accepter. Cette prémisse est que, si la demande avait eu un objet et si la Cour avait été appelée à se prononcer à son égard, il aurait existé une possibilité d'intervention en l'espèce.

A aucun moment qui intéresse la présente instance, Fidji n'a été partie à l'Acte général de 1928 et n'a accepté la clause facultative du Statut de la Cour, qui ont été invoqués par l'Etat demandeur pour établir la compétence de la Cour, et il n'a pas non plus invoqué un titre quelconque de juridiction vis-à-vis de la France dans sa requête à fin d'intervention.

La Cour aurait dû statuer sur cette requête elle-même comme le lui prescrit l'article 62 de son Statut et aurait dû, à mon avis, la rejeter pour le motif que la condition de réciprocité qui accompagne l'acceptation de la juridiction obligatoire de la Cour n'était nullement remplie entre Fidji et la France.

M. DILLARD et sir Humphrey WALDOCK, juges, font la déclaration commune suivante:

[Traduction]

L'ordonnance dit que la Cour, ayant considéré la demande de la Nouvelle-Zélande comme désormais sans objet, n'a plus aucune suite à donner à cette demande et qu'en conséquence il n'existe désormais plus d'instance sur laquelle une intervention puisse se greffer. De ce fait, d'après la Cour, la requête du gouvernement fidjien tombe.

La conclusion découle logiquement de la prémisse. En tant que membres de la Cour, liés par la décision rendue en l'affaire des *Essais nucléaires,* nous sommes donc tenus de voter pour l'ordonnance. Il n'est manifestement pas possible que le Gouvernement fidjien intervienne à l'instance dès lors que, en vertu de l'arrêt de la Cour, aucune instance n'existe.

Cela dit, nous nous sentons l'obligation de dire que nous n'acceptons pas la prémisse sur laquelle repose la conclusion de la Cour. Comme l'indique de façon détaillée l'opinion dissidente que nous présentons avec nos collègues, nous ne souscrivons pas à la décision de la Cour selon laquelle il n'y a aucune suite à donner à la demande formulée par la Nouvelle-Zélande contre la France.

Si les vues de la minorité l'avaient emporté dans l'affaire *Nouvelle-Zélande c. France,* il aurait fallu examiner la question de l'intervention de Fidji afin de déterminer s'il existait un lien juridictionnel suffisant entre Fidji et la France pour justifier l'intervention de Fidji en vertu de l'article 62 du Statut de la Cour. De plus, on aurait dû selon nous donner à Fidji la possibilité de se faire entendre sur la question avant de prendre une décision.

Il résulte de ce qui précède que, tout en nous estimant tenus de voter pour l'ordonnance que rend la Cour, nous avons pour ce faire des motifs qui diffèrent à certains égards de ceux que la Cour a avancés.

M. JIMÉNEZ DE ARÉCHAGA, juge, fait la déclaration suivante:

[Traduction]

J'ai voté pour le rejet de la requête par laquelle Fidji demandait à intervenir en vertu de l'article 62 du Statut, mais pour un autre motif que celui sur lequel se fonde l'ordonnance, à savoir que Fidji, qui n'est pas partie à l'Acte de 1928, ni au système de la clause facultative, n'a invoqué, dans sa requête, aucun lien de juridiction avec la France.

Pour pourvoir intervenir en application de l'article 62 du Statut en vue de faire valoir un droit contre le défendeur, un Etat doit se trouver dans une situation qui lui permettrait d'attraire lui-même le défendeur devant la Cour.

Les rédacteurs de l'article 62 du Statut sont partis du principe que l'Etat intervenant aurait son propre titre de juridiction vis-à-vis du défendeur, car à l'époque le projet de Statut envisageait une juridiction obligatoire pour tous. Quand ce système a été remplacé par celui de la clause facultative, aucun changement n'a été apporté à l'article 62, mais, aux fins de son interprétation et de son application, celui-ci doit être considéré comme restant soumis à la même condition. S'il en allait autrement, il en résulterait des conséquences fâcheuses et incompatibles avec des principes fondamentaux tels que ceux de l'égalité des parties devant la Cour ou de la réciprocité rigoureuse des droits et des obligations entre les Etats qui acceptent sa compétence. Un Etat qu'un autre Etat ne peut pas assigner comme défendeur devant la Cour ne peut pas non plus se présenter comme demandeur ni

comme partie intervenante contre ce même Etat, avec la faculté de soumettre des conclusions indépendantes à l'appui d'un intérêt propre. A mon avis, la disposition de l'article 69, paragraphe 2, du Règlement de la Cour qui exige que soient exposées les «raisons de droit et de fait justifiant l'intervention» doit s'entendre, en des circonstances comme celles de la présente espèce, comme imposant aussi l'obligation d'établir un lien juridictionnel indépendant entre l'intervenant et le défendeur.

Sir Garfield BARWICK, juge *ad hoc*, fait la déclaration suivante:

[Traduction]

J'ai voté pour l'ordonnance relative à la requête de Fidji à fin d'intervention dans la présente instance non pas en raison des arrêts rendus par la Cour dans les affaires *Australie c. France et Nouvelle-Zélande c. France* mais uniquement pour les motifs exposés par MM. Jiménez de Aréchaga et Onyeama dans leurs déclarations concernant l'ordonnance relative à Fidji, que j'approuve entièrement.

(Paraphé) M.L.

(Paraphé) S.A.

COUR INTERNATIONALE DE JUSTICE

ANNÉE 1974

20 décembre 1974

AFFAIRE DES ESSAIS NUCLÉAIRES

(NOUVELLE-ZÉLANDE c. FRANCE)

Questions de compétence et de recevabilité – Nécessité d'un examen préalable portant sur la question essentiellement préliminaire de l'existence d'un différend – Exercice d'un pouvoir inhérent de la Cour.

Analyse de la demande formulée dans la requête et détermination de son objet – Portée des conclusions et déclarations du demandeur pour la définition de la demande – Pouvoir de la Cour d'interpréter les conclusions – Déclarations publiques faites au nom du défendeur avant et après la clôture de l'instance.

Les actes unilatéraux comme sources d'obligations juridiques – Principe de la bonne foi.

Règlement du différend par l'effet d'une déclaration unilatérale créant une obligation juridique – Le fait que le demandeur n'exerce pas son droit de se désister n'empêche pas la Cour de parvenir à sa propre conclusion – La disparition du différend entraîne celle de l'objet de la demande – La Cour ne peut exercer sa compétence que s'il existe réellement un différend entre les Parties.

ARRÊT

Présents: M. LACHS, *Président;* MM. FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, sir Humphrey WALDOCK, MM. NAGENDRA SINGH, RUDA, *juges;* sir Garfield BARWICK, *juge* ad hoc; M. AQUARONE, *Greffier.*

En l'affaire des essais nucléaires,

entre

la Nouvelle-Zélande,

représentée par

M. R. Q. Quentin-Baxter, membre du barreau de Nouvelle-Zélande, professeur de droit international à l'Université Victoria de Wellington,

comme agent et conseil,

assisté par

S. Exc. M. H. V. Roberts, ambassadeur de Nouvelle-Zélande aux Pays-Bas,

comme coagent,

et par

l'honorable A. M. Finlay, Q.C., *Attorney-General* de Nouvelle-Zélande,

M. R. C. Savage, Q.C., *Solicitor-General* de Nouvelle-Zélande,

M. K. J. Keith, membre du barreau de Nouvelle-Zélande, professeur de droit international

à l'Université Victoria de Wellington,

M. C. D. Beeby, membre du barreau de Nouvelle-Zélande, conseiller juridique au ministère

des affaires étrangères,

M^me^ A. B. Quentin-Baxter, membre du barreau de Nouvelle-Zélande,

comme conseils,

et

la République française,

LA COUR,

ainsi composée,

rend l'arrêt suivant:

1. Par lettre du 9 mai 1973 reçue au Greffe de la Cour le même jour l'ambassadeur de Nouvelle-Zélande aux Pays-Bas a transmis au Greffier une requête introduisant une instance contre la France au sujet d'un différend concernant la légalité des essais nucléaires réalisés en atmosphère par le Gouvernement français dans la région du Pacifique Sud. Pour établir la compétence de la Cour, la requête invoque l'article 36, paragraphe 1, et l'article 37 du Statut de la Cour, ainsi que l'article 17 de l'Acte général pour le règlement pacifique des différends internationaux conclu à Genève le 26 septembre 1928, et subsidiairement l'article 36, paragraphes 2 et 5 du Statut de la Cour.

2. Conformément à l'article 40, paragraphe 2, du Statut, la requête a été immédiatement communiquée au Gouvernement français. Conformément au paragraphe

3 du même article, les autres Etats admis à ester devant la Cour ont été informés de la requête.

3. En application de l'article 31, paragraphe 2, du Statut, le Gouvernement néo-zélandais a désigné le très honorable sir Garfield Barwick, *Chief Justice* d'Australie, pour siéger comme juge *ad hoc* en l'affaire.

4. Dans une lettre de l'ambassadeur de France aux Pays-Bas datée du 16 mai 1973 et remise par celui-ci au Greffier le même jour, le Gouvernement français a fait savoir que, pour les motifs exposés dans la lettre et dans une annexe jointe à celle-ci, il estime que la Cour n'a manifestement pas compétence en l'espèce, qu'il ne peut accepter sa juridiction, et qu'en conséquence le Gouvernement français n'a pas l'intention de désigner un agent et demande à la Cour d'ordonner que l'affaire soit rayée de son rôle. Le Gouvernement français n'a pas désigné d'agent.

5. Le 14 mai 1973, l'agent de la Nouvelle-Zélande a déposé au Greffe une demande en indication de mesures conservatoires fondée sur l'article 33 de l'Acte général de 1928 pour le règlement pacifique des différends internationaux, les articles 41 et 48 du Statut et l'article 66 du Règlement de la Cour. Par ordonnance du 22 juin 1973, la Cour a indiqué, sur la base de l'article 41 du Statut, certaines mesures conservatoires en l'affaire.

6. Par la même ordonnance du 22 juin 1973, la Cour, considérant qu'il était nécessaire de régler aussi rapidement que possible les questions relatives à sa compétence et à la recevabilité de la requête, a décidé que les pièces écrites porteraient d'abord sur ces questions et a fixé la date d'expiration des délais au 21 septembre 1973 pour le dépôt du mémoire du Gouvernement néo-zélandais et au 21 décembre 1973 pour le dépôt du contre-mémoire du Gouvernement français. Le coagent de la Nouvelle-Zélande ayant demandé que soit prorogé au 2 novembre 1973 le délai dans lequel le mémoire devait être déposé, la date d'expiration des délais fixés par l'ordonnance du 22 juin 1973 a été reportée par ordonnance du 6 septembre 1973 au 2 novembre 1973 pour le mémoire du Gouvernement néo-zélandais et au 22 mars 1974 pour le contre-mémoire du Gouvernement français. Le mémoire du Gouvernement néo-zélandais a été déposé dans le délai ainsi prorogé et il a été communiqué au Gouvernement français. Le Gouvernement français n'a pas déposé de contre-mémoire et, la procédure écrite étant ainsi terminée, l'affaire s'est trouvée en état le 23 mars 1974, c'est-à-dire le lendemain du jour où expirait le délai fixé pour le dépôt du contre-mémoire du Gouvernement français.

7. Le 18 mai 1973, le Gouvernement fidjien a déposé au Greffe, conformément à l'article 62 du Statut, une requête à fin d'intervention dans l'instance. Par ordonnance du 12 juillet 1973, la Cour, eu égard à son ordonnance du 22 juin 1973 prescrivant que les pièces écrites porteraient d'abord sur les questions relatives à sa compétence et à la recevabilité de la requête, a décidé de surseoir à l'examen de la requête par laquelle le Gouvernement fidjien demandait à intervenir jusqu'à ce qu'elle eût statué sur ces questions.

8. Le 24 juillet 1973, le Greffier a dressé la notification prévue à l'article 63 du Statut aux Etats, autres que les Parties à l'instance, qui existaient encore et étaient indiqués dans les documents pertinents de la Société des Nations comme parties à l'Acte général pour le règlement pacifique des différends internationaux conclu à Genève le 26 septembre 1928, qui était invoqué dans la requête comme l'un des fondements de la compétence de la Cour.

9. Les Gouvernements de l'Argentine, de l'Australie, de Fidji et du Pérou ont demandé que les pièces de la procédure écrite soient tenues à leur disposition conformément à l'article 48, paragraphe 2, du Règlement. Les parties ont été consultées dans chaque cas et, le Gouvernement français maintenant la position prise dans la lettre du 16 mai 1973 pour refuser de donner un avis, la Cour, ou le Président, a décidé de faire droit à ces demandes.

10. Les Parties ayant été dûment averties, des audiences publiques ont eu lieu les 10 et 11 juillet 1974, durant lesquelles la Cour a entendu M. R. Q. Quentin-Baxter, agent de la Nouvelle-Zélande, M. A. M. Finlay et M. R. C. Savage, conseils, plaider pour le Gouvernement néo-zélandais sur les questions relatives à la compétence de la Cour et à la recevabilité de la requête. Le Gouvernement français n'était pas représenté aux audiences.

11. Dans la procédure écrite, les conclusions ci-après ont été déposées au nom du Gouvernement néo-zélandais:

dans la requête:

«La Nouvelle-Zélande prie la Cour de dire et juger que les essais nucléaires provoquant des retombées radioactives effectués par le gouvernement français dans la région du Pacifique Sud constituent une violation des droits de la Nouvelle-Zélande au regard du droit international et que ces droits seront enfreints par tout nouvel essai.»

dans le mémoire:

«Le Gouvernement néo-zélandais s'estime fondé à ce que la Cour dise et juge que:

a) la Cour a compétence pour connaître de la requête déposée par la Nouvelle-Zélande et pour examiner le différend au fond;

b) la requête est recevable.»

12. A l'issue de la procédure orale, les conclusions écrites ci-après ont été déposées au Greffe au nom du Gouvernement néo-zélandais:

«Le Gouvernement néo-zélandais s'estime fondé à ce que la Cour dise et juge que:

a) la Cour a compétence pour connaître de la requête déposée par la Nouvelle-Zélande et pour examiner le différend au fond;

b) la requête est recevable.»

13. Aucune pièce écrite n'ayant été déposée par le Gouvernement français et celui-ci ne s'étant pas fait représenter à la procédure orale, aucune conclusion n'a été prise formellement par ce gouvernement. Toutefois, l'attitude du Gouvernement français en ce qui concerne la question de la compétence de la Cour a été définie dans la lettre précitée de l'ambassadeur de France aux Pays-Bas datée du 16 mai 1973, et dans le document qui y était joint en annexe. La lettre de l'ambassadeur contenait notamment ce passage:

«ainsi qu'il en averti le Gouvernement néo-zélandais, le Gouvernement de la République estime que la Cour n'a manifestement pas compétence dans cette affaire et qu'il ne peut accepter sa juridiction».

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14. Comme il a été indiqué (paragraphe 4), l'ambassadeur de France déclarait aussi dans sa lettre du 16 mai 1973 que le Gouvernement français «demande respectueusement à la Cour de bien vouloir ordonner que cette affaire soit rayée de son rôle». Au début de l'audience publique consacrée à la demande en indication de mesures conservatoires qui s'est tenue le 24 mai 1973, le Président a annoncé: «Il a été dûment pris acte de cette demande ... et la Cour l'examinera le moment venu, conformément à l'article 36, paragraphe 6, de son Statut». Dans son ordonnance du 22 juin 1973, la Cour a dit que, pour les raisons énoncées dans cette ordonnance, elle ne pouvait «faire droit, au stade actuel de la procédure,» à la demande du Gouvernement français. Ayant eu depuis lors la possibilité d'examiner cette demande compte tenu de la suite de la procédure, la Cour estime que la présente affaire n'est pas de celles auxquelles il conviendrait d'appliquer la procédure sommaire de radiation du rôle.

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15. Il est regrettable que le Gouvernement français ne se soit pas présenté pour développer ses arguments sur les questions qui se posent en la phase actuelle de la procédure et qu'ainsi la Cour n'ait pas eu l'aide que l'exposé de ces arguments et toute preuve fournie à l'appui auraient pu lui apporter. La Cour doit cependant poursuivre l'affaire pour aboutir à une conclusion et, ce faisant, doit tenir compte non seulement des preuves et des arguments qui lui sont présentés par le demandeur, mais aussi de toute documentation ou preuve pertinente. Elle doit sur cette base s'assurer en premier lieu qu'il n'existe aucun obstacle à l'exercice de sa fonction judiciaire et en second lieu, s'il n'existe aucun obstacle de ce genre, que la requête est fondée en fait et en droit.

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16. La présente affaire concerne un différend entre le Gouvernement néo-zélandais et le Gouvernement français au sujet de la légalité des essais nucléaires réalisés en atmosphère par ce dernier dans la région du Pacifique Sud. Attendu que, dans la phase actuelle de l'instance, la Cour ne doit traiter que de questions préliminaires, il convient de rappeler que, dans une phase de cette nature, elle doit se placer dans l'optique qu'elle a définie en ces termes dans les affaires de la *Compétence en matière de pêcheries:*

«La question étant ainsi limitée, la Cour s'abstiendra non seulement d'exprimer une opinion sur des points de fond, mais aussi de se prononcer d'une manière qui pourrait préjuger ou paraître préjuger toute décision qu'elle pourrait rendre sur le fond.» (*C.I.J. Recueil 1973,* p.7 et 54.)

Il y a lieu cependant de résumer les principaux faits qui sont à l'origine de l'affaire.

17. Avant le dépôt de la requête introductive d'instance en l'espèce, le Gouvernement français avait procédé à des essais atmosphériques d'engins nucléaires à son centre d'expérimentations du Pacifique, dans le territoire de la Polynésie française, en 1966, 1967, 1968, 1970, 1971 et 1972. Le lieu utilisé pour les explosions a été principalement l'atoll de Mururoa, à quelque 4600 kilomètres du point le plus proche de l'île septentrionale de la Nouvelle-Zélande et à 1950 kilomètres environ du point le plus proche des îles Cook, Etat autonome librement associé à la Nouvelle-Zélande. Le Gouvernement français a institué des «zones interdites» aux aéronefs et des «zones dangereuses» pour la navigation aérienne et maritime, afin d'empêcher les avions et les navires d'approcher du centre d'expérimentations; ces zones ont été établies chacune des années où des essais ont eu lieu, pour la durée de ces essais.

18. Comme le Comité scientifique des Nations Unies pour l'étude des effets des rayonnements ionisants l'a indiqué dans ses rapports successifs à l'Assemblée générale, les essais d'engins nucléaires effectués dans l'atmosphère ont libéré dans celle-ci et disséminé ensuite dans le monde entier à des degrés variables des quantités mesurables de matières radioactives. La Nouvelle-Zélande affirme que les essais atmosphériques français ont provoqué des retombées de cette nature notamment en territoire néo-zélandais. La France soutient entre autres que les éléments radioactifs produits par ses expériences sont si minimes qu'ils ne peuvent être considérés que comme négligeables et que les retombées sur le territoire néo-zélandais qui en résultent n'ont jamais présenté de danger pour la santé de la population néo-zélandaise. Ces points litigieux intéressant manifestement le fond de l'affaire, la Cour doit s'abstenir, pour les raisons précédemment indiquées, d'exprimer une opinion à leur sujet.

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19. Par lettres du 21 septembre 1973 et du 1er novembre 1974, le Gouvernement néo-zélandais a informé la Cour que, après l'ordonnance du 22 juin 1973 qui, à titre de mesures conservatoires prises en vertu de l'article 41 du Statut, indiquait notamment que le Gouvernement français devait s'abstenir de procéder à des essais nucléaires provoquant le dépôt de retombées radioactives sur le territoire de la Nouvelle-Zélande, deux nouvelles séries d'essais atmosphériques ont eu lieu au centre d'expérimentations du Pacifique en juillet et août 1973 et de juin à septembre 1974. Ces lettres indiquaient aussi que l'on avait enregistré sur le territoire néo-zélandais des retombées, que l'analyse des échantillons prélevés établissait de façon concluante, selon le Gouvernement néo-zélandais, la présence de dépôts provenant de ces explosions et que «le Gouvernement néo-zélandais est d'avis que le Gouvernement français a clairement violé l'ordonnance rendue par la Cour le 22 juin 1973».

20. Un certain nombre de déclarations autorisées ont été récemment faites au nom du Gouvernement français, concernant les intentions de celui-ci au sujet de ses futures expériences nucléaires dans la région du Pacifique Sud. La portée de ces déclarations et leur incidence sur la présente instance seront examinées en détail dans la suite de l'arrêt.

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21. La requête invoque, comme base de la compétence de la Cour:

«a) l'article 36, paragraphe 1, et l'article 37 du Statut de la Cour et l'article 17 de l'Acte général pour le règlement pacifique des différends internationaux signé à Genève le 26 septembre 1928; et subsidiairement

b) l'article 36, paragraphes 2 et 5, du Statut de la Cour».

22. La portée de la présente phase de la procédure a été définie dans l'ordonnance rendue par la Cour le 22 juin 1973, qui demandait aux Parties de traiter d'abord des questions relatives à la compétence de la Cour et à la recevabilité de la requête. Pour cette raison, ainsi qu'il a été indiqué, non seulement les Parties mais la Cour elle-même doivent s'abstenir d'aborder la demande au fond. Cependant, quand elle examine ces questions de caractère préliminaire, la Cour a le droit et, dans certaines circonstances, peut avoir l'obligation de prendre en considération d'autres questions qui, sans qu'on puisse les classer peut-être à strictement parler parmi les problèmes de compétence ou de recevabilité, appellent par leur nature une étude préalable à celle de ces problèmes.

23. A cet égard, il convient de souligner que la Cour possède un pouvoir inhérent qui l'autorise à prendre toute mesure voulue, d'une part pour faire en sorte que, si sa compétence au fond est établie, l'exercice de cette compétence au fond ne se révèle pas vain, d'autre part pour assurer le règlement régulier de tous les points en litige ainsi que le respect des «limitations inhérentes à l'exercice de la fonction judiciaire» de la Cour et pour «conserver son caractère judiciaire» (*Cameroun septentrional, arrêt, C.I.J. Recueil 1963*, p.29). Un pourvoir inhérent de ce genre, sur la base duquel la Cour est pleinement habilitée à adopter toute conclusion éventuellement nécessaire aux fins qui viennent d'être indiquées, découle de l'existence même de la Cour, organe judiciaire établi par le consentement des Etats, et lui est conféré afin que sa fonction judiciaire fondamentale puisse être sauvegardée.

24. Eu égard à ces considérations, la Cour doit examiner d'abord une question qu'elle estime essentiellement préliminaire, à savoir l'existence d'un différend, car que la Cour ait ou non compétence en l'espèce la solution de cette question pourrait exercer une influence décisive sur la suite de l'instance. Il lui incombe donc d'analyser de façon précise la demande que la Nouvelle-Zélande lui adresse dans sa requête. La présente phase de l'instance n'ayant été consacrée qu'à des questions préliminaires, le demandeur n'a pas eu l'occasion de développer complètement ses thèses sur le fond. Il reste que c'est par rapport à la requête, laquelle doit, d'après l'article 40 du Statut, indiquer «l'objet du différend», que la Cour doit examiner la nature et l'existence du différend porté devant elle.

25. La Cour rappelle que la demande présentée dans la requête (paragraphe 11 ci-dessus) tend à ce que la Cour dise et juge «que les essais nucléaires provoquant des retombées radioactives effectués par le Gouvernement français dans la région du Pacifique Sud constituent une violation des droits de la Nouvelle-Zélande au regard du droit international» _ les droits qui auraient été violés sont énumérés dans la requête _ «et que ces droits seront enfreints par tout nouvel essai».

26. La correspondance diplomatique échangée entre la Nouvelle-Zélande et la France pendant ces dix dernières années montre les pré-occupations que les expériences nucléaires françaises effectuées en atmosphère dans la région du Pacifique Sud suscitent en Nouvelle-Zélande et indique que celle-ci a eu pour objectif la cessation des essais. Ainsi, dans une lettre à l'ambassadeur de France à Wellington en date du 19 décembre 1972, le premier ministre de Nouvelle-Zélande déclarait:

«Mon gouvernement s'est engagé à essayer, par tous les moyens possibles, de faire cesser les essais, et nous n'hésiterons pas à utiliser les voies dont nous disposons, d'un commun accord, le cas échéant, avec les pays qui pensent comme nous. J'espère cependant, Monsieur l'ambassadeur, que vous ferez part à votre gouvernement, pendant votre séjour à Paris, de mon désir sincère de voir disparaître ce seul élément de désaccord grave qui trouble les relations, par ailleurs excellentes, entre nos pays. Quant à moi, je ne vois d'autre solution que l'arrêt des essais.»

De plus, dans la requête de la Nouvelle-Zélande, il était dit à propos des entretiens qui ont eu lieu en avril 1973 entre les deux gouvernements:

«Ils n'ont malheureusement pas abouti à un accord. En particulier le Gouvernement français n'a pas cru pouvoir donner au premier ministre adjoint de Nouvelle-Zélande l'assurance que celui-ci demandait, à savoir que le programme français d'expériences nucléaires atmosphériques dans le Pacifique Sud avait pris fin.»

Dans une lettre au Président de la République française en date du 4 mai 1973, qui faisait suite à ces entretiens, le premier ministre de Nouvelle-Zélande déclarait:

"La France n'ayant pas accédé à notre demande de mettre un terme aux essais atmosphériques d'armes nucléaires dans le Pacifique Sud, et le Gouvernement français n'acceptant pas le point de vue néo-zélandais selon lequel ces essais sont illégaux, le Gouvernement néo-zélandais n'a pas d'autre choix que de soumettre à la Cour internationale de Justice le différend qui l'oppose à la France.

Je souligne à nouveau que nous voyons là la seule question litigieuse entre nous et que nos efforts ont pour seul objet d'éliminer cet élément de divergence.»

27. La nature de la demande néo-zélandaise se trouve précisée encore par la manière dont la Nouvelle-Zélande – ses premiers ministres successifs aussi bien que ses représentants devant la Cour – a réagi aux déclarations mentionnées au paragraphe 20 qui ont été faites au nom du Gouvernement français et concernant les expériences nucléaires dans la région du Pacifique Sud. Lors de la procédure orale, l'*Attorney-General* de Nouvelle-Zélande a esquissé l'historique du différend et rappelé la correspondance diplomatique échangée entre le 10 juin et le 1er juillet 1974 par la France et la Nouvelle-Zélande et portée à la connaissance de la Cour par le demandeur le 3 juillet, ainsi qu'un communiqué de la présidence de la République française en date du 8 juin 1974. Dans les observations qu'il a formulées sur ces documents qui font partie du dossier, l'*Attorney-General* a indiqué qu'on pouvait peut-être à l'analyse y voir la preuve d'une certaine évolution de la controverse entre les Parties, tout en soulignant que, de l'avis de son gouvernement, cette évolution n'était pas de nature à résoudre le différend à sa satisfaction. Plus particulièrement, se référant à une note adressée le 10 juin 1974 par l'ambassade de France à Wellington au ministère des affaires étrangères de Nouvelle-Zélande (citée au paragraphe 36 ci-après), il a déclaré: «La Nouvelle-Zélande n'a rien reçu qu'elle puisse considérer comme une assurance ferme que 1974 verra la fin des essais nucléaires atmosphériques dans le Pacifique Sud.» L'*Attorney-General* a poursuivi en ces termes:

«Le 11 juin, le premier ministre de Nouvelle-Zélande, M. Kirk, a prié l'ambassadeur de France à Wellington de bien vouloir transmettre une lettre au président de la République française. Des copies de cette lettre ont également été déposées au Greffe. Le premier ministre de Nouvelle-Zélande priait notamment le président de la République de peser, même au stade alors atteint, les conséquences que pouvaient avoir tous nouveaux essais en atmosphère dans le Pacifique et de décider de mettre fin à une activité qui était depuis plus d'une décennie une source de vive anxiété pour les populations de la région du Pacifique.» (Audience du 10 juillet 1974.)

Il ressort de ces déclarations, rapprochées de la correspondance diplomatique mentionnée plus haut, que si la Nouvelle-Zélande avait pu interpréter la note du 10 juin 1974 «comme une assurance ferme que 1974 [verrait] la fin des essais nucléaires atmosphériques» effectués par la France «dans le Pacifique Sud» ou si le président de la République française, à la suite de la lettre du 11 juin 1974, avait décidé de «mettre fin à [cette] activité», le Gouvernement demandeur aurait considéré qu'il avait atteint son objectif.

28. Plus tard, le 1er novembre 1974, le premier ministre de Nouvelle-Zélande, M. W. E. Rowling, a commenté

dans une déclaration publique les indications données par la France quant à son intention de mettre un terme aux essais atmosphériques dans le Pacifique et il a déclaré ce qui suit:

«Il importe ... de bien saisir que rien de ce qu'a pu dire le Gouvernement français, soit à la Nouvelle-Zélande, soit à la communauté internationale dans son ensemble, ne constitue une assurance qu'il n'y aura plus d'essais nucléaires en atmosphère dans le Pacifique Sud. La possibilité de nouveaux essais atmosphériques demeure ouverte. *Tant que nous n'avons pas l'assurance que les essais nucléaires de cette nature ont définitivement pris fin, le différend entre la Nouvelle-Zélande et la France subsiste...*» (Les italiques sont de la Cour.)

Sans commenter pour le moment l'interprétation que le premier ministre a donnée des déclarations françaises, la Cour voudrait faire observer que le passage en italiques implique clairement qu'une assurance selon laquelle les essais nucléaires «ont définitivement pris fin» mettrait, d'après la Nouvelle-Zélande, un terme au différend.

29. Les essais que l'instance concerne sont définis dans la requête comme «les essais nucléaires provoquant des retombées radioactives effectués ... dans la région du Pacifique Sud», le caractère de ces essais n'étant pas précisé. La Nouvelle-Zélande n'en a pas moins surtout défendu sa cause du point de vue des essais réalisés en atmosphère et les déclarations citées aux paragraphes 26, 27 et 28, en particulier celles qu'ont faites les 11 juin et 1er novembre 1974 les premiers ministres de Nouvelle-Zélande qui se sont succédé, montrent qu'une assurance selon laquelle «les essais nucléaires de cette nature», autrement dit les essais en atmosphère, «ont définitivement pris fin» répondrait à l'objet de la demande néo-zélandaise. La Cour considère donc qu'aux fins de la requête la demande de la Nouvelle-Zélande doit s'interpréter comme uniquement applicable aux essais atmosphériques, et non à des essais d'un autre type, et comme uniquement applicable à des essais en atmosphère réalisés de façon à provoquer des retombées radioactives sur le territoire néo-zélandais.

30. Compte tenu des déclarations citées plus haut, il est essentiel d'examiner si le Gouvernement néo-zélandais sollicite de la Cour un jugement qui ne ferait que préciser le lien juridique entre le demandeur et le défendeur par rapport aux questions en litige, ou un jugement conçu de façon telle que son libellé obligerait l'une des Parties ou les deux à prendre ou à s'abstenir de prendre certaines mesures. C'est donc le devoir de la Cour de circonscrire le véritable problème en cause et de préciser l'objet de la demande. Il n'a jamais été contesté que la Cour est en droit et qu'elle a même le devoir d'interpréter les conclusions des parties; c'est l'un des attributs de sa fonction judiciaire. Assurément, quand la demande n'est pas formulée comme il convient parce que les conclusions des parties sont inadéquates, la Cour n'a pas le pouvoir de «se substituer [aux Parties] pour en formuler de nouvelles sur la base des seules thèses avancées et faits allégués» (*C.P.J.I. série A n_ 7, p. 35*), mais tel n'est pas le cas en l'espèce et la question d'une formulation nouvelle des conclusions par la Cour ne se pose pas non plus. En revanche, la Cour a exercé à maintes reprises le pouvoir qu'elle possède d'écarter, s'il est nécessaire, certaines thèses ou certains arguments avancés par une partie comme élément de ses conclusions quand elle les considère, non pas comme des indications de ce que la partie lui demande de décider, mais comme des motifs invoqués pour qu'elle se prononce dans le sens désiré. C'est ainsi que, dans l'affaire des *Pêcheries*, la Cour a dit de neuf des treize points que comportaient les conclusions du demandeur: «Ce sont là des éléments qui, le cas échéant, pourraient fournir les motifs de l'arrêt et non en constituer l'objet.» (*C.I.J. Recueil 1951*, p. 126.) De même, dans l'affaire des *Minquiers et Ecréhous*, la Cour a relevé que:

«Les conclusions du Gouvernement du Royaume-Uni, reproduites ci-dessus, consistent en trois paragraphes, les deux derniers étant les motifs à l'appui de la première proposition qui doit être considérée comme la conclusion finale de ce gouvernement. Les conclusions du Gouvernement français se composent de dix paragraphes, les premiers neuf étant les motifs qui conduisent à la dixième proposition, qui doit être considérée comme la conclusion finale de ce gouvernement.» (*C.I.J. Recueil 1953*, p. 52; voir aussi *Nottebohm, deuxième phase, arrêt, C.I.J. Recueil 1955*, p. 16.)

31. Dans les circonstances de l'espèce, il appartient à la cour, ainsi qu'il a été mentionné, de s'assurer de l'objet véritable du différend, de l'objet et du but de la demande (voir *Interhandel, arrêt, C.I.J. Recueil 1959*, p. 19; *Droit de passage sur territoire indien, fond, arrêt, C.I.J. Recueil 1960*, p. 33-34). Pour ce faire, elle doit prendre en considération non seulement les conclusions du demandeur mais l'ensemble de la requête, les arguments qu'il a développés devant la Cour et les autres documents dont il a été fait état ci-dessus. Si ces éléments délimitent nettement l'objet de la demande, ils ne peuvent manquer d'influer sur l'interprétation des conclusions. Il est demandé à la Cour de dire et juger que les essais nucléaires atmosphériques effectués par la France sont illicites, mais il lui est demandé aussi de dire et juger que les droits de la Nouvelle-Zélande «seront enfreints par tout nouvel essai». La requête contient donc une conclusion tendant à ce que les droits et obligations des Parties soient définis. Il est clair cependant que le différend trouve son origine dans les essais nucléaires atmosphériques effectués par la France dans la région du Pacifique Sud et que le demandeur a eu pour objectif initial et conserve pour objectif ultime la cessation de ces essais. C'est d'ailleurs ce que confirment les diverses déclarations faites par le Gouvernement néo-zélandais,

en particulier celle par laquelle l'*Attorney-General* a dit devant la Cour pendant la procédure orale, le 10 juillet 1974, à propos des conclusions présentées par la Nouvelle-Zélande: «Mon gouvernement cherche à obtenir la cessation d'une activité dangereuse et illicite.» Le différend porté devant la Cour ne peut être isolé de la situation dont il est issu et des faits survenus depuis dont il a pu subir l'influence.

32. Ainsi qu'il a été mentionné, le demandeur lui-même a implicitement admis que des événements postérieurs à la requête pouvaient être pertinents quand il a appelé l'attention de la Cour sur le communiqué du 8 juin 1974 et la correspondance diplomatique qui a suivi et présenté des observations à son sujet. Dans ces conditions la Cour est tenue de prendre en considération des faits nouveaux survenus tant avant qu'après la clôture de la procédure orale. Etant donné la non-comparution du défendeur, il incombe tout particulièrement à la Cour de s'assurer qu'elle est bien en possession de tous les faits disponibles.

33. A l'audience du 10 juillet 1974, le conseil de la Nouvelle-Zélande a fourni à la Cour une interprétation de certaines déclarations d'intention communiquées au Gouvernement néo-zélandais par le Gouvernement français et le président de la République française. Il s'est référé notamment au communiqué du 8 juin 1974 (paragraphe 35 ci-après) et à la note diplomatique du 10 juin 1974 (paragraphe 36 ci-après) et, après avoir cité un passage de cette note, a déclaré:

«Je tiens à souligner deux points: le premier, c'est que le maximum que la France offre, c'est de cesser, au moment qu'elle choisira elle-même, d'agir au mépris d'une ordonnance existante de la Cour; le second, c'est que cette offre est mitigée par l'adjonction du mot «normalement». La Nouvelle-Zélande n'a rien reçu qu'elle puisse considérer comme une assurance ferme que 1974 verra la fin des essais nucléaires atmosphériques dans le Pacifique Sud.»

Depuis lors, des autorités françaises ont fait au sujet des expériences futures un certain nombre de déclarations publiques allant toutes dans le même sens, qui sont autant d'éléments propres à aider la Cour à évaluer l'interprétation des documents antérieurs présentée par le demandeur et qu'il importe d'examiner pour déterminer si elles consacrent un changement dans les intentions de la France relatives à son comportement dans l'avenir. Il est vrai que ces déclarations n'ont pas été faites devant la Cour mais elles sont du domaine public, sont connues du Gouvernement néo-zélandais et ont été commentées par le premier ministre de Nouvelle-Zélande dans sa déclaration du 1er novembre 1974. Il est bien entendu nécessaire d'examiner toutes ces déclarations, celles qui ont été portées à l'attention de la Cour en juillet 1974 comme celles qui ont été faites ultérieurement.

34. Si la Cour avait estimé que l'intérêt de la justice l'exigeait, elle aurait certes pu donner aux Parties la possibilité de lui présenter leurs observations sur les déclarations postérieures à la clôture de la procédure orale, par exemple en rouvrant celle-ci. Cette façon de procéder n'aurait cependant été pleinement justifiée que si le sujet de ces déclarations avait été entièrement nouveau, n'avait pas été évoqué en cours d'instance, ou était inconnu des Parties. Manifestement, tel n'est pas le cas. Les éléments essentiels que la Cour doit examiner ont été introduits dans la procédure par le demandeur lui-même pendant les audiences, et d'une façon qui n'était pas seulement incidente, quand il a appelé l'attention de la Cour sur une déclaration antérieure des autorités françaises, produit les documents où elle figurait et présenté une interprétation de son caractère, en particulier sur le point de savoir si elle renfermait une assurance ferme. C'est donc à l'initiative du demandeur que la déclaration et l'interprétation qu'en donne la Nouvelle-Zélande se trouvent soumises à la Cour. De plus, le demandeur a publiquement formulé des observations par la suite (paragraphe 28 ci-dessus) sur des déclarations faites par les autorités françaises après la clôture de la procédure orale. La Cour est donc en possession non seulement des déclarations des autorités françaises concernant la cessation des essais nucléaires dans l'atmosphère, mais aussi des vues exprimées par le demandeur à leur sujet. Bien que la Cour, en tant qu'organe judiciaire, ait conscience de l'importance du principe que traduit la maxime *audi alteram partem*, elle ne pense pas que ce principe l'empêche de prendre en considération des déclarations postérieures à la procédure orale et qui se bornent à compléter et à renforcer des points déjà discutés pendant cette procédure _ déclarations que le demandeur ne peut pas ignorer. C'est pourquoi le demandeur ayant présenté des observations sur les déclarations faites par les autorités françaises aussi bien avant qu'après la procédure orale, il pouvait raisonnablement escompter que la Cour traite de ce sujet et aboutisse à ses propres conclusions sur le sens et les effets de ces déclarations. La Cour, ayant pris note des observations du demandeur et ne s'estimant pas tenue de consulter les Parties sur la base de sa décision, considère qu'il ne servirait à rien de rouvrir la procédure orale.

35. Il convient d'examiner les déclarations mentionnées plus haut dans l'ordre chronologique. La première est celle que contient le communiqué publié par la présidence de la République française le 8 juin 1974, peu avant le début de la campagne d'essais nucléaires lancée par la France en 1974:

«Le *Journal Officiel* du 8 juin 1974 publie l'arrêté remettant en vigueur les mesures de sécurité de la zone d'expérimentation nucléaire du Pacifique Sud.

La présidence de la République précise, à cette occasion, qu'au point où en est pervenue l'exécution de son programme de défense en moyens nucléaires la France sera en mesure de passer au stade des tirs souterrains aussitôt que la série d'expériences prévues pour cet été sera achevée.»

36. La deuxième déclaration est contenue dans une note de l'ambassade de France à Wellington au ministère des affaires étrangères de Nouvelle-Zélande en date du 10 juin 1974:

«il convient de faire observer que la présidence de la République française a décidé, contrairement aux années précédentes, de faire précéder l'ouverture de la campagne d'expérimentations nucléaires par un communiqué à la presse. Cette procédure a été choisie en raison du fait qu'un élément nouveau est intervenu dans le développement du programme de mise au point de la force de dissuasion française. Cet élément nouveau est le suivant: la France, au point où en est parvenue l'exécution de son programme de défense en moyens nucléaires, sera en mesure de passer au stade des tirs souterrains aussitôt que la série d'expériences prévues pour cet été sera achevée.

Ainsi, les essais atmosphériques qui seront prochainement effectués seront normalement les derniers de ce type.

Les autorités françaises expriment le voeu que le Gouvernement néo-zélandais trouvera de l'intérêt à cette information et voudra la prendre en considération.»

37. Comme le conseil du demandeur l'a indiqué à l'audience du 10 juillet 1974, le premier ministre de Nouvelle-Zélande a fait connaître sa réaction devant cette deuxième déclaration dans une lettre qu'il a adressée au président de la République française le 11 juin 1974 et dont on trouvera ci-après deux extraits:

«J'ai ... noté que l'annonce est faite en des termes qui ne constituent pas une renonciation expresse aux essais nucléaires dans l'atmosphère pour l'avenir.»

«Je veux espérer que, même au stade actuel, vous vous montrerez disposé à peser les conséquences que peuvent avoir tous nouveaux essais en atmosphère dans le Pacifique et à décider de mettre fin à une activité qui est depuis plus d'une décennie une source de vive anxiété pour les populations de la région du Pacifique.»

Ainsi la Nouvelle-Zélande a considéré que le mot «normalement» constituait une réserve à la déclaration, de sorte que celle-ci ne répondait pas à l'attente du demandeur qui voyait là de toute évidence une échappatoire. Cela ressort clairement des observations du conseil de la Nouvelle-Zélande à l'audience du 10 juillet 1974. De plus, après avoir dit dans une note du 17 juin 1974 qu'il y avait des raisons de penser que la France avait procédé a une explosion nucléaire dans l'atmosphère le 16 juin 1974, l'ambassade de Nouvelle-Zélande à Paris a formulé le commentaire suivant:

«L'annonce que la France passera aux essais souterrains en 1975 constitue certes un élément nouveau, mais qui ne modifie pas l'opposition fondamentale de la Nouvelle-Zélande à toute expérimentation nucléaire et ne diminue en aucune façon son opposition aux essais atmosphériques prévus pour cette année, et cela d'autant plus que le Gouvernement français n'est pas en mesure de donner l'assurance ferme qu'aucun essai atmosphérique ne sera entrepris après 1974.»

38. La troisième déclaration française est contenue dans une réponse faite le 1er juillet 1974 par le président de la République à la lettre du premier ministre de Nouvelle-Zélande en date du 11 juin:

«Dans les circonstances actuelles, c'est du moins une satisfaction pour moi de noter que vous avez relevé de façon positive dans votre lettre l'annonce faite dans le communiqué du 8 juin 1974 du passage aux essais souterrains. Il y a là un élément nouveau dont je veux espérer que le Gouvernement néo-zélandais mesurera l'importance.»

39. Ces trois déclarations ont toutes été portées à l'attention de la Cour par le demandeur lors de la procédure orale. Comme elle l'a déjà indiqué, la Cour doit examiner aussi les déclarations faites ultérieurement en la matière par les autorités françaises, à savoir le 25 juillet 1974 par le président de la République, le 16 août 1974 par le ministre de la défense, le 25 septembre 1974 par le ministre des affaires étrangères devant l'Assemblée générale des Nations Unies et le 11 octobre 1974 par le ministre de la défense.

40. La déclaration qu'il convient d'examiner d'abord est celle que le président de la République a faite le 25 juillet 1974 lors d'une réunion de presse dans les termes suivants:

«sur cette question des essais nucléaires, vous savez que le premier ministre s'était exprimé publiquement à l'Assemblée nationale, lors du discours de présentation du programme du Gouvernement. Il avait indiqué que les expériences nucléaires françaises seraient poursuivies. J'avais moi-même précisé que cette campagne d'expériences atmosphériques serait la dernière, et donc les membres du gouvernement étaient complètement informés de nos intentions à cet égard...»

41. Le 16 août 1974, au cours d'une interview donnée à la télévision française, le ministre de la défense a dit que le Gouvernement français avait tout mis en oeuvre pour que les essais nucléaires de 1974 soient les derniers

à se dérouler dans l'atmosphère.

42. Le 25 septembre 1974, le ministre des affaires étrangères a dit, s'adressant à l'Assemblée générale des Nations Unies:

«Parvenus désormais, dans la technologie nucléaire, à un degré où il devient possible de poursuivre nos programmes par des essais souterrains, nous avons pris nos dispositions pour nous engager dans cette voie dès l'année prochaine.»

43. Le 11 octobre 1974, le ministre de la défense a tenu une conférence de presse au cours de laquelle il a dit par deux fois en termes presque identiques qu'il n'y aurait pas d'essai aérien en 1975 et que la France était prête à procéder à des essais souterrains. La remarque ayant été faite qu'il n'avait pas ajouté «normalement», il en a convenu. Cette indication est intéressante eu égard au passage de la note de l'ambassade de France à Wellington au ministère des affaires étrangères de Nouvelle-Zélande en date du 10 juin 1974, cité au paragraphe 36 ci-dessus, où il est précisé que les essais atmosphériques envisagés «seront normalement les derniers de ce type». Le ministre a mentionné aussi que d'autres gouvernements, qu'ils aient été officiellement avisés ou non de la décision, ont pu la connaître à la lecture des journaux et des communiqués de la présidence de la République.

44. Vu ce qui précède, la Cour estime que le communiqué du 8 juin 1974 (paragraphe 35 ci-dessus), la note de l'ambassade de France en date du 10 juin 1974 (paragraphe 36 ci-dessus) et la lettre du président de la République française en date du 1er juillet 1974 (paragraphe 38 ci dessus) ont annoncé à la Nouvelle-Zélande qu'une fois terminée la campagne d'essais de 1974 la France cesserait de procéder à des expériences nucléaires en atmosphère. Il convient de relever spécialement le voeu exprimé dans la note du 10 juin 1974 «que le Gouvernement néo-zélandais trouvera de l'intérêt à cette information et voudra la prendre en considération» et la mention faite dans cette note et dans la lettre du 1er juillet 1974 d'«un élément nouveau» dont le Gouvernement néo-zélandais est invité à mesurer l'importance. La Cour doit en particulier tenir compte de la déclaration du président de la République en date du 25 juillet 1974 (paragraphe 40 ci-dessus) suivie de la déclaration du ministre de la défense en date du 11 octobre 1974 (paragraphe 43 ci-dessus). L'une et l'autre révèlent que les déclarations officielles faites au nom de la France sur la question des futures expériences nucléaires ne sont pas subordonnées à ce que pouvait éventuellement impliquer l'indication contenue dans le terme «normalement».

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45. Avant d'examiner si les déclarations des autorités françaises répondent à l'objet de la demande néo-zélandaise tendant à ce qu'il soit mis fin aux essais nucléaires en atmosphère dans le Pacifique Sud, il faut d'abord déterminer la nature de ces déclarations ainsi que leur portée sur le plan international.

46. Il est reconnu que des déclarations revêtant la forme d'actes unilatéraux et concernant des situations de droit ou de fait peuvent avoir pour effet de créer des obligations juridiques. Des déclarations de cette nature peuvent avoir et ont souvent un objet très précis. Quand l'Etat auteur de la déclaration entend être lié conformément à ces termes, cette intention confère à sa prise de position le caractère d'un engagement juridique, l'Etat intéressé étant désormais tenu en droit de suivre une ligne de conduite conforme à sa déclaration. Un engagement de cette nature, exprimé publiquement et dans l'intention de se lier, même hors du cadre de négociations internationales, a un effet obligatoire. Dans ces conditions, aucune contrepartie n'est nécessaire pour que la déclaration prenne effet, non plus qu'une acceptation ultérieure ni même une réplique ou une réaction d'autres Etats, car cela serait incompatible avec la nature strictement unilatérale de l'acte juridique par lequel l'Etat s'est prononcé.

47. Bien entendu, tout acte unilatéral n'entraîne pas des obligations mais un Etat peut choisir d'adopter une certaine position sur un sujet donné, dans l'intention de se lier _ ce qui devra être déterminé en interprétant l'acte. Lorsque des Etats font des déclarations qui limitent leur liberté d'action future, une interprétation restrictive s'impose.

48. Pour ce qui est de la forme, il convient de noter que ce n'est pas là un domaine dans lequel le droit international impose des règles strictes ou spéciales. Qu'une déclaration soit verbale ou écrite, cela n'entraîne aucune différence essentielle, car de tels énoncés faits dans des circonstances particulières peuvent constituer des engagements en droit international sans avoir nécessairement à être consignés par écrit. La forme n'est donc pas décisive. Comme la Cour l'a dit dans son arrêt sur les exceptions préliminaires en l'affaire du *Temple de Préah Vihéar:*

«[comme] c'est généralement le cas en droit international qui insiste particulièrement sur les intentions des parties, lorsque la loi ne prescrit pas de forme particulière, les parties sont libres de choisir celle qui leur plaît, pourvu que leur intention en ressorte clairement» (*C.I.J. Recueil 1961,* p. 31).

La Cour a ajouté dans la même affaire: «la seule question pertinente est de savoir si la rédaction employée dans une déclaration donnée révèle clairement l'intention...» (*ibid.*, p. 32).

49. L'un des principes de base qui président à la création et à l'exécution d'obligations juridiques, quelle qu'en soit la source, est celui de la bonne foi. La confiance réciproque est une condition inhérente de la coopération internationale, surtout à une époque où, dans bien des domaines, cette coopération est de plus en plus indispensable. Tout comme la règle du droit des traités *pacta sunt servanda* elle-même, le caractère obligatoire d'un engagement international assumé par déclaration unilatérale repose sur la bonne foi. Les Etats intéressés peuvent donc tenir compte des déclarations unilatérales et tabler sur elles; ils sont fondés à exiger que l'obligation ainsi créée soit respectée.

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50. Ayant examiné les principes juridiques en jeu, la Cour en vient plus précisément aux déclarations du Gouvernement français. Le Gouvernement néo-zélandais a indiqué à la Cour pendant la procédure orale (paragraphe 27 ci-dessus) comment il interprétait certaines de ces déclarations. Au sujet de celles qui ont suivi, on peut se référer à ce qu'a dit le premier ministre de Nouvelle-Zélande le 1er novembre 1974 (paragraphe 28 ci-dessus). On notera que la Nouvelle-Zélande a admis que le différend pourrait être résolu par une déclaration unilatérale, de la nature précisée plus haut, qui serait donnée par la France. Dans la déclaration publique du 1er novembre 1974, il est dit: «Tant que nous n'avons pas l'assurance que les essais nucléaires de cette nature ont définitivement pris fin, le différend entre la Nouvelle-Zélande et la France subsiste.» Cela s'explique par l'idée que «la possibilité de nouveaux essais atmosphériques demeure ouverte». Il appartient cependant à la Cour de se faire sa propre opinion sur le sens et la portée que l'auteur a entendu donner à une déclaration unilatérale d'où peut naître une obligation juridique, et à cet égard elle ne peu être liée par les thèses d'un autre Etat qui n'est en rien partie au texte.

51. Parmi les déclarations du Gouvernement français en possession desquelles la Cour se trouve, il est clair que les plus importantes sont celles du président de la République. Etant donné ses fonctions, il n'est pas douteux que les communications ou déclarations publiques, verbales ou écrites, qui émanent de lui en tant que chef de l'Etat, représentent dans le domaine des relations internationales des actes de l'Etat français. Ses déclarations et celles des membres du Gouvernement français agissant sous son autorité, jusques et y compris la dernière déclaration du ministre de la défense, en date du 11 octobre 1974, doivent être envisagées comme un tout. Ainsi, quelle qu'ait pu en être la forme, il convient de les considérer comme constituant un engagement de l'Etat, étant donné leur intention et les circonstances dans lesquelles elles sont intervenues.

52. Les déclarations unilatérales des autorités françaises ont été faites publiquement en dehors de la Cour et *erga omnes*, même si certaines ont été communiquées au Gouvernement néo-zélandais. Ainsi qu'on l'a vu plus haut, pour que ces déclarations eussent un effet juridique, il n'était pas nécessaire qu'elles fussent adressées à un Etat particulier, ni qu'un Etat quelconque signifiât son acceptation. Les caractères généraux de ces déclarations et leur nature sont les éléments décisifs quand il s'agit d'en apprécier les effets juridiques; c'est à leur interprétation que la Cour doit procéder maintenant. La Cour est en droit de partir de la présomption que ces déclarations n'ont pas été faites *in vacuo* mais à propos des essais qui forment l'objet même de l'instance, bien que la France ne se soit pas présentée en l'espèce.

53. Quand il a annoncé que la série d'essais atmosphériques de 1974 serait la dernière, le Gouvernement français a signifié par là à tous les Etats du monde, y compris le demandeur, son intention de mettre effectivement fin à ces essais. Il ne pouvait manquer de supposer que d'autres Etats pourraient prendre acte de cette déclaration et compter sur son effectivité. La validité de telles déclarations et leurs conséquences juridiques doivent être envisagées dans le cadre général de la sécurité des relations internationales et de la confiance mutuelle si indispensable dans les rapports entre Etats. C'est du contenu réel de ces déclarations et des circonstances dans lesquelles elles ont été faites que la portée juridique de l'acte unilatéral doit être déduite. L'objet des déclarations étant clair et celles-ci étant adressées à la communauté internationale dans son ensemble, la Cour tient qu'elles constituent un engagement comportant des effets juridiques. La Cour estime que le président de la République, en décidant la cessation effective des essais atmosphériques, a pris un engagement vis-à-vis de la communauté internationale à qui il s'adressait. Certes le Gouvernement français a constamment soutenu que ses expériences nucléaires ne contreviennent à aucune disposition du droit international en vigueur et il n'a pas reconnu non plus qu'il était tenu de mettre fin à ses essais par une règle de droit international mais cela ne change rien aux conséquences juridiques des déclarations étudiées plus haut. La Cour estime que l'engagement unilatéral résultant de ces déclarations ne saurait être interprété comme ayant comporté l'invocation d'un pouvoir arbitraire de révision. La Cour constate en outre que le Gouvernement français a assumé une obligation dont il convient de comprendre l'objet précis et les limites dans les termes mêmes où ils sont exprimés publiquement.

54. La Cour doit maintenant comparer l'engagement pris par la France avec la demande formulée par la Nouvelle-Zélande. Bien que celle-ci ait formellement prié la Cour de se prononcer sur les droits et les obligations des Parties, elle a soutenu tout au long du différend que son objectif ultime était la cessation des essais. Elle

a demandé à la France de lui donner l'assurance que le programme français d'expériences nucléaires dans l'atmosphère prendrait fin. Tout en exprimant son opposition aux essais de 1974, le Gouvernement néo-zélandais s'est référé spécifiquement à une assurance d'après laquelle «1974[verrait] la fin des essais nucléaires atmosphériques dans le Pacifique Sud» (paragraphe 33 ci-dessus). Il a indiqué à plusieurs reprises qu'il était disposé à accepter une telle assurance. Puisque la Cour conclut qu'une obligation a été assumée par la France à cet égard, il n'y a pas lieu qu'elle se prononce sur les droits et les obligations des Parties dans le passé _ ce que la Cour aurait le droit et même le devoir de faire en d'autres circonstances _ quelle que soit la date par rapport à laquelle un tel prononcé pourrait être fait.

55. La Cour est donc en présence d'une situation où l'objectif du demandeur a été effectivement atteint, du fait que la Cour constate que la France a pris l'engagement de ne plus procéder à des essais nucléaires en atmosphère dans le Pacifique Sud.

56. Cette conclusion n'est pas modifiée par le fait que le Gouvernement néo-zélandais a déclaré, dans une série de notes diplomatiques adressées au Gouvernement français de 1966 à 1974, se réserver formellement «le droit de tenir le Gouvernement français responsable de toute perte ou dommage subi par la Nouvelle-Zélande ... à la suite de tout nouvel essai d'armes nucléaires effectué par la France»; en effet, aucune mention d'une demande d'indemnisation n'est faite dans la requête et, à l'audience du 10 juillet 1974, l'*Attorney-General* de Nouvelle-Zélande a dit expressément: «Mon gouvernement cherche à obtenir la cessation d'une activité dangereuse et illicite, non une compensation pour la poursuite de cette activité.» La Cour constate donc qu'aucune question de dédommagement pour les essais effectués ne se pose en l'espèce.

57. Il faut supposer que, si la Nouvelle-Zélande avait reçu une assurance qui fût d'après elle satisfaisante, à l'un des moments où elle en demandait une, elle aurait considéré le différend comme clos et se serait désistée conformément au Règlement. Si elle ne l'a pas fait, cela n'empêche pas la Cour d'arriver à sa propre conclusion sur la question. Il est vrai que «la Cour ne saurait faire état des déclarations, admissions ou propositions qu'ont pu faire les Parties au cours de négociations directes qui ont eu lieu entre elles, lorsque ces négociations n'ont pas abouti à un accord complet» (*Usine de Chorzòw (fond), C.P.J.I. série A n_ 17*, p. 51). Mais telle n'est pas en l'espèce la situation qui se présente à la Cour. Le demandeur a clairement indiqué ce qui lui donnerait satisfaction et le défendeur a agi indépendamment; la question qui se pose à la Cour est donc celle de l'interprétation du comportement des deux Parties. La conclusion à laquelle cette interprétation a amené la Cour ne signifie pas qu'elle opère elle-même un retrait de la demande; elle se borne à établir l'objet de cette demande et l'effet des actes du défendeur, comme elle est tenue de le faire. En prétendant que des déclarations faites au nom de la France ne sauraient mettre fin au différend, on irait à l'encontre des vues exprimées sans équivoque par le demandeur aussi bien devant la Cour qu'en dehors.

58. La Cour, comme organe juridictionnel, a pour tâche de résoudre des différends existant entre Etats. L'existence d'un différend est donc la condition première de l'exercice de sa fonction judiciaire; on ne peut se contenter à cet égard des affirmations d'une partie car «l'existence d'un différend international demande à être établie objectivement» par la Cour (*Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase, avis consultatif, C.I.J. Recueil 1950*, p. 74). Le différend dont la Cour a été saisie doit donc persister au moment où elle statue. Elle doit tenir compte de toute situation dans laquelle le différend a disparu parce que l'objectif qui n'a cessé d'être celui du demandeur a été atteint d'une autre manière. Si les déclarations de la France concernant la cessation effective des expériences nucléaires ont la portée que la Cour a décrite, autrement dit si elles ont éliminé le différend, il faut en tirer les conséquences qui s'imposent.

59. On pourrait soutenir que, bien que la France se soit obligée, par déclaration unilatérale, à ne pas effectuer d'essais nucléaires en atmosphère dans la région du Pacifique Sud, un arrêt de la Cour sur ce point pourrait encore présenter de l'intérêt car, s'il adoptait les thèses du demandeur, il renforcerait la position de celui-ci en constatant l'obligation du défendeur. Cependant, la Cour ayant conclu que le défendeur a assumé une obligation de comportement sur la cessation effective des expériences nucléaires, aucune autre action judiciaire n'est nécessaire. Le demandeur a cherché à maintes reprises à obtenir du défendeur l'assurance que les essais prendraient fin et celui-ci a, de sa propre initiative, fait une série de déclarations d'où il résulte qu'ils prendront fin. C'est pourquoi la Cour conclut que, le différend ayant disparu, la demande présentée par la Nouvelle-Zélande ne comporte plus d'objet. Il en résulte qu'aucune autre constatation n'aurait de raison d'être.

60. Cela n'est pas à dire que la Cour ait la faculté de choisir parmi les affaires qui lui sont soumises celles qui lui paraissent se prêter à une décision et de refuser de statuer sur les autres. L'article 38 du Statut dispose que la mission de la Cour est «de régler conformément au droit international les différends qui lui sont soumis»; en dehors de l'article 38 lui-même, d'autres dispositions du Statut et du Règlement indiquent aussi que la Cour ne peut exercer sa compétence contentieuse que s'il existe réellement un différend entre les parties. En n'allant pas plus loin en l'espèce la Cour ne fait qu'agir conformément à une interprétation correcte de sa fonction judiciaire.

61. La Cour a indiqué dans le passé des considérations qui pouvaient l'amener à ne pas statuer. La présente affaire est l'une de celles dans lesquelles «les circonstances qui se sont produites ... rendent toute décision judiciaire sans objet» (*Cameroun septentrional, arrêt, C.I.J. Recueil 1963*, p. 38). La Cour ne voit donc pas de raison de laisser se poursuivre une procédure qu'elle sait condamnée à rester stérile. Si le règlement judiciaire peut ouvrir la voie de l'harmonie internationale lorsqu'il existe un conflit, il n'est pas moins vrai que la vaine poursuite d'un procès compromet cette harmonie.

62. La Cour conclut donc qu'aucun autre prononcé n'est nécessaire en l'espèce. Il n'entre pas dans la fonction juridictionnelle de la Cour de traiter des questions dans l'abstrait une fois qu'elle est parvenue à la conclusion qu'il n'y a plus lieu de statuer au fond. La demande ayant manifestement perdu son objet, il n'y a rien à juger.

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63. Dès lors que la Cour a constaté qu'un Etat a pris un engagement quant à son comportement futur, il n'entre pas dans sa fonction d'envisager que cet Etat ne le respecte pas. La Cour fait observer que, si le fondement du présent arrêt était remis en cause, le requérant pourrait demander un examen de la situation conformément aux dispositions du Statut; la dénonciation par la France, dans une lettre du 2 janvier 1974, de l'Acte général pour le règlement pacifique des différends internationaux, qui est invoqué comme l'un des fondements de la compétence de la Cour en l'espèce, ne saurait en soi faire obstacle à la présentation d'une telle demande.

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64. Dans l'ordonnance déjà mentionnée du 22 juin 1973, la Cour a précisé que les mesures conservatoires indiquées l'étaient «en attendant son arrêt définitif dans l'instance introduite le 9 mai 1973 par la Nouvelle-Zélande contre la France». L'ordonnance cesse donc de produire ses effets dès le prononcé du présent arrêt et les mesures conservatoires prennent fin en même temps.

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65. Par ces motifs,

LA COUR,

par neuf voix contre six,

dit que la demande de la Nouvelle-Zélande est désormais sans objet et qu'il y a dès lors pas lieu à statuer.

Fait en anglais et en français, le texte anglais faisant foi, au palais de la Paix, à La Haye, le vingt décembre mil neuf cent soixante-quartorze, en trois exemplaires, dont l'un restera déposé aux archives de la Cour et dont les autres seront transmis respectivement au Gouvernement néo-zélandais et au Gouvernement de la République française.

Le Président,

(Signé) Manfred LACHS.

Le Greffier,

(Signé) S. AQUARONE.

MM. FORSTER, GROS, PETRÉN ET IGNACIO-PINTO, juges, joignent à l'arrêt les exposés de leur opinion individuelle.

MM. ONYEAMA, DILLARD, JIMÉNEZ DE ARÉCHAGA et sir Humphrey WALDOCK, juges, joignent à l'arrêt une opinion dissidente commune. M. DE CASTRO, juge, et sir Garfield BARWICK, juge *ad hoc*, joignent à l'arrêt les exposés de leur opinion dissidente.

(Paraphé) M.L.

(Paraphé) S.A.

INTERNATIONAL COURT OF JUSTICE: JUDGEMENTS IN THE FISHERIES JURISDICTION CASES[1]*

FISHERIES JURISDICTION CASE

(UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND v. ICELAND)

MERITS

JUDGEMENT OF 25 JULY 1974

Failure of Party to appear — Statute, Article 53.

History of the dispute — Interpretation of interim agreement pending settlement of substantive dispute — Effect on obligation of Court to give judgment.

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 Conference of 1958 and 1960 — Concepts of fishery zone and preferential rights of coastal State in situation of special dependence on coastal fisheries — Conservation needs — Preferential rights no justification for claim to extinguish concurrent rights of other fishing States — historic rights of United Kingdom - Regulations of 14 July 1972 not opposable to United Kingdom — Reconciliation of preferential rights of coastal State and rights of other fishing States — Obligation to keep conservation measures for 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.

JUDGEMENT

Present: President LACHS; *Judges* FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, Sir Himphrey WALDOCK, NAGENDRA SINGH, RUDA; *Registrar* AQUARONE.

In the Fisheries Jurisdiction *case,*

between

the United Kingdom of Great Britain and Northern Ireland,

represented by

Mr. D. H. Anderson, Legal Counsellor in the Foreign and Commonwealth Office,

as Agent,

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[1] [Reproduced from the text provided by the International Court of Justice.

[In United Kingdom v. Iceland, President Lachs and Judges Bengzon, de Castro, Dillard, Forster, Jiménez de Aréchaga, Morozov, Nagendra Singh, Ruda and Sir Humphrey Waldock voted in favor of the Judgment; Judges Gros, Ignacio-Pinto, Onyeama and Petrén voted against.

[President Lachs and Judges Ignacio-Pinto and Ngendra Singh appended declarations Judges Forster, Bengzon, Jimenez de Arechaga, Nagendra Singh and Ruda appended a joint separate opinion; Judges Dillard, de Castro and Sir Humphrey Waldock appended separate opinions; Judges Gros, Petrén and Onyeama appended dissenting opinions. These have been excerpted for International Legal Materials by S. Jacob Scherr, Fellow of the American Society of International Law.

[The Court's Judgement of February 2, 1973, concerning the question of jurisdiction, appears at 12 I.L.M. 290 (1973). Orders concerning interim measures of protection appear at 11 I.L.M. 1069 (1972) and 12 I.L.M. 743 (1973). The interim agreement between Iceland and the United Kingdom, done at Reykjavik on November 13, 1973, appears at 112 I.L.M. 1315 (1973).]

assisted by

the Rt. Hon. Samuel Silkin Esq., QC, MP, Attorney-General,

Mr. G. Slynn, Junior Counsel to the Treasury,

Mr. J. L. Simpson, CMG, TD, Member of the English Bar,

Professor D. H. N. Johnson, Professor of International and Air Law in the University of London, Member of the English Bar,

Mr. P. G. Langdon-Davies, Member of the English Bar,

Dr. D. W. Bowett, President of Queens' College, Cambridge, Member of the English Bar,

as Counsel,

and by

Mr. J. Graham, Fisheries Secretary, Ministry of Agriculture, Fisheries and Food,

Mr. M. G. de Winton, CBE, MC, Assistant Solicitor, Law Officers' Department,

Mr. G. W. P. Hart, Second Secretary, Foreign and Commonwealth Office,

as Advisers,

and

the Republic of Iceland,

THE COURT

composed as above,

delivers the following judgement:

1. By a letter of 14 April 1972, received in the Registry of the Court the same day, the Chargé d'Affaires of the British Embassy in the Netherlands 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 29 May 1972 from the Minister for Foreign Affairs of Iceland, received in the Registry on 31 May 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 19 July 1972, the Agent of the United Kingdom 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. By a letter of 21 November 1973, the Agent of the United Kingdom informed the Court, with reference to the Orders of 17 August 1972 and 12 July 1973, of the conclusion on 13 November 1973 of an Exchange of Notes constituting an interim agreement "relating to fisheries in the disputed area, pending a settlement of the substantive dispute and without prejudice to the legal position or rights of either government in relation thereto". Copies of the Exchange of Notes were enclosed with the letter. A further copy was communicated to the Court by the Minister for Foreign Affairs of Iceland under cover of a letter dated 11 January 1974. The Exchange of Notes was registered with the United Nations Secretariat under Article 102 of the Charter of the United Nations.

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 United Kingdom and a Counter-Memorial by the Government of Iceland. The Memorial of the Government of the United Kingdom 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 5 January 1973, after due notice to the Parties, a public hearing was held in the course of which the Court heard the oral argument of counsel for the United Kingdom on the question of the Court's jurisdiction; the Government of Iceland was not represented at the hearing.

6. By a Judgement dated 2 February 1973, the Court found that it had jurisdiction to entertain the Application filed by the United Kingdom 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 United Kingdom and 15 January 1974 for

the Counter-Memorial of the Government of Iceland. The Memorial of the Government of the United Kingdom 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 United Kingdom was invited to submit to the Court any observations which the Government of the United Kingdom might whish to present on the question of the possible joinder of this case with the case instituted on 5 June 1972 by the Federal Republic of Germany against the Republic of Iceland (General List No. 56), 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 26 September 1973, the agent of the United Kingdom 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 United Kingdom 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 Federal Republic of Germany 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 25 and 29 March 1974, after due notice to the Parties, public hearings were held in the course of which the Court heard the oral argument of counsel for the United Kingdom 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 United Kingdom both during the course of the hearings and subsequently, and replies were given either orally at the hearings or in writing. Copies of the verbatim record of the hearings and of the written questions and replies were transmitted to the Government of Iceland.

10. The Governments of Argentina, Australia, Ecuador, the Federal Republic of Germany, India, New Zealand and Senegal 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.

11. In the course of the written proceedings, the following submissions were presented on behalf of the Government of the United Kingdom:

in the Application:

"The United Kingdom asks the Curt to adjudge and declare:

(a) That there is no foundation in international law for the claim by Iceland to be entitled to extend its fisheries jurisdiction by establishing a zone of exclusive fisheries jurisdiction extending to 50 nautical miles from the baselines hereinbefore referred to; and that its claim is therefore invalid; and

(b) that questions concerning the conservation of fish stocks in the waters around Iceland are not susceptible in international law to regulation by the unilateral extension by Iceland of its exclusive fisheries jurisdiction to 50 nautical miles from the aforesaid baselines but are matters that may be regulated, as between Iceland and the United Kingdom, by arrangements agreed between those two countries, whether or not together with other interested countries and whether in the form of arrangements reached in accordance with the North-East Atlantic Fisheries Convention of 24 January 1959, or in the form of arrangements for collaboration in accordance with the Resolution on Special Situations relating to Coastal Fisheries of 26 April 1958, or otherwise in the form of arrangements agreed between them that give effect to the continuing rights and interests of both of them in the fisheries of the waters in question."

in the Memorial on the merits:

"... the Government of the United Kingdom submit to the Court that the Court should adjudge and declare:

(a) that the claim by Iceland to be entitled to a zone of exclusive fisheries jurisdiction extending 50 nautical miles from baselines around the coast of Iceland is without foundation in international law and is invalid;

(b) that, as against the United Kingdom, Iceland is not entitled unilaterally to assert an exclusive fisheries jurisdiction beyond the limits agreed to in the Exchange of Notes of 1961;

(c) that Iceland is not entitled unilaterally to exclude British fishing vessels from the area of the high seas beyond the limits agreed to in the Exchange of Notes of 1961 or unilaterally to impose restrictions on the activities of such vessels in that area;

(d) that activities by the Government of Iceland such as are referred to in part V of this Memorial, that is to say, interference by force or the threat of force with British fishing vessels operating in the said area of the high seas, are unlawful and that Iceland is under an obligation to make compensation therefor to the United Kingdom (the form and amount of such compensation to be assessed, failing agreement between the Parties, in such manner as the Court may indicate); and

(e) that, to the extent that a need is asserted on conservation grounds, supported by properly attested scientific evidence, for the introduction of restrictions on fishing activities in the said area of the high seas, Iceland and the United Kingdom are under a duty to examine together in good faith (either bilaterally or together with other interested States and either by new arrangements or through already existing machinery for international collaboration in these matters such as the North-East Atlantic Fisheries Commission) the existence and extent of that need and similarly to negotiate for the establishment of such a regime or the fisheries of the area as, having due regard to the interests of other States, will ensure for Iceland, in respect of any restrictions that are shown to be needed as aforesaid, a preferential position consistent with its position as a State specially dependent on those fisheries and as will also ensure for the United Kingdom a position consistent with its traditional interest and acquired rights in and current dependency on those fisheries."

12. At the hearing of 25 March 1974, the Court was informed that, in view of the conclusion of the interim agreement constituted by the Exchange of Notes of 13 November 1973 referred to above, the Government of the United Kingdom had decided not to pursue submission *(d)* in the Memorial. At the close of the oral proceedings, written submissions were filed on the Registry of the Court on behalf of the Government of the United Kingdom; these submissions were identical to those contained in the Memorial, and set out above, save for the omission of submission *(d)* and the consequent re-lettering of submission *(e)* as *(d)*.

13. 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 29 May 1972 from the Minister for Foreign Affairs of Iceland, namely that there was on 14 April 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."

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14. Iceland has not taken part in any phase of the present proceedings. By the above-mentioned letter of 29 May 1972, the Government of Iceland informed the court that it required the Exchange of Notes between the Government of Ireland and the Government of the United Kingdom dated 11 March 1961 as terminated; that in its view there was no basis under the Statute for the Court 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 1 August 1972 concerning the Untied Kingdom's request 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 Judgement of 2 February 1973, in which the Court decided that it has jurisdiction to entertain the United Kingdom's Application and to deal with the merits of the dispute, the Government of Iceland maintained the same position with regard to the subsequent proceedings. By its letter of 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. At these hearings, counsel for the United Kingdom, having drawn attention to the non-appearance in Court of any representative of the Respondent, referred to Article 53 of the Statute, and concluded by presenting the final submissions of the United Kingdom on the merits of the dispute for adjudication by the Court.

15. 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 Article 36 and 37, but also that the claim is well founded in fact and law."

16. 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 either are not in dispute or are 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.

17. 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 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 or immediately thereafter. 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.

18. Accordingly, for the purposes of Article 53 of the Statute, 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.

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19. 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."

20. 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 coats. For this reasons, 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.
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> 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 act 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."

21. Commenting upon Article 2 of the 1948 Law, the *exposé des motifs* referred to the Anglo-Danish Convention of 1901, which applied to the fisheries in the waters around Iceland and established a 3-mile limit for the exclusive right of fishery. This Convention, which was subject to termination by either party on giving two years' notice, was mentioned as one of the international agreements with which any regulations issued under the Law would have to compatible so long as the Convention remained in force. In the following year, on 3 October 1949, the Government of Iceland gave notice of the denunciation of the Convention, with the result that it ceased to be in force after the expiry of the prescribed two-year period of notice on 3 October 1951. Furthermore, during that interval this Court had handed down its Judgment in the *Fisheries case (I.C.J. Reports 1951*, p. 116) between the United Kingdom and Norway, in which it had endorsed the validity of the system of straight baselines applied by Norway off the Norwegian coast. Early in 1952, Iceland informed the United Kingdom of its intention to issue new fishery regulations in accordance with the 1948 Law. Then, on 19 March of that year, 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.

22. The 1952 Fisheries Regulations met with protests from the United Kingdom, regarding Iceland's claim to a 4-mile limit and certain features of its straight- baseline system, which the United Kingdom considered to go beyond the principles endorsed by the Court in the *Fisheries* case. After various attempts to resolve the dispute, a *modus vivendi* was reached in 1956 under which there was to be no further extension of Iceland's fishery limits pending discussion by the United Nations General Assembly in that year of the Report of the International Law Commission on the Law of the Sea. This discussion resulted in the convening at Geneva in 1958 of the first United Nations Conference on the Law of the Sea.

23. The 1958 Conference, having failed to reach agreement either on the limit of the territorial sea or on the zone of exclusive fisheries, 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 conclusions 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 United Kingdom did not accept the validity of the new Regulations, and its fishing vessels continued to fish inside the 12-mile limit, with the result that a number of incidents occurred on the fishing grounds. 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 mater in which, *inter alia,* it said:

> "... the Althing declares that it considers that Iceland has an indisputable right to fishery limits of 12 miles, that *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 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. After the Second United Nations Conference on the Law of the Sea, in 1960, the United Kingdom and Iceland embarked on a series of negotiations with a view to resolving their differences regarding the 12-mile fishery limits and baselines claimed by Iceland in its 1958 Regulations. According to the records of the negotiations which were drawn up by and have been brought to the Court's attention by the Applicant, the Icelandic representatives in their opening statement called attention to the proposals submitted to the 1960 Conference on the Law of the Sea concerning preferential rights and to the widespread support these proposals had received, and asserted that Iceland, as a country in special situation, "should receive preferential treatment even beyond 12 miles". Fishery conservation measures outside the 12-mile limit, including the reservation of areas for Icelandic fishing, were discussed, but while the United Kingdom representatives recognized that "Iceland is a special situation country", no agreement was reached regarding fisheries outside the 12-mile limit. In these discussions, the United Kingdom insisted upon receiving an assurance concerning the future extension of Iceland's fishery jurisdiction and a compromissory clause was then included in the Exchange of Notes which was agreed upon by the Parties on 11 March 1961.

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 United Kingdom, were as follows:

(1) The United Kingdom 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 United Kingdom accepted for that purpose the baselines set out in the 1958 Regulations subject to the modification of four specified points.

(3) For a period of three years from the date of the Exchange of Notes, Iceland would not object to United Kingdom vessels fishing within certain specified areas and during certain stated months of the year.

(4) During that three-year period, however, United Kingdom vessels would not fish within the outer 6 miles of the 12-mile zone in seven specified areas.

(5) Iceland "will continue to work for the implementation of the Althing Resolution of May, 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such extension and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice".

In its Note in reply the United Kingdom emphasized that:

> "... in view of the exceptional dependence of the Icelandic nation upon coastal fisheries for their livelihood and economic development, and without prejudice to the rights of the United Kingdom under international law towards a third party, the contents of Your Excellency's Note are acceptable to the United Kingdom and the settlement of the dispute has been accomplished on the terms stated therein".

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 United Kingdom, in an aide-mémoire of 17 July 1971, to draw the attention of Iceland to the terms of the 1961 Exchange of Notes regarding the right of either Party to refer to the Court any extension of iceland's fishery limits. While reserving all its rights, the United Kingdom emphasized that the Exchange of Notes was not open to unilateral denunciation or termination. This prompted discussions between the two countries in which no agreement was reached; 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 United Kingdom replied on 27 September 1971 and placed formally on record its view that "such an extension of the fishery zone around Iceland would have no basis in 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 United Kingdom and Iceland held discussions. At these talks, the British delegation stated their view that Iceland's objectives could be achieved by a catch-limitation agreement. In further talks which took place in January 1972 the United Kingdom expressed its readiness to negotiate any arrangements for the limitation of catches that scientific evidence might show to be necessary, and in which any preferential requirements of the coastal State resulting from its dependence on fisheries would be recognized. It further proposed, as an interim measure pending the elaboration of a multilateral arrangement, to limit its annual catch of demersal fish in Icelandic waters to 185,000 tons. The Icelandic Government was not, however, prepared to negotiate further on this basis.

29. On 15 February 1927 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 repeating that the provisions of the Exchange for 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 base-lines 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 Governments 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 United Kingdom Ambassador in Reykjavik of his Government's intention to proceed in accordance with this Resolution.

30. On 14 March 1972, the United Kingdom in an aide-mémoire took note of the decision of Iceland to issue new Regulations, reiterated its view that "such an extension of the fishery zone around Iceland would have no basis in international law", and rejected Iceland's contention that the Exchange of Notes was no longer in force. Moreover, formal notice was also given by the United Kingdom that an application would shortly be made to the Court in accordance with the Exchange of Notes; the British Government was however willing to continue discussions with Iceland "in order to agree satisfactory practical arrangements for the period while the case is before the International Court of Justice". On 14 April 1972, the United Kingdom 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, in the course of which various proposals for catch-limitation, fishing-effort limitation, area or seasonal restrictions for United Kingdom vessels were discussed, in the hope of arriving at practical arrangements for an interim regime pending the settlement of the dispute. By 12 July there was still no agreement on such an interim regime, and the Icelandic delegation announced that new Regulations would be issued on 14 July 1972 which would exclude all foreign vessels from fishing within the 50-mile limit after 1 September 1972. The United Kingdom delegation replied that, while ready to continue the discussions for an interim regime, they reserved the United Kingdom's rights in areas outside the 12-mile limit and would seek an Order for interim measures of protection from the Court. The new Regulations, issued on 14 July 1972, extended Iceland's fishery limits to 50 miles as from 1 September 1972 and, by Article 2, prohibited all fishing activities by foreign vessels inside those limits. Consequently, on 19 July 1972, the United Kingdom filed its request for the indication of interim measures of protection.

32. On 11 August 1972 the Icelandic Foreign Ministry sent a Note to the United Kingdom Embassy in Reykjavik, in which the Icelandic Government renewed its interest in the recognition of its preferential rights in the area, an issue which had already been raised in 1967 by the Icelandic delegation to the North-East Atlantic Fisheries Commission. In a memorandum presented at the Fifth Meeting of that Commission, the Icelandic delegation had drawn attention to the need for consideration of the total problem of limiting fishing effort in Icelandic waters by, for example, a quota system under which the priority position of Iceland would be respected in accordance with internationally recognized principles regarding the preferential requirements of the coastal State where the people were overwhelmingly dependent upon the resources involved for their livelihood. In the Note of 11 August 1972 it was recalled that:

> "That Icelandic representatives laid main emphasis on receiving from the British side positive replies to two fundamental points:
>
> 1. Recognition of preferential rights for Icelandic vessels as to fishing outside the 12-mile limit.
>
> 2. That Icelandic authorities should have full rights and be in a position to enforce the regulations established with regard to fishing inside the 50-mile limit".

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".

33. 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 United Kingdom vessels engaged in fishing outside the 12-mile fishery zone; and that the United Kingdom should limit the annual catch of its vessels in the "Sea Area of Iceland" to 170,000 tons. That the United Kingdom 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 United Kingdom vessels soon after they came into effect on 1 September 1972. Moreover, when in August 1972 the United Kingdom made it clear to Iceland that in its view any settlement between the parties of an interim regime should be compatible with the Court's Order, Iceland replied on 30 August that it would not consider the Order to be binding upon it "since the Court has no jurisdiction in the matter".

34. By its Judgement 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 Judgement, Iceland persisted in its efforts to enforce the 50-mile limit against United Kingdom vessels 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.

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35. Negotiations for an interim arrangement were, however, resumed between the two countries, and were carried on intermittently during 1972 and 1973. In the meantime incidents on the fishing grounds involving British and Icelandic vessels were becoming increasingly frequent, and eventually discussions between the Prime Ministers of Iceland and the United Kingdom in 1973, led to the conclusion of an "Interim Agreement in the Fisheries Dispute" constituted by an Exchange of Notes dated 13 November 1973.

36. The terms of the Agreement were set out in the Icelandic Note, which began by referring to the discussions which had taken place and continued:

> "in these discussions the following arrangements have been worked out for an interim agreement relating to fisheries in the disputed area, pending a settlement of the substantive dispute and without prejudice to the legal position or rights of either Government in relation thereto, which are based on an estimated annual catch of about 130,000 metric tons by British vessels".

The arrangements for the fishing activities of United Kingdom vessels in the disputed area were then set out, followed by paragraph 7 which stipulated:

> "The arrangement will run for two years from the present date. Its termination will n ot affect the legal position of either Government with respect to the substantive dispute".

The Note ended with the formal proposal, acceptance of which was confirmed in the United Kingdom's reply, that the Exchange of Notes should "constitute an interim agreement between our two countries".

37. The interim agreement contained no express reference to the present proceedings before the Court nor any reference to any waiver, whether by the United Kingdom or by Iceland, of any claims in respect of the matters in dispute. On the contrary, it emphasized that it was an interim agreement, that it related to fisheries in the disputed area, that it was concluded pending a settlement of the substantive dispute, and that it was without prejudice to the legal position or rights of either Government in relation to the substantive dispute. In the light of these saving clauses, it is clear that the dispute still continues, that its final settlement is regarded as pending, and that the Parties meanwhile maintain their legal rights and claims as well as their respective stands in the conflict. The interim agreement thus cannot be described as a "phasing-out" agreement, a term which refers to an arrangement whereby both parties consent to the progressive extinction of the fishing rights of one of them over a limited number of years. Nor could the interim agreement be interpreted as constituting a bar to, or setting up any limitation on, the pursuit by the Applicant of its claim before the Court. On the face of the text, it was not intended to affect the legal position or rights of either country in relation to the present proceedings. That this was the United Kingdom's understanding of the interim agreement is confirmed by a statement made by the British Prime Minister in the House of Commons on the date of its conclusion: "Our position at the World Court remains exactly as it is, and the agreement is without prejudice to the case of either country in this matter". The Government of Iceland for its part, in the letter of 11 January 1974 already referred to, stated that:

"This agreement is in further implementation of the policy of the Government of Iceland to solve the practical difficulties of the British trawling industry arising out of the application of the 1948 Law and the Althing Resolution of 14 February 1972, by providing an adjustment during the next two years. It also contributes to the reduction of tension which has been provoked by the presence of British armed naval vessels within the fifty-mile limit".

38. The interim agreement of 1973, unlike the 1961 Exchange of Notes, does not describe itself as a "settlement" of the dispute, and, apart form being of limited duration, clearly possesses the character of a provisional arrangement adopted without prejudice to the rights of the Parties, nor does it provide for the waiver of claims by either Party in respect of the matters in dispute. The Applicant has not sought to withdraw or discontinue its proceedings. The primary duty of the Court is to discharge its judicial function and it ought not therefore to refuse to adjudicate merely because the Parties, while maintaining their legal positions, have entered into an agreement one of the objects of which was to prevent the continuation of incidents. When the Court decided, by its Order of 12 July 1973, to confirm that the provisional measures in the present case should remain operative until final judgement was given, it was aware that negotiations had taken place between the Parties with a view to reaching an interim arrangement, and it stated specifically that "the provisional measures indicated by the Court and confirmed by the present Order do not exclude an interim arrangement which may be agreed upon by the Governments concerned ..." *(Fisheries Jurisdiction (United Kingdom v. Iceland), Interim Measures, Order of 12 July 1973, I.C.J. Reports 1973,* p.303, para. 7).

39. In response to questions put by a Member of the Court, counsel for the United Kingdom expressed the view that the interim agreement, as a treaty in force, regulates the relations between the two countries so far as British fishing is concerned in the specified areas. The judgment of the Court, the United Kingdom envisages, will state the rules of customary international law between the Parties, defining their respective rights and obligations, but will not completely replace with immediate effect the interim agreement, which will remain a treaty in force. In so far as the judgment may possibly

deal with matters which are not covered in the interim agreement, which will remain a treaty in force. In so far as the judgment may possibly deal with matters which are not covered in the interim agreement, the judgment would, in the understanding of the United Kingdom, have immediate effect; the Parties will in any event be under a duty fully to regulate their relations in accordance with the terms of the judgment as soon as the interim agreement ceases to be in force, i.e., on 13 November 1975 or such earlier date as the Parties may agree. In view of the United Kingdom, the court's judgement will:

> "... constitute an authoritative statement of the rights and obligations of the parties under existing law and may provide a basis for the negotiation of arrangements to follow those contained in the Interim Agreement".

40. The Court is of the view that there is no incompatibility with its judicial function in making a pronouncement on the rights and duties of the Parties under existing international law which would clearly be capable of having a forward reach; this does not mean that the Court should declare the law between the parties as it might be at the date of expiration of the interim agreement, a task beyond the powers of any tribunal. The possibility of the law changing is ever present; but that cannot relieve the Court from its obligation to render a judgment on the basis of the law as it exists at the time of its decision. In any event it cannot be said that the issues now before the Court have become without object; for there is no doubt that the case is one in which "there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the Parties" *(Northern Cameroons, Judgment, I.C.J. Reports 1963, pp. 33-34).*

41. Moreover, if the Court were to come to the conclusion that the interim agreement prevented it from rendering judgement, or compelled it to dismiss the Applicant's claim as one without object, the inevitable result would be to discourage the making of interim arrangements in future disputes with the object of reducing friction and avoiding risk to peace and security. This would run contrary to the purpose enshrined in the provisions of the United Nations Charter relating to the pacific settlement of disputes. It is because of the importance of these considerations that the Court has felt it necessary to state at some length its views on the inferences discussed above. The Court concludes that the existence of the interim agreement ought not to lead it to refrain from pronouncing judgment in the case.

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42. The question has been raised whether the Court has jurisdiction to pronounce upon certain matters referred to the Court in the last paragraph of the Applicant's final submissions (paragraphs 11 and 12 above) to the effect that the parties are under a duty to examine together the existence and extent of the need for restrictions of fishing activities in Icelandic waters on conservation grounds and to negotiate for the establishment of such a régime as will, *inter alia,* ensure for Iceland a preferential position consistent with its position as a State specially dependent on its fisheries.

43. In its Judgement 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 United Kingdom of Great Britain and Northern Ireland on 14 April 1972 and to deal with the merits of the dispute" *(I.C.J. Reports 1973,* p. 22, para. 46). The Application which the Court found it had jurisdiction to entertain contained a submission under letter *(b)* (cf. paragraph 11 above) which in its second part raised the issues of conservation of fishery resources and of preferential fishing rights. These questions, among others, had previously been discussed in the negotiations between the parties referred to in paragraphs 27 and 32 above and were also extensively examined in the pleadings and hearings on the merits.

44. The Order of the Court indicating interim measures of protection *(Fisheries Jurisdiction (United Kingdom v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972,* p. 12) 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 dependence of the Icelandic nation upon coastal fisheries" and "of the need for conservation of fish stocks in the Iceland area" *(loc. cit.,* pp. 16-17, paras, 23 and 24).

45. 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. 20, 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.

46. 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 any forms of control of the agreed provisions" *(I.C.J. Reports 1973,* p. 303, 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. 15, para. 12).

47. As to the compromissory clause in the 1961 Exchange of Notes, this gives the Court jurisdiction with respect to "a dispute in relation to such extension", i.e., "the extension of fisheries jurisdiction around 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 a 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 negotiations between the Parties, both in 1960 (paragraph 25 above) and in 1971-1972 (paragraphs 28 to 32 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 in relation to the extension of fisheries jurisdiction around Iceland".

48. 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.

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49. 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 become 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.

50. 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".

51. 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.

52. 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 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 to 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 57 below.

53. 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.

54. The concept of a 12-mile fishery zone, referred to in paragraph 52 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 United Kingdom 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 49 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.

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55. 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.

56. 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 reconciliation and arbitral procedures shall be established for the settlement of any disagreement".

57. 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 populations 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".

58. 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".

59. There can be no doubt of the exceptional dependence of Iceland on its fisheries. That exceptional dependence was explicitly recognized by the Applicant in the Exchange of Notes on 11 March, and the Court has also taken judicial notice of such recognition, by declaring that it is "necessary to bear in mind the exceptional dependence of the Icelandic nation upon coastal fisheries for its livelihood and economic development" *(I.C.J. Reports 1972,* p. 16, para. 23).

60. 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 the two main demersal species concerned - cod and haddock - the Applicant has shown itself aware of the need for a catch-limitations in other regions of the North Atlantic. If a system of catch-limitation were not established in the Icelandic area, the fishing effort displaced from those other regions might well be directed towards the unprotected grounds in that area.

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*[See I.L.M. page 1261.]

61. 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 United Kingdom, would be prohibited. The mode of implementation of the regulations, carried out by Icelandic governmental authorities vis-à-vis United Kingdom fishing vessels, before the 1973 interim agreement, and despite the Court's interim measures, confirms this interpretation.

62. 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, has 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.

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63. In this case, the Applicant has pointed out that its vessels have been fishing in Icelandic waters for centuries and that they have done so in a manner comparable with their present activities for upwards of 50 years. Published statistics indicate that from 1920 onwards, fishing of demersal species by United Kingdom vessels in the disputed area has taken place on a continuous basis from year to year, and that, except for the period of the Second World War, the total catch of those vessels has been remarkably steady. Similar statistics indicate that the waters in question constitute the most important of the Applicant's distant-water fishing grounds for demersal species.

64. The Applicant further states that in view of the present situation of fisheries in the North Atlantic, which has demanded the establishment of agreed catch-limitations of cod and haddock in various areas, it would not be possible for the fishing effort of United Kingdom vessels displaced from the Icelandic area to be diverted at economic levels to other fishing opportunity, it is further contended, the exclusion of British fishing vessels from the Icelandic area would have very serious adverse consequences, with immediate results for the affected vessels and with damage extending over a wide range of supporting and related industries. It is pointed out in particular that wide-spread unemployment would be caused among all sections of the British fishing industry and in ancillary industries and that certain ports - Hull, Grimsby and Fleetwood - specially reliant on fishing in the Icelandic area, would be seriously affected.

65. 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 in particular its final provision requiring Iceland to give advance notice to the United Kingdom of any extension of its fishery limits impliedly acknowledged the existence of United Kingdom fishery interests 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 stated on 9 November 1971:

> "... the British have some interests to protect in this connection. For along time they have been fishing Icelandic waters ... The well-being of specific British fishing towns may nevertheless to some extent be connected with the fisheries in Icelandic waters ..."

66. Considerations similar to those which have prompted the recognition of the preferential rights of the coastal State in a special situation apply when coastal populations in other fishing 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 are of importance not only to Iceland but also to the United Kingdom.

67. 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 uni-

lateral 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 United Kingdom, and the latter is under no obligation to accept the unilateral termination by Iceland of United Kingdom fishery rights in the area.

68. 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 United Kingdom; that Iceland may on the other hand claim preferential rights in the distribution of fishery resources in the adjacent waters; that the United Kingdom 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 United Kingdom to have due regard to each other's interests, and to the interests of other States, in those resources.

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69. 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 form 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 Conference 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 57 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.

70. 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, as was expressly recognized in the 1961 Exchange of Notes, a coastal State's exceptional dependence on fisheries may relate not only to the livelihood of its people but to its economic development. In each case, 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.

71. In view of the Court's finding (paragraph 67 above) that the Icelandic Regulations of 14 July 1972 are not opposable to the United Kingdom for the reasons which have been stated, it follows that the Government of Iceland is not in law entitled unilaterally to exclude United Kingdom fishing vessels 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 United Kingdom 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.

72. It follows that even if the Court holds that Iceland's extension of its 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.

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73. 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 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 (United Kingdom v. Iceland), Interim Measures, Order of 12 July 1973, I.C.J. Reports 1973,* p. 303, 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. It is thus 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.

74. 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 State fishing in the area, of agreed measures to secure just treatment of the special situation.

75. 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 exercises 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).

76. 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; subsequently, further negotiations were directed to the conclusion of the interim agreement of 13 November 1973. The obligation to seek a solution of the dispute by peaceful means, among which negotiations are the most appropriate to this case, has not been eliminated by that interim agreement. The question has been raised, however, on the basis of the deletion of a sentence which had been proposed by the United Kingdom in the process of elaboration of the text, whether the parties agreed to wait for the expiration of the term provided for in the interim agreement without entering into further negotiations. The deleted sentence, which would have appeared in paragraph 7 of the 1973 Exchange of Notes, read: "The Governments will reconsider the position before that term expires unless they have in the meantime agreed to a settlement of the substantive dispute".

77. The Court cannot accept the view that the deletion of this sentence which concerned renegotiation of the interim régime warrants the inference that the common intention of the Parties was to be released from negotiating in respect of the basic dispute over Iceland's extension to a 50-mile limit throughout the whole period covered by the interim agreement. Such an intention would not correspond to the attitude taken up by the Applicant in these proceedings, in which it has asked the Court to adjudge and declare that the Parties are under a duty to negotiate a régime for the fisheries in the area. Nor would an interpretation of this kind, in relation to Iceland's intention, correspond to the clearly stated policy of the Icelandic authorities to continue negotiations on the basic problems relating to the dispute, as emphasized by paragraph 3 of the Althing Resolution of 15 February 1972, referred to earlier, which reads: "That efforts to reach a solution of the problems connected with the extension be continued through discussions with the governments of the United Kingdom and the Federal Republic of Germany". Taking into account that the interim agreement

contains a definite date for its expiration, and in the light of what has been stated in paragraph 75 above, it would seem difficult to attribute to the Parties an intention to wait for that date and for the reactivation of the dispute, with all the possible friction it might engender, before one of them might require the other to attempt a peaceful settlement through negotiations. At the same time, the Court must add that its Judgement obviously cannot preclude the Parties from benefiting from any subsequent developments in the pertinent rules of international law.

78. In the fresh negotiations which are to take place on the basis of the present Judgement, 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).

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79. For these reasons,

THE COURT,

by ten votes to four,

(1) finds that the Regulations concerning the Fishery Limits off Iceland *(Reglugerò um fiskveiòilandhelgi Islands)* 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 form the baselines specified therein are not opposable to the government of the United Kingdom;

(2) finds that, in consequence, the Government of Iceland is not entitled unilaterally to exclude United Kingdom fishing vessels from areas between the fishery limits agreed to in the exchange of Notes of 11 March 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 United Kingdom are under mutual obligations to undertake negotiations in good faith for the quitable solution of their differences concerning their respective fishery rights in the areas specified in subparagrah 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 its people upon the fisheries in the seas around its coasts for their livelihood and economic development;

(b) that by reason of its fishing activities in the areas specified in subparagraph 2, the United Kingdom 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 United Kingdom 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.

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 United Kingdom of Great Britain and Northern Ireland 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 IGNACIO-PINTO makes the following declaration:

To my regret, I have been obliged to vote against the Court's Judgement. 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 points, 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 there is no foundation in international law for the claim by Iceland to be entitled to extend its fisheries jurisdiction by establishing a zone of exclusive fisheries jurisdiction extending to 50 nautical miles from the baselines hereinbefore referred to; and that its claim is therefore invalid" *(I.C.J. Reports 1973,* p.5, para. 8 *(a)*).

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 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 United Kingdom".

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 11 March 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 11 March 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 United Kingdom, 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 the 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 United Kingdom, 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 to 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 française 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 within the limits of the jurisdiction conferred on it.

Judge NAGENDRA SINGH makes the following declaration:

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 last submission *(e)*[2] relettered as *(d)* 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, the interim agreement of 1973 entered into by the contesting Parties with full reservation as to their respective rights and which helped to avoid intensification of the dispute could never prevent the Court from pronouncing on the United Kingdom submissions. To decide otherwise would have meant imposing a penalty on those who negotiate an interim agreement to avoid friction as a preliminary to the settlement of a dispute.

Again, 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 of 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 are 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 this case "the extension of fisheries jurisdiction around 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. 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.

[2] See paras. 11 and 12 of the Judgement of the text of the submissions

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 conservaiton 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 conclusoin that it had jurisdiciton 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 Judgemetn which has importance form 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 futue 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 future could not prevent the Court from rendering Judgment today.

Judges FORSTER, BENGZON, JIMENEZ DE ARECHAGA, NAGENDRA SINGH and RUDA append a joint separate opinion to the Judgment of the Court; Judges DILLARD, DE CASTRO and Sir Humphrey WALDOCK append separate opinions to the Judgment of the Court.

Judges GROS, PETREN and ONYEAMA append dissenting opinions to the Judgment of the Court.

(Initialled) M.L.

(Initialled) S.A.

JOINT SEPARATE OPINION OF JUDGES FORSTER, BENGZON, JIMENEZ DE ARECHAGA, NAGENDRA SINGH AND RUDA

1. What has made it possible for us to concur in the reasoning of the Court and to subscribe to its decision is that, while the Judgement declares the Icelandic extension of its fisheries jurisdiction non-opposable to the Applicant's historic rights, it does not declare, as requested by the Applicant, that such an extension is without foundation in interntaiona law and invalid *erga onmes*. In refraining from pronouncing upon the applicant's first submission and in reaching instead a decision of non-opposability to the United Kingdom of the Icelandic regulations, the Judgment is based on legal grounds which are specifically confined to the circumstances and special characteristics of the present case and is not based on the Applicant's main legal contention, namely, that a customary rule of international law exists today imposing a general prohibition on extensions by States of their exclusive fisheries jurisdiction beyond 12 nautical miles from their baselines.

2. In our view, to reach the conclusion that there is at present a general rule of customary law establishing for coastal States an obligatory maximum fishery limit of 12 miles would not have been well founded. There is not today an international usage to that effect sufficiently widespread and uniform as to constitute, within the meaning of Article 38, paragraph 1(*b*), of the Court's Statute, "evidence of a general practice accepted as law".

It is an indisputable fact that it has not been possible for States, despite the efforts made at successive codification conferences on the law of the sea, to reach an agreement on a rule of conventional law fixing the maximum breadth of the territorial sea nor the maximum distance seaward beyond which States are not allowed to extend unilaterally their fisheries judisdiction. The deliberations of the 1958 Geneva Conference on the Law of the Sea revealed this failure which has been recorded in its resolution VIII of 27 April 1958. The General Assembly of the United Nations consequently laid down that these two subjects would constitute the agenda for the 1960 Conference on the Law of the Sea, which also failed to reach agreement on a text. The establishment of a rule on these two questions thus remains among the topics on the agenda of the current Third United Nations Conference on the Law of the Sea.

4. The law with respect to free-swimming fishery resources has evolved with complete independence from the question of the continental shelf: the two subjects, divorced at the 1958 Conference, have remained separate. It follows that while the provisions of the Continental Shelf Convention (or the principles it established as customary law) cannot afford *per se* a legal basis to a claim with respect to free-swimming fish in the waters above the shelf, these provisions cannot either be applied *a contrario* in order to rule as unlawful a claim to exclusive fisheries in the superjacent waters. In order to prove the lack of reltionship between the two questions it is sufficient to recall that the Applicant itself has claimed since 1964 exclusive rights over free-swimming fishery resoruces in waters beyond and adjacent to its own territorial sea, that is to say in waters which, under the terms of Article 1 of the Continental Shelf Convention, are superjacent to part of its continental shelf.

5. It has also been contended that a 12-mile maximum fishery limit results by implication from the fact that Article 24 of the Territorial Sea Convention establishes a maximum 12-mile limit for the contiguous zone. However, the contiguous zone is also entirely unrelated to fishery questions: fishing does not find a place among the purposes of the zone referred to in that Article. It does not seem possible therefore to infer from this provision a restriction with respect to fishery limits. Moreover, when the contiguous zone concept and its limits were adopted at the Geneva Conference no-one understood at the time that by agreeing to this comparatively secondary provision, the Conference was deciding by implication the two basic questions which had been left in suspense and had in the end to be referred to a second Conference: the maximum breadth of the territorial sea and the maximum fishery jurisdiction of the coastal State. The Conference recorded in its resolution No. VIII that these two questions had remained unsettled. In the face of that decison, it does not seem plausible to contend now that the Conference in adopting Article 24 on the Contiguous Zone implied, even inadvertently, a maximum limit for fishery jurisdiction or for the territorial sea.

6. No maximum rule on fishery limits, having the force of international custom, appears to have as yet emerged to be finally established. The Applicant has however contended that such a rule did crystallize around the proposal which failed to be adopted by open vote at the 1960 Conference on the Law of the Sea. It is true that a general practice has developed around that proposal and has in fact amended the 1958 Convention *praeter legem:* an exclusive fishery zone beyond the territorial sea has become an established feature of contemporary international law. It is also true that the joint formula voted at that Conference provided for a 6 + 6 formula, i.e., for an exclusive 12-mile fishery zone. It is however necessary to make a distinction between the two meanings which may be ascribed to that reference to 12-miles:

(a) the 12-mile extension has now obtained recognition to the point that even distant-water fishing States no longer object to a coastal State extending its exclusive fisheries jurisdiciton zone to 12 miles; or, on the other hand,

(b) the 12-mile rule has come to mean that States cannot validly extend their exlcusive fishery zones beyond that limit.

7. In our view, the concept of the fishery zone and the 12-mile limit became established with the meaning indicated in 6 *(a)* above when, in the middle sixties, distant-water fishing States ceased to challenge the exclusive fishery zone of 12 miles established by a number of coastal States. It is for this reason that it may be said, as the Judgement does, that the 12-mile limit "appears now to be generally acepted".

8. However, to recognize the possibility that States might claim without risk of challenge or objection an exclusive fisheries zone of 12 miles cannot by any sense of logic necessarily lead to the conclusion contended for by the Applicant, namely, that such a figure constitutes in the present state of maritime international law an obligatory maximum limit and that a State going beyond such a limit commits an unlawful act, which is invalid *erga omnes.* This contention of the Applicant is an answer to a different question, which must be examined separately.

9. That question is as follows: is there an existing rule of customary law which forbids States to extend their fisheries jurisdiciton beyond 12 miles? In order to reply in the affirmative to this question, it would be necessary to be satisfied that such a rule meets the conditions required for the birth of an international custom.

10. It is a fact that a continually increasing number of States have made claims to extend and have effectively extended their fisheries jurisdicition beyond 12 miles. While such a trend was initiated in Latin America, it has been lately followed not only in that part of the world, but in other regions as well. A number of countries in Africa and Asia have also adopted a similar action. The total number adopting that position may now be estimated to be between 30 to 35 coastal States, depending on the interpretation to be given to certain national laws or decrees.

11. While those claims have generally given rise to protests or objections by a number of important maritime and distant-water fishing States, and in this respect they cannot be described as being "generally accepted", a majority of States have not filed similar protests, and quite a number have, on the contrary, made public pronouncements or formal proposals which would appear to be inconsistent with the making of such protests.

12. In this respect, attention must be drawn to declarations made, or proposals filed by a number of States in relation to or in preparation for the Third conference on the Law of the Sea. It is true that, as the Court's Judgement indicates, the proposals and preparatory documents made in the aforesaid context are *de lege ferenda.* However, it is not possible in our view to brush aside entirely these pronouncements of States and consider them devoid of all legal significance. If the law relating to fisheries constituted a subject on which there were clear indications of what precisely is the rule of international law in existence, it may then have been possible to disregard altogether the legal significance of certain proposals, declarations or statements which advocate changes or improvements in a system of law which is considered to be unjust or inadequate. But this is not the situation. There is at the moment great uncertainty as to the existing customary law on account of the conflicting and discordant practice of States. Once the uncertainty of such a practice is admitted, the impact of the aforesaid official pronouncements, declarations and proposals must undoubtedly have an unsettling effect on the crystallization of a still evolving customary law on the subject. Furthermore, the law on fishery limits has always been and must by its very essence be a compromise between the claims and counter-claims of coastal and distant-water fishing States. On a subject where practice is contradictory and lacks precision, is it possible and reasonable to discard entirely as irrelevant the evidence of what States are prepared to claim and to acquiesce in, as gathered from the positions taken by them in view of or in preparation for a conference for the codifiction and progressive development of the law on the subject?

13. The least that can be said, therefore, is that such declarations and statements and the written proposals submitted by representatives of States are of significance to determine the views of those States as to the law on fisheries jurisdiction and their *opinio iuris* on a subject regulated by customary law. A number of pronouncements of States in the aforesaid circumstances reveals that while the fundamental principle of freedom of fishing in the high seas is not challenged as such, a large number of coastal States contest or deny that such a principle applies automatically and without exception to adjacent waters in all parts of the world as soon as the 12-mile limit is reached. Such an attitude is not only based on the clear consideration that two conferences have failed to agree on a maximum limit but also because of additional factors which have emerged in the intervening period between the Second and Third United Nations Conferences. For example, it is contended that the 12-mile fishery limit ensures, in fact, a clear privilege and a distinct advantage to the few States equipped to undertake distant-water fishing, thus widening the gulf between developed and developing States; a second fact is that technological advances and the pressure on food supplies resulting from the population explosion have caused a serious danger of depletion of living resources in the vicinity of the coasts of many countries. In this respect, economic studies on fisheries have shown that the principle of open and unrestricted access to coastal waters inevitably results in physical and economic waste, since there is no incentive for restraint in the interest of future returns: anything left in adjacent waters for tomorrow may be taken by others today. While the better-equipped States can freely move their fleets to other grounds as soon as the fishing operations become uneconomical, the coastal States, with less mobile fleets, maintain the greatest interest in ensuring that the resources near their own coasts are not depleted.

14. While granting that proposals and preparatory documents are *de lege ferenda* and made with the purpose of reaching future agreements on the basis of concessions and compromise, the following inferences could, however, be legitimtely drawn from their existence:

(a) States submitting proposals for a 200-mile economic zone, for instance, which includes control and regulation of fishery resources in that area, would be in a somewhat inconsistent position if they opposed or protested against claims of other States for a similar extension. Such would be the case, in particular, of those States that have, in the Council of Ministers of the Organizaiton of African Unity, voted in favour of the declaration on the Issues of the Law of the Sea, Article 6 of which says:

> "... that the African States recognize the right of each coastal state to establish an exclusive economic zone beyond their territorial seas whose limits shall not exceed 200 nautical miles, measured from the baselines establishing their territorial sea".

Another instance is that of the People's Republic of China. In the joint communiqué of establishment of diplomatic relations with Peru of 2 November 1971, the People's Republic of China recognized "the sovereignty of Peru over the maritime zone adjacent to her coasts within the limits of 200 nautical miles". The same recognition was expressed in a similar communiqué with Argentina on 16 February 1972.

(b) it would not seem justified to count States which have agreed to or made such declarations and proppsals as figuring in the group of States concurring in the establishment of an alleged practice in favour of a 12-mile maximum obligatory limit.

15. If, to the 30 to 35 States which have already extended their fisheries jurisdiciton beyond 12 miles, there is added the further number of 20 to 25 States which have taken the attitudes described in the preceding para-

graph, the conclusion would be that, today, more than half the maritime States are on record as not supporting in fact and by their conduct the alleged maximum obligatory 12-mile rule. In these circumstances, the limited State practice confined to some 24 maritime countries cited by the Applicant in favour of such a rule cannot be considered to meet the requirement of generality demanded by Article 38 of the Court's Statute.

16. Another essential requirement for the practice of States to acquire the status of customary law is that such State practice must be common, consistent and concordant. Thus contradiction in the practice of States or inconsistent conduct, particularly emanating form these very States which are said to be following or establishing the custom, would present the emergence of a rule of customary law.

17. Certain States, whose conduct is invoked as showing the existence of the 12-mile maximum rule, have not hesitated to protect their own fishing interests beyond that limit, when they felt that it was required for the benefit of their nationals by the existence of important fisheries in waters adjacent to their coasts. Various methods have been utilized to achieve that result, but the variety of methods should not obscure the essential fact. It could be observed for instance, that the United States and the USSR have lately carried out this form of protection not unilaterally but through bilateral agreements *inter se* and with other States.[3] However, these Powers began by adopting unilateral measures which created for the States whose nationals were fishing in adjacent waters the need to enter into fishery agreements if they wished that their natonals could continue their fishing activities in those grounds. Once the need for an agreement was thus created, it was not difficult for these Powers, because of their possibilities in offering various countervailing advantages, to reach agreements which assured them of a preferential or even an exlusive position in those fishing grounds in which they had special interests in areas adjacent to their shores well beyond the 12 miles. This demonstrates the fact that even for States which cannot claim a special dependence on their fisheries for their livelihood or eocnomic development, 12 miles may not be sufficient. It would not seem fair or equitable to postulate on the basis of such divergent conduct a rule of law which would deny the power to protect much more vital fishing interests to countries lacking the same possibilities of offering attractive terms by way of compensation for abstaining from fishing in their adjacent waters.

18. The practice of France offers another interesting example with respect to the question of uniformity of custom. France extended its fishing limits, in 1972, to 80 miles in the French Guiana. Law No. 72-620 of 5 July 1972 established this zone of 80 miles with a view to ensure the conservation of biological resources". However, Article 2 laid down:

> "In that part of the zone defined in Article 1 which extends beyond territorial waters, measures shall be taken as needed, in accordance with conditions laid down by decree, for the purpose of limiting the fishing of the various species of marine animal. The application of these measures to the vessels of foreign States shall be carried out with due regard for the geographical situation of those States and the fishing habits of their nationals.
>
> In the same part of the zone, fishing by the vessels of States not authorizing fishing by French vessels in comparable circumstances may be prohibited by decree".

Thus France is reserving its right to forbid foreign vessels to fish in the zone between the 12 and 80-mile limit off Guiana, if French vessels are not authorized to fish in zones beyond 12 miles off the coast adjacent to another country. It is hardly possible to count France among the states whose practice invaribly supports an alleged 12-mile maximum limit, when it is reserving the right to forbid foreign fishing outside 12 miles off the shore of the French Guiana, under certain conditions.

19. Likewise, archipelago States which have claimed or established fishery limits according to the geographical characteristics of their territories could hardly be counted as States accepting the existence of a maximum 12-mile obligatory limit. The same observaiton could be made in regard to States which have fixed an exclusive fishing zone far beyond the 12-mile limit off their coasts by establishing "fisheries closing lines" in certain bays.

20. Consequently, it is not possible to find today in the practice of States what the Court described in the *Asylum* case as "a constant and uniform usage, accepted as law" (*I.C.J. Reports 1950*, p. 277). The alleged 12-mile limit maximum obligatory rule does not fulfil "an indispensable requirement", namely, "that within the period in question, short though it might be, State practice, in-

[3] International Convention (with annex and Protocol) for the High Seas Fisheries of the North Pacific Ocean signed on 9 May 1952 by the United States of America, Canada and Japan (*United Nations Treaty Series*, Vol. 205, p. 65); Convention concerning the High Seas Fisheries of the North-West Pacific Ocean signed on 14 May 1956 by Japan and the Union of Soviet Socialist Republics (*AJIL*, 1959, p. 763); Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Certain Fishery Problems in the North-Eastern Part of the Pacific Ocean off the Coast of the United States of America, signed on 13 February 1967 (*United Nations Treaty Series*, Vol. 688, p. 157); Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Certain Fishery Problems on the High Seas in Western Areas of the Middle Atlantic Ocean, signed on 25 November 1967 (*United Nations Treaty Series*, Vol. 701, p. 162); Agreements effected by Exchange of Notes signed on 23 December 1968 between the United States and Japan on Certain Fisheries off the United States Coast and Salmon Fisheries (*YIAS* of the United States, No. 6600).

cluding that of States whose interests are specially affected, should have been both extensive and virtually uniform" *(North Sea Continental Shelf* cases, *I.C.J. Reports 1969,* p. 43).

21. It could therefore be concluded that there is at present a sitution of uncertainty as to the existence of a customary rule prescribing a maximum limit of a State's fisheries jurisdiction. No firm rule could be deduced from State practice as being sufficiently general and uniform to be accepted as a rule of customary law fixing the maximum extent of the coastal State's jurisdiction with regard to fisheries. This does not mean that there is a complete "lacuna" in the law which would authorize any claim or make it impossible to decide concrete disputes. In the present case, for instance, we have been able to concur in a Judgment based on two concepts which we fully support: the preferential rights of the coastal State and the rights of a State where a part of its population and industry have a long established economic dependence on the same fishery resources.

22. Admittedly, this situation of legal uncertainty is unsatisfactory and conducive to international friction and disputes. It is to be hoped however that the law on the subject may be clarified as a result of the efforts directed to its codification and progressive development which are now being made at the Caracas conference.

(Signed) I. FORSTER.

(Signed) C. BENGZON.

(Signed) E. JIMÉNEZ DE ARÉCHAGA.

(Signed) NAGENDRA SINGH.

(Signed) J.M. RUDA.

SEPARATE OPINION OF JUDGE DILLARD

In the present case there was little doubt that the attempt by Iceland unilaterally to exercise *exclusive* jurisdiction in the disputed waters could not be opposed to the vessels of the United Kingdom. But the reasons in support of this conclusion did not reflect a uniform approach and this, in turn, affected varying interpretations to be given to the requirements of the treaty and the submisisons of the Applicant.

At the outset, I should say that the Judgement of the Court reflects an approach which I consider soundly grounded. On the other hand, other approaches were, in my view, by no means lacking in persuasive force. I shall elaborate briefly on two of them. I shall then turn to the special problem involved in responding to the Applicant's third and fourth submissions.[1]

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* *

One such approach would rest on the proposition that Iceland has materially breached the Exchange of Notes of 1961 which the Court had previously pronounced to be a treaty in force. The terms and implication of that treaty admit of no doubt. Even if Iceland, in keeping with her repeatedly announced aspiration to extend her limits - an aspiration also embedded in the treaty - had been privileged unilaterally to *pronounce* an extension, she was not legally privileged to *apply* that extension to the vessels of the United Kingdom except under any one of three contengencies: *a)* that the United Kingdom failed to challenge it or *(b)* that through negotiations the Parties reached an agreement or *(c)* that, if challenged, this Court would have pronounced on whether the extension was well founded under international law.

The analysis of the treaty, including the obligation to give six months' notice of any extension and the obligation to have recourse to the Court, have been analysed in detail in the Judgement of the Court at the jurisdictional stage and need not be repeated here[2]. Suffice it to say that the requirement that "in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice", was no mere severable clause of minor significance but an essential element of the entire agreement, the importance of which to the United Kingdom was underlined in the negotiations. And its importance was enhanced by providing an amicable method of resolving a potential dispute.

It hardly needs extensive elaboration to demonstrate that when Iceland agreed to a specified *method* whereby an extension of fisheries jurisdiction by Iceland could be effected vis-à-vis the United Kingdom, her repudiation of that method constituted a material breach of the treaty. It is almost axiomatic that when an agreement or other instrument itself provides for the way in which a given thing is to be done, it must be done in that way or not at all *(I.C.J. Reports 1972,* p. 68).

[1] All of the Applicant's submissions are set out in para. 11 of the Judgment.

[2] Judgment of 2 February 1973, *I.C.J. Reports 1973,* pp. 8-16.

This approach, based on a clear violation of the treaty, would render *irrelevant* at the "merit" stage of the dispute any purported theory Iceland might advance to justify her extension. This is true whether the alleged justification is keyed to a change in customary law, or to the "reasonableness" of the extended limits by reference to the continental shelf doctrine or any other reason. So long as the treaty is one in force she is not legally privileged to repudiate it, or to ignore the *method* whereby the dispute was to be resolved.

The consequence of this approach would be to allow the Court to adjudge and declare that *under international* Iceland is not privileged to take the law into her own hands and, so far as the present proceedings are concerned, she cannot therefore oppose her extension to the United Kingdom.

.....

The present case involves, both in its pratical aspect and its long-range implication the problem of the wise or meritorious allocation of limited resources or what are presumed to be limited resources. This presents an almost typical instance of what, in classical theories of justice, may be desribed as distributive as opposed to corrective (sometimes called remedial) justice.

Obviously this is no place to undertake an abstract discussion of the requirements of what may be a just solution to a specific controversy. The general subject commands an immense literature and it would be at once pretentious and possibly irrelevant to broach it. I am merely suggesting that, when contrasted with corrective justice, it may provide a helpful analytical tool in considering the nature of a dispute, the role of a court and the character of the norms at its diposal[1].

Allowing for gross over-simplification the distinction may be put this way: questions of *establishing a system* or *régime* of equitable allocation of resources engage elements of distributive justice; on the other hand *disturbances* to the system fall under the province of corrective justice[1].

It is not unusual to assume that the former lies exclusively in the lap of the legislative branch and the later in that of the Court. But this easy way out of the problem ignores the turbulent way in which disputes are generated, the manner in which they are put in the lap of the Court, and the need to resolve them.

In the present case it may be urged, as Iceland has, that the wise allocation of resources should be left to the norms of law which may emerge form the Conference on the Law of the Sea. Whatever virtue adheres to this position is, however, neutralized by the sheer fact that the Court must decide a case in which, basically, elements of distributive justice intrude.

Its capacity to do so is not precluded by any *theory* of the judicial process which inhibits it from analysing all the elements invovled in any dispute, marshalling all the supporting data, even of ahighly sophisticated scientific character, and "laying down the law" in terms of the *establishment* of a régime of allocation. But considerations of a practical, political and psychological nature dictate that this funciton is best done at the outset by the parties themselves or better still by other bodies specially qualified to assess the conficting interests, the relevant scientific factors, the values involved, and the continuing need for revising the *régime* in light of changing conditions. The Court's role is best limited to providing legal guidelines which may *facilitate* the establishment of the system and in the event of a subsequent dispute, to help redress disturbances to it. Meanwhile the Court has consistently indulged the assumption that the Paties will, in fact, negotite in good faith.

This, of course, is the approach taken by the Court in subparagraphs 3 and 4 of its *dispositif.* Viewed in this light, it supplements the findings in the first two subparagraphs, while also responding to the requirements of distributive justice.

(Signed) Hardy C. DILLARD.

SEPARATE OPINION OF JUDGE DE CASTRO

[Translation]

3. The 1973 Agreement between the United Kingdom and Iceland

The Court has been informed of the Exchange of Notes constituting an interim agreement on fisheries between the Government of the United Kingdom and the Government of the Republic of Iceland, dated 13 November 1973.

[1] There are many ways of analysing the concept of distributive justice and some were discussed in various opinions in the *North Sea Continental Shelf* cse. I would agree that in the context of that case the use of the concept by the Federal Republic of Germany was questionable.

[1] The distinction (although not in the form I have put it) is usually attributed to Aristotle who discusses it in connection with "particular" justice in his *Politics* (III, 9 and V, 1) and his *Nicomachean Ethics* (V, 3, 1-17). See also Aristotle, *Ethics* (Everyman edition, 1950), p. 112 *et seq.* Additional references and a brief explanation of the distinction may be found in Academy of International Law, 91 *Recueil des cours,* 1957-I, pp. 549-550.

This agreement deprives of effect as between the parties the Orders of the Court made on 17 August 1972 and 12 July 1973, indicating interim measures. It establishes a temporary régime valid for a period of two years. The agreement is temporary "pending a settlement of the substantive dispute". It is also stated that "its termination will not affect the legal position of either Government with respect to the substantive dispute" (para. 7).

The Court may wonder whether the effect of the 1973 agreement is only to replace the interim measures laid down in the Orders of the Court by the Exchange of Notes. It seems to me that this agreement has a wider and more general scope which should be examined.

On that same date, 13 November 1973, the United Kingdom Prime Minister said in the House of Commons, in reply to Mr. Harold Wilson:

"Our position at the World Court remains exactly as it is, and the agreement is without prejudice to the case of either country in this mater. This is an interim agreement covering two years from the moment of signature this afternoon, in the expectation that the Conference on the Law of the Sea will be able to reach firm conclusions. We all know the difficulties facing a Conference on the Law of the Sea, but both Governments hope that it will have been possible by the expiration of this agreement to reach agreement on the law of the sea and that that will then govern the situation".

The Court cannot ignore the terms of this agreement and the interpretation, given in the House of Commons, of its aims and intentions. It is thus placed in an embarrassing position.

As a result of this agreement, the Court's judgement on the merits of the case will have no immediate effect. It has been subjected by the Parties to a waiting period of two years and to two conditions, the first concerning a settlement of the dispute by a new agreement and the second relating to an agreement at the Conference on the Law of the Sea. All this is irregular and hardly in keeping with what seems to be the function of the Court.

This agreement also shows that the Parties do not believe that the Court will be able to settle their dispute. They have found a solution to certain issues refereed to the Court, albeit for a period of two years only. This agreement is an interim one, but it was concluded "pending a settlement of the substantive dispute". Now the settlement which the Parties say they are waiting for its not that which may result from a judgment of the Court. This is obvious, in view of the attitude of Iceland, which continues to deny that the Court has jurisdiction. The hope of the Parties that they will be able to reach a definite settlement is based on negotiations now in progress, whether or not they are carried on with the Conference on the Law of the Sea in view.

Does the announcement of these negotiations justify suspending the proceedings? It is true that peaceful settlement of disputes should be brought about above all by means of negotiation. The Court is open to States to settle issues of a legal nature which they may refer to it, but a dispute is ripe for reference to the Court, when negotiations between the parties reach deadlock and when the success of the negotiations has definitely been ruled out as a result of a *non volumus* or a *non possumus* of the parties. I do not know of any precedent which might help to answer this question; in my opinion, once proceedings have been initiated, there is no way of suspending them, and they should continue unless the case is settled out of court or discontinued.

The agreement constitutes a valuable argument in favour of cautious solutions. It shows that the readiness expressed by Iceland in the 1972 Resolution to seek a solution of the problems connected with the extension through discussions was not an empty formula. It also shows that a judgment of the Court, delivered before the Parties reach a settlement through negotiations on the substance of the dispute, and drawn up without taking into consideration the indicative value of the agreement, could be an insurmountable obstacle to a negotiated settlement of the dispute - and that would be contrary to the essential purpose of the Court which is to contribute to the peaceful settlement of disputes.

(Signed) F. DE CASTRO.

SEPARATE OPINION OF JUDGE SIR HUMPHREY WALDOCK

33. As to the first submission, it follows that I agree with the Court that for the purposes of the present Judgment it is not, strictly speaking, necessary to pronounce upon the question raised by that submission, namely whether the extension of Iceland's fishery limit to 50 miles is without foundation in international law and is invalid. Framed in that way, the submission appears to ask the Court to hold that the extension was *ipso jure* illegal and therefore invalid *erga omnes*; and this view of the submission is confirmed by the statement of counsel at the public sitting on 25 March 1974 when, *inter alia,* he said: "This answers the question whether an extension of an exclusive fisheries zone beyond 12 miles would be illegal, it would". Although I consider that Iceland's extension of her fishery limit beyond the 12-mile limit agreed to in 1961 would not be *opposable* to the United Kingdom under general international law as

well as under the Exchanges of Notes, I should have more hesitation in upholding the proposition advanced in the first submission. The reason is that it does not seem to me to formulate the issue in the manner in which it presents itself in modern maritime international law.

34. After the failure of The Hague Codification Conference of 1930 to establish the 3 -mile limit as a universal rule and obligatory limit for the breadth of the territorial sea, the question arose as to what, if any, is the rule of international law concerning the breadth of the territorial sea. The prevailing opinion was that, at the failure of the Conference, the 3-mile limit remained a limit which could be said to be generally accepted and, therefore, *ipso jure,* valid and enforceable against any other State; but that a claim in excess of that limit could no longer be said to be *ipso jure* contrary to international law and invalid *erga omnes;* and that the validity of such a claim as against another State would depend on whether it was accepted or acquiesced in by that State (cf. G. Gidel, *Droit International public de la mer,* 1934, Vol 3, pp. 134-135).

35. Since 1930 a considerable number of new claims to maritime jurisdiction have been advanced by coastal States, whether to a larger territorial sea or to other forms of maritime jurisdiction. In the absence of clearly established general rules, the legal issue has continued to present itself in terms of the opposability of the claim to each other State rather than of the absolute legality or illegality of the claim *erga omnes;* in other words, in terms of the acceptance or acquiescence of other States. At the two Geneva Conferences on the Law of the Sea of 1958 and 1960 the 12-mile limit figured prominently in the debates both with respect to the breadth of the territorial sea and the extent of the exclusive fishery zone, though adopted at those Conferences in regard to neither. In fisheries, as paragraph 52 of the Judgment relates, the law evolved through State practice and a coastal State's right to an exclusive fishery zone up to 12 miles from its baselines appears to have become generally accepted. Larger claims have certainly been advanced by individual States and the third Untied Nations Law of the Sea Conference is already in session. But these larger claims, while accepted by some States, are rejected by others and beyond the 12-mile limit general acceptance does not exist, nor, as paragraph 53 of the Judgment observes, can the Court anticipate the law before the legislator has laid it down. Therefore, an extension of fisheries jurisdiction beyond 12 miles is not, in my opinion, opposable to another State unless shown to have been accepted or acquiesced in by that State.

36. In the present instance, Iceland's unilateral extension of her exclusive fishery limits from 12 to 50 miles as from 1 September 1972 was at once objected to by the United Kingdom. Consequently, if it were necessary to rest the Judgment on this point, I would consider the Court justified in holding that Iceland's extension of her fishery jurisdiction beyond the 12-mile limit agreed to in the 1961 Exchange of Notes is also not opposable to the United Kingdom under general international law.

. . . . .

46. As to the question of the Court's competence in the event of the failure of the parties to resolve the dispute by negotiation or other means of their own choice, I agree with the Court that this question is hypothetical and does not call for its consideration in the present proceedings. Under Article 60 of the Statute the Judgement is "final and without appeal". It thus constitutes a final disposal of the case brought before the Court by the Application of 14 April 1972, subject only to the right reserved to any party by that Article to request the Court to construe the judgment in the event of a dispute as to its meaning or scope. Consequently, should some other dispute between the parties as to their respective fishery rights in the waters around Iceland be brought before the Court unilaterally by either of them it would be for the Court, in the light of the particular circumstances of that dispute, then to determine its jurisdiction to entertain the case and the validity of any objections that might then be raised to the exercise of its jurisdiction.

(Signed) H. WALDOCK.

DISSENTING OPINION OF JUDGE GROS

[Translation]

I consider that Iceland's claim to establish an exclusive fishing zone over the superjacent waters of the continental shelf is contrary to the rules of international law, but the reasoning which leads me to that opinion, and my analysis of the dispute itself, are different from what is contained in the Judgment, from both the reasoning and the decision of the Court; a judgement of the Court comprises the reasoning part and the operative clause, and to understand the scope of the judgement it is not possible to separate either of these elements from the other, and an elliptical operative clause only reveals its meaning when read with the reasoning leading up to it. Adapting myself to the method adopted by the Court, I have cast a negative vote on the questions which it has selected. I must explain how I understood the Court's mission in the present case, the meaning of the question put to it, the answer to be given thereto, and thus the reasons supporting my dissenting opinion.

1. The first question which was raised for the Court in this merits-phase of the case was to determine what its task was. The Court has recognized in its Judgment of 2

February 1973 on jurisdiction that the Exchange of Notes of 11 March 1961 contained in its penultimate paragraph, a "compromissory clause" which conferred jurisdiction on the Court to give judgment in any dispute which might arise concerning the extension of fisheries jurisdiction around Iceland. Examination of that agreement and of the negotiations which led up to its being concluded leads me to an interpretation different from that in the Judgment as to the definition of the disputes which could be brought before the Court.

2. The basic principle of the Court's jurisdiction is the acceptance of that jurisdiction by the Parties; whether what is in question is a compromissory clause providing for the jurisdiction, or a special agreement, the rule is that interpretation cannot extend the jurisdiction which has been recognized. It should be added in the present case that, Iceland having failed to appear, and Article 53 of the Statute being applied by the Court, it is particularly necessary to satisfy oneself that the Court is passing upon a dispute which has been defined as justiciable by Iceland and the United Kingdom, and not some other dispute constructed during consideration for the case by the Court. An obligation to bring a dispute before a court is always reciprocal and of equal extent for each State which has accepted it; hence the need to proceed to a special verification in this case, since Iceland has not co-operated in the precise definition of the dispute. I have stated on another occasion that I disagreed with the penalizing approach of the Court with regard to a State which fails to appear, in its interpretation of Article 53 *(Fisheries Jurisdiction, I.C.J. Reports 1973*, p. 307); the present phase has strengthened my conviction on this point.

3. The Exchange of Notes of 1961 would not appear to leave room for any doubt, and I will quote the English text which is the authoritative text:

> "The Icelandic Government will continue to work for the implementation of the Althing Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months' notice of such extension and, in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice".

Thus the reference is to a possible dispute in relation to the extension by the Government of Iceland of its fisheries jurisdiction around Iceland in relation to the limits recognized in the 1961 agreement. The Court, in its Judgment of 2 February 1973, stated in the last explanatory paragraph on this point:

> "The compromissory clause enabled either of the parties to submit to the Court any dispute between them *relating to an extension of Icelandic fisheries jurisdiction* in the waters above its continental shelf beyond the 12-mile limit. The present dispute is exactly of the character anticipated in the compromissory clause of the Exchange of Notes". *(I.C.J. Reports 1973,* p. 21, para. 43; emphasis added).

It is important to note that the formula underlined may be found in paragraphs 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 27, 28, 40 and 41 of the Judgment. To rely on the form of words used in the operative clause of the 1973 Judgment in order to assert that the Court found that it had jurisdiction to entertain the Application, with the implication that the content of that Application binds the Court, is to disregard, first the inherent connection between the reasoning of the 1973 Judgment, which is based solely on the concept of extension of fisheries jurisdiction, and the form of the operative clause; and secondly the rule that it is the 1961 treaty which determines what the subject-matter of the justiciable dispute is, and not the Application or the submissions of one of the Parties. The Court should decide what the extent of its jurisdiction is, without being bound by the argument addressed to it on the point.

I have quoted the original-language text of the Judgment to avoid any ambiguity resulting from translation, and to show that I cannot accept the argument that a form of words as precise as "dispute in relation to the extension of fisheries jurisdiction" can be interpreted as impliedly including any connected question which one of the Parties may have had occasion to refer to in the course of negotiations preceding the 1961 agreement, if the other Party refused to make that question the subject of the agreement itself. That an idea or even a proposal my have been put forward in the course of negotiations is not sufficient for them to survive rejection, and acceptance of that rejection by the author of such proposals; any other view of the matter would enable multiple disputes to be artificially created, simply by the introduction into a negotiation, as a matter of principle, of various problems. No negotiations could be usefully carried on if courts had such freedom to extend their results. It would become necessary to draw up minutes of agreement as to the remaining of the most important articles of a treaty, and then, as suspicion increased, of all its articles.

In the present case, it is clear that the 1961 agreement only contemplated one sort of dispute as justiciable, namely the extension of Iceland's fisheries jurisdiction.

4. If any confirmation from a textual source were necessary on this point, it should be recalled that the only passage where any more general consideration is mentioned is in the United Kingdom reply to the Icelandic Note of 11 March 1961, in the last paragraph and in the following form:

> "I have the honour to confirm that in view of the exceptional dependence of the Icelandic national upon coastal fisheries for their livelihood and economic development, and without prejudice to the rights of

> the United Kingdom under international law towards a third party, the contents of Your Excellency's Note are acceptable to the United Kingdom and the settlement of the dispute has been accomplished on the terms stated therein". (Application, p. 25).

Nothing further need be said; this is an opinion held by the Government of the United Kingdom, and not a term of the agreement.

5. The kind of dispute which the parties to the 1961 agreement had in contemplation, and which they agreed to bring before the Court, was pegged to a legal point which was specially defined, in a limited way, and because assurances, which were also special and precise, had been sought and obtained on this one point. If, as I hold, this definition of the justiciable dispute has not been applied in the present Judgment, the Court has gone beyond the bounds of its jurisdiction.

Iceland, which is absent from the proceedings, has from the outset disputed that the Court has any jurisdiction, and this claim was rejected in the Judgment of 2 February 1973 by an almost unanimous Court, which observed that the dispute was exactly of the character anticipated in the 1961 agreement (cf. para. 3 above) and that that agreement was still in force and applicable. The Judgment on the merits, on the other hand, departs from the definition of the dispute on which judgment is to be given on two points:

(a) in that it does not decide the precise question of law contemplated in the compromissory clause of 1961, i.e., the conformity with international law of the extension to 50 miles of Iceland's fisheries jurisdiction;

(b) in that it adopts an extensive interpretation, in relation to the text, of the 1961 agreement on the scope of the Court's jurisdiction, as if it had read: any dispute on any question whatever connected with a modification of the fisheries regime fixed by the present agreement.

With some internal contradiction, the Judgment simultaneously declines to exercise the jurisdiction conferred upon the Court by the 1961 agreement and exercises jurisdiction which was not created by that agreement. Study of the records of the negotiations which led to the 1961 agreement will show that this is so.

. . . . .

15. The history of the negotiation of the text founding the jurisdiction of the Court in the present case explains - if there were any need, the text being clear - the laconic provision in the penultimate paragraph of the 1961 agreement. When Iceland entered into an undertaking in 1961 it did so to a limited extent. The Court should give an answer on the only question which could be brought before it; since it has not done so, it has not exercised the jurisdiction conferred by the agreement. I have made it clear for my own part that I regarded the extension from 12 to 50 sea miles as contrary to general international law, and therefore non-opposable to any State fishing in the waters adjacent to the 12-mile limit around Iceland. The Court stated in its Judgment in the *North Sea Continental Shelf* cases that: "The coastal State has no jurisdiction over the superjacent waters" *(I.C.J. Reports 1969,* p. 37, para. 59). The claim of Iceland is expressly in relation to those waters. As to the lawfulness of an encroachment into sea areas which all States fishing in the area, without exception, regarded as forming part of the high seas on 1 September 1972, it is unarguable that it was lawful; Articles 1 and 2 of the Convention on the High Seas and Article 24 of the Convention on the Territorial Sea are provisions which are in force, and since the only argument relied on to exclude them is that they are outdated, no reply on this point is needed; the calling of a third codifying Conference in July 1974 amply demonstrates that certain procedures, and agreement, are necessary to replace codifying texts. Until different texts have been regularly adopted, the law of the sea is recorded in the texts in force.

It has also been said that a claim extending beyond 12 miles is not *ipso jure* unlawful, because there have been many claims of this kind; but by conceding that these claims are also not *ipso jure* lawful one admits that acceptance by others is necessary to make them opposable. What could a claim which was disputed by all the States concerned in a given legal situation be, if it were not unlawful? But since all States fishing in the Icelandic waters in question are opposed to the extension, what is the reason for not stating this and drawing the necessary conclusion?

There is no escaping the fact that if the States which oppose the extension cannot do so on the basis of a rule of international law, their opposition is ineffective, and this must be said; but if they can base their opposition on such a rule, it is equally necessary not to hesitate to say that. It is the accumulation and the constancy of the opposition which should have obliged the Court to make a general pronouncement in the present case.

This was in fact the purpose of the first submission of the United Kingdom, which is not answered in the Judgment; furthermore the Agent said in the course of his argument that it was understood and accepted "that submissions (b) and (c) are based on general international law and are of course not confined merely to the effect of the Exchange of Notes". The Court has decided entirely otherwise. As a result of its refusal to give judgment on the conformity of the 50-mile extension with general international law, the court has had to treat the 1961 agreement as the sole ground of non-opposability

of that extension to the United Kingdom, interpreting that agreement as a recognition by Iceland that the Court has jurisdiction for any dispute concerning any measure relating in any way to fisheries.

16. Going beyond the events of 1961, it should be added that analysis of Iceland's position on the fisheries problem for the last quarter-century and more leads to the conclusion that that State has unremittingly advanced, and secured recognition of, the view that claims as to the extent of the fishery zone were entirely distinct from problems of conservation. Thus under the North-West Atlantic Fisheries Convention of 8 February 1949 (Art. I, para. 2), and then under the North-East Atlantic Fisheries Convention of 24 January 1959, Iceland was to be one of the parties which attached the greatest importance to the formal reservation that those conventions did not affect the rights, claims, or views of any contracting State in regard to the extent of jurisdiction over fisheries.

The constant element in the policy of Iceland appears to me to be the distinction between limits of an exclusive fishery zone, and a claim to preferential rights beyond that zone. These are two clearly different problems; by asserting, by means of its Regulations of 14 July 1972, exclusive fisheries jurisdiction up to a 50-mile limit Iceland took up its position in the field of its claims as to the extent of its exclusive fishing zone, as the two parties to the 1961 agreement had foreseen; this was the legal point which the Court was to decide.

*
* *

17. Subparagraph 3 of the operative clause of the Judgment contains a decision that there is an obligation to negotiate between Iceland and the United Kingdom "for the equitable solution of their differences concerning their respective fishery rights...", and subparagraph 4 indicates various considerations as guidelines for such negotiations. I consider that the role of the Court does not permit of it giving a pronouncement on these two points, and that by doing so, the Court has exceeded the bounds of its jurisdiction.

18. Subparagraph 3 refers to differences concerning the "respective" fishery rights of the two States. There are of course differences, since Iceland is claiming to exclude the United Kingdom finally from the area up to 50 miles, but this claim is made *erga omnes,* and it is somewhat unreal to treat as a bilateral problem, capable of being bilaterally resolved, the effects of the Icelandic Regulations of 14 July 1972 asserting exclusive jurisdiction over the superjacent waters of the continental shelf, after having declined to reply to the question raised as to the unlawfulness of such Regulations in international law. Although in subparagraph 4 there are formal safeguards for the position of the other States, the Court has regarded it as possible, to isolate, as it were, the bilateral differences and settle them by the Judgment. This is the first point that I should deal with before turning to the substance of subparagraphs 3 and 4 of the operative clause of the Judgment.

19. The origin of these subparagraphs 3 and 4 of the operative clause is in the last part of the United Kingdom's submission (final submission (d)) which gave the dispute a wider dimension that the sole question of the lawfulness of the unilateral extension of jurisdiction, and on the basis of that submission problems of conservation have been extensively discussed in argument. But the bounds of a judgment are not fixed by a party in its Application, nor in its final submissions, nor, *a fortiori*, in its argument, when the jurisdiction being exercised is one specially laid down by a treaty, with a view to bringing before the Court a precise question of law. Particularly when the other Party is absent from the proceedings, the Court cannot simultaneously decline to reply to the joint request for a declaratory judgment which was indisputably made in the 1961 agreement, and decide what the conditions shall be of negotiations over conservation as to which no-one but the Applicant has ever asked its opinion, since it should be remembered that according to Iceland there are 11 States regularly fishing in the waters around Iceland *(cf. Fisheries Jurisdiction in Iceland,* Reykjavik, February 1972, table 2, p. 14). As for the United Kingdom, its counsel, in reply to a question on 29 March 1974, stated that in the United Kingdom's pleadings, the only States which were regarded as interested or affected or concerned by the question of fisheries around Iceland were those which have in the past fished in that area, that is to say, apart from the United Kingdom and Iceland, the Federal Republic of Germany, the Faroes, Belgium and Norway. Thus questions also arose as to the nature of the interest in the fisheries of the geographical area in question, which the Judgment neither takes into account nor resolves.

. . . .

21. If one reads the second submission in the United Kingdom's Application it is apparent that the second part thereof was so drafted that it could not constitute a claim, but merely an argument in support of the first part of that submission, by which the Court was asked to declare that questions of conservation cannot be regulated by a unilateral extension of limits to 50 miles, as a sort of consequence of the declaration asked for as to the non-conformity of the Icelandic regulations with general international law, in the first submission of the United Kingdom. The submission continues with the following:

> "[questions of conservation] are matters that may be regulated, as between Iceland and the United Kingdom, by arrangements agreed between those two countries, *whether or not together with other interested countries* and whether in the form of arrange-

> ments reached in accordance with the North-East Atlantic Fisheries Convention of 24 January, 1959, or in the form of arrangements for collaboration in accordance with the Resolution on Special Situations relating to Coastal Fisheries of 26 April, 1958, *or otherwise in the form of arrangements agreed between them* that give effect to the continuing rights and interests of both of them in the fisheries of the waters in question" (Application, para. 21; emphasis added).

A further version of this submission was given in the Memorial on the merits (reproduced in para. 11 of the Judgment) where the obligation to negotiate appears formally expressed, and was to be maintained as a final submission. The Court would have exhausted its jurisdiction by saying, in reply to the first part of the submission, that questions of conservation cannot be regulated by a unilateral extension of limits to 50 miles and a claim by Iceland to exclusive jurisdiction in that zone.

How could such a general question of law as to conservation involving at least 11 fishing States be judicially settled "between Iceland and the United Kingdom ... whether or not together with other interested countries"? While it was possible in 1961 for Iceland and the United Kingdom to agree on an assurance against any fresh extension of jurisdiction, the effect of which would be suspended as between those two Stated by recourse to the Court, it is not reasonable to imagine that a system of conservation of marine resources concerning 11 States could be worked out by two of them. The importance of the United Kingdom's interest in the fisheries around Iceland is recognized. But the question put to the Court is not the equitable sharing of the resources of these fisheries, a suggestion analogous to that which the Court rejected in its Judgment with regard to the delimitation of the continental shelf of the North Sea *(I.C.J. Reports 1969,* p. 13, para. 2, and pp. 21 and 23, paras. 18 to 20), from which Judgment I would adopt the expression that in the present case, there is nothing "undivided to share out" between the United Kingdom and Iceland. The idea of the "respective" fishing rights is not a correct description of the position in fact and in law. The legal status of the fisheries between 12 and 50 miles form Iceland can only be an objective status, which takes account of the interests of all States fishing in those waters. Further, the problems of "fishing rights" in the waters around Iceland have been under study for a considerable time with the States concerned, and Iceland has recognized the need to resolve those problems with such States, as has also the United Kingdom.

22. On 22 July 1972 - at the heights of the Iceland fishery crisis and one week after the promulgation of the Icelandic Regulations of 14 July 1972, which constitute the act impugned in the United Kingdom Application - there was signed in Brussels an agreement between the European Economic Community and Iceland in order to "consolidate and to extend ... the economic relations existing between the Community and Iceland". The first article relates that "the aim is to foster in the Community and in Iceland the advance of economic activity [and] the improvement of living and employment conditions". The agreement applies to fish products (Art. 2), to which a Protocol No. 6 is specially devoted; Article 2 of that Protocol provides:

> "The Community reserves the right not to apply the provision of this Protocol *if a solution satisfactory to the member States of the Community and to Iceland has not been found for the economic problems arising from the measures adopted by Iceland concerning fishing rights".* (Emphasis added).

In application of this Article 2 of Protocol No. 6, and at the request or with the approval of member States of the Community (including the United Kingdom and the Federal Republic of Germany), although the agreement with Iceland had come into force on 1 April 1973, the implementation of the Protocol on Icelandic fish products has already been postponed five times, the last time on 1 April 1974. To prevent Iceland from benefiting from a customs arrangement granted it by a treaty because there is an unsettled dispute over "fishing rights" is, to say the least, to declare oneself concerned or affected by that dispute. Thus the European Economic Community has five times declared its direct interest in coming to a settlement regarding fishing rights in the waters round Iceland by refusing to grant Iceland the implementation of the special tariff provisions laid down in the agreement of 22 July 1972. This agreement is moreover mentioned in the *White Book* on the fishing dispute published by the British Government in June 1973 (*Cmnd. 5341):* the reference occurs in paragraph 22, immediately following a paragraph on Anglo-German co-operation, and we read:

> "It will be for the Community to declare when a satisfactory solution to the fisheries dispute has been achieved and, consequently, when to decide that the terms of the Protocol should take effect".

23. The common interest evinced by the member States of the European Economic Community, and the terms of Article 2, paragraph 1, of the above-cited Protocol No. 6, alike show that these States are not indifferent to the elaboration of a régime for fisheries in the waters round Iceland. For its part, Iceland, by accepting the agreement and Protocol No. 6, has recognized the interest of the European Economic Community in the settlement of the question of fishing rights. Thus the memorandum explaining the grounds of the first proposal to postpone implementation of Protocol No. 6, submitted by the Commission to the Council on 20 March 1973, refers to the "economic problems arising form the measures adopted by Iceland concerning fishing rights" for the member States of the Community. This position of Iceland vis-à-vis the EEC may usefully be compared with that of

Norway in its agreement of 14 May 1973 with the EEC, which came into force on 1 July 1973: the concessions granted therein by the EEC will only be valid provided Norway respects "fair conditions of competition"; on 16 April 1973, the date when the agreement was initialled, the Commission indicated that all the tariff-reductions granted on certain fish products of Norwegian origin had been agreed to subject to the continued observance of the existing conditions of overall competition in the fishing sector, which covers the eventuality of any unilateral extension of the fishery zone.

As is well known, the member States of the European Community constitute a majority in the North-East Atlantic Fisheries Commission; what is more, an observer of the Community as such takes part in its work, as is also the case of the North-West Atlantic Fisheries Commission. The catch-quotas of the participant Community members could, according to a proposal made by the Commission of the Communities to the Council, be negotiated and administered on a Community basis.

24. Now an agreement whereby Iceland formally accepts that treaty provisions of undoubted economic importance for that country should be suspended for so long as the problem of the economic difficulties arising out of the measures it has taken in respect of fishing rights remains unresolved would appear to constitute a recognition by Iceland and the EEC of an obligation to negotiate. The negotiations concern the economic consequences of Iceland's claim to exclusive fisheries jurisdiction, and the context of the negotiations is no longer, directly, fishing rights; but what the EEC understood in an analogous situation has been seen in the instance of Norway, and the distinction should not be over-nicely drawn. The question of fishing rights is necessarily affected by any decision regarding the economic consequences, whatever solution is reached for dealing with the economic consequences and whatever the chosen method; but the debate is one of wider scope, and extends to general economic relations between all the countries concerned. While the Court, in subparagraph 4 of the operative part of the Judgment, has not sought to define more than the conservation aspect of fishing rights in the prescriptions directed to the United Kingdom and Iceland, the working-documents of the Community accurately convey an all-round picture of the various aspects of the problem of fishing in the waters round Iceland. One more example: a Danish memorandum on fishing submitted to the Council on 20 March 1973 recommends, after reviewing the problem of regions almost wholly dependent on fishing (Greenland, the Faroes), special measures of both a structural and a regional nature.

By finding, in the Judgment, that there is a bilateral obligation to negotiate concerning "respective" rights of a bilateral character, when Iceland has accepted a multilateral obligation to negotiate on much wider basses in institutions and international bodies which do not come within the purview of the Court's jurisdiction, the Court has formulated an obligation which is devoid of all useful application.

. . . .

26. It was not a series of accidents which caused these problems to be considered successively under the auspices of the OEEC (in 1956, in order to put an end to the difficulties of landing Icelandic fish catches in British ports) and of NATO (informal talks in 1958 between representatives of Iceland, the United Kingdom, the Federal Republic of Germany and France), before being raised in the framework of the European Economic Community and the treaty of 1972, but the recognition of the objective character of the régime of these fisheries.

If a bilateral agreement with Iceland was possible in 1961, that was because the essential content of that agreement consisted of the United Kingdom's recognition of the 12-mile limit; but in the last portion of the operative part of its Judgment the Court passes upon a question regarding a fisheries régime for the conservation of resources, and there is nothing bilateral about that. Iceland pointed this out in clear terms to the United Kingdom during the London conservations of 3 and 4 November 1971. (United Kingdom Memorial on the merits, para. 23) before enacting its 1972 Regulations: Iceland's purpose was to protect its fishing industry against massive competition by "super-trawlers" from Spain, Portugal, Poland, the USSR and Japan and to facilitate the planned expansion of Iceland's own fishing industry (it will be noted that Iceland here adds three States, to the eleven listed in paragraph 19 above, but, in any event, the circle of States concerned is not unlimited even if such variations are to found; it is thus wholly irrelevant to look into the claims of States which are equally far removed from the Iceland fishery area and Iceland's preoccupations). Iceland has wider aims than conservation. A review of Iceland's economic problems seen in relation to an extension of fisheries jurisdiction is to be found in the already-quoted OECD report of 1972 (in particular, pp. 32-39). As the Court did not touch upon this aspect of the situation, I will simply say that any tribunal that wished to study the régime of Iceland's fisheries would have found it indispensable to consider these problems; it is not sufficient to say in general terms that Iceland is dependent on its coastal fisheries "for its livelihood and economic development" if no attempt is made to grasp the economic realities underlying the phrase. Indeed, for want of all research on the point, the Court's pronouncement constitutes simply an abstract reply to an abstract question. Even from the standpoint adopted by the Court, whereby a problem of objective régime may purportedly be resolved by means of bilateral negotiations, the question should have been placed within its true dimensions, these

being of wider scope than conservation procedure, which, in the unique case of Iceland, is probably not the only factor capable of reconciling the legitimate interests that stand confronted (cf. para. 31 below).

27. The obligation to negotiate in the present case does not originate in a kind of general undertaking drawn from Article 33 of the Charter, which is above all a list of means of settlement; this theory makes of the obligation to negotiate a universal but an uncertain remedy, since when negotiations take place without a specific objective the Parties necessarily remain free to appraise their desirability and the necessity of their success. There is only one obligation laid down in Article 33, that of seeking a solution to any dispute likely to endanger peace and security, and parties are left entirely free to adopt the "peaceful means of their own choice". There is nothing to authorize selecting one of those means, negotiation, and turning it into a legal obligation, when all the other methods remain open. The danger in this new construction is that it may have the result of imposing upon States which are before the Court in relation to a specific dispute, in the form of directions for negotiations occasioned by that dispute - but not on the dispute itself -, rules of conduct which a mediator or conciliation commission might propose, though without compulsory effect. Thus it is as if, in creating the idea of an obligation to negotiate on account of Article 33, it were desired to lend one of the means greater effect than the others. This interpretation would enable the Court, in any grave dispute, to transform itself into an arbitrator, conciliator or mediator, as the case might be, and that is what it has done in the present instance. Article 33 of the Charter does not permit this evolution in the role of the Court, which is contrary both to the Charter and to the Court's own statute. In paragraph 100 of its 1969 Judgment the Court said that one must not "over-systematize" *(I.C.J. Reports 1969,* p. 54).

The source of the obligation to negotiate in this case is the legal nature of the fisheries régime which is the subject of the dispute, and that can only be actualized by means of negotiation among all the States concerned; it is there, solely, that the Court could have found the answer to the question it had chosen to ask itself and discovered that it could not incorporate it into its decision but at most give it a place in the reasoning of the judgment.

28. To conclude my observations on subparagraphs 3 and 4 of the operative part: by virtue of the interpretation placed on the 1961 agreement and the negotiations that enabled it to be concluded (see in particular paras. 25 and 47 of the Judgment) the Court considers that Iceland has agreed to the inclusion of problems of conservation (zones and methods), preferential rights and historic rights within the categories of dispute which it might find the Court adjudicating. I have already indicated that it appeared to me to be an unwavering constant of Icelandic policy always to distinguish problems of conservation and preferential rights from the problem of the extension of fisheries jurisdiction (para. 16 above) and that the 1961 agreement was one of the proofs of this. If this position had shifted in 1961, why is there nothing in the records to reveal as much? Yet what would have been the concession in point? - the recognition that, in relation to any extension beyond the 12-mile limit of the exclusive fishery zone, any problems of conservation or preferential and historic rights might also be referred to adjudication as elements of a dispute over the extension of the zone. I must say that I find this improbable in the absence of any formal admission on the part of Iceland and considering its constant attitude of opposition to all confusion of problems concerning the breadth of the exclusive fishery zone with problems of the fishery régime beyond that zone.

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29. One further point remains to be examined: what is the effect of this last part of the operative clause of the Judgment? The interim agreement of 13 November 1973 is a treaty which the Court is obviously powerless to modify; and it applies as an interim agreement until 13 November 1975 "pending a settlement of the substantive dispute and without prejudice to the legal position or rights of either Government on the question" (this is from the first sentence of the agreement). In 1972 the Parties conducted unsuccessful negotiations directed to the conclusion of an interim agreement for the duration of the proceedings before the Court; the agreement of November 1973 is different: it guarantees the United Kingdom a certain provisional position for two years in any event, while expressly reserving the question of settlement of the dispute. It is clearly contrary to the first paragraph of the agreement, cited above, and contrary to all the probabilities, to say that by using this expression Iceland agreed that a decision of the Court on the merits could settle the dispute. The legal position of Iceland is in fact recognized by the agreement, and it is reserved - thus left outside the agreement. If Iceland had tacitly accepted that the Court should be empowered to settle the dispute on the merits, which it has always refused to do, it would thus have recognized the jurisdiction of the Court. That amounts to saying that it would have granted what in its eye was a favourable position to the United Kingdom for two years, and in addition recognized that the Court would give judgment on the merits of a dispute as to which Article 7 of the agreement indicates that the Parties are aware that it will no doubt be still in existence in November 1975: "Its termination [that of the agreement] will not affect the legal position of either Government with respect to the substantive dispute". Comparison of this Article 7 with the first paragraph

seems to me to leave no room for doubt. Furthermore, the history of Article 7 was already available in a British document *(White Book.* Ann. A. Doc. 9) which reproduces the counter-proposals for an interim agreement made by the United Kingdom on 3-4 May 1973 in the course of talks in Reykjavik. The Icelandic ministers had asked that at these talks the question should be examined whether, if an interim arrangement were agreed, the proceedings before the Court could be suspended *(White Book,* Ann. A, Doc. 6 (f), p. 16). The draft counter-proposal of the United Kingdom shows how the negotiations went on this point *(White Book,* Ann. A, doc. 9, para. 6) and my colleague, Judge Petrén has demonstrated in his dissenting opinion that Iceland refused to accept a form of words for Article 7 which would have provided for an obligation to negotiate with the United Kingdom on the merits before November 1975; that obligation having been formally excluded, it is impossible to go against the clear text of the treaty and impose it. The 1973 agreement, which maintains the legal position of the Parties as they stand at present and as they may be in November 1975, therefore prevents the bilateral obligation to negotiate pronounced by the Court from having any effect. The two Governments could of course decide to negotiate tomorrow, if they so wish, but there is nothing to oblige them to do so, and the 1973 agreement recognizes this.

This is not all. The general considerations in subparagraph 4 of the operative clause of the Judgment, being intended for bilateral Anglo-Icelandic negotiations, are in danger of being overtaken by events by November 1975. If it is suggested that before November 1975 the United Kingdom could come back to the Court, in one way or another, I should explain briefly that it seems to me that the position is otherwise.

30. The Judgment (subpara. 4 of the operative clause) is not applicable until 1975, since the interim settlement for British fishing was reached with the reservation of any settlement on the merits. This again confirms the abstract, not to say illusory, aspect of this final part of the operative clause. It also follows from this that any change in international law in this field will render the Judgment obsolete.

Paragraph 76 of the Judgment states that the agreement of November 1973 does not relieve the Parties from their obligation to negotiate; even if such a bilateral obligation existed, which has here been contested, the 1973 agreement broke new ground, where modification is not possible, as defined in the following way by the Prime Minister of the United Kingdom in the House of Commons:

> "Our position at the World Court remains exactly as it is, and the agreement is without prejudice to the case of either country in this matter. This is an interim agreement covering two years from the moment of signature this afternoon, in the expectation that the Conference on the Law of the Sea will be able to reach firm conclusions. We all know the difficulties facing a conference on the law of the sea, but *both governments hope that it will have been possible by the expiration of this agreement to reach agreement on the law of the sea and that that will then govern the situation". (Hansard, Commons,* 13 November 1973, column 252; emphasis added).

If the British Government recognizes that the agreement is without prejudice to the legal position of the Icelandic Government, and is not contemplating any possibility prior to the expiration of the agreement other than general agreement on the law of the sea in connection with the proceedings of the Third Conference on the Law of the Sea, it definitely appears that the two governments considered that the 1973 agreement "relieved" them from bilateral negotiation for so long as no general agreement has been reached in the general framework of the proceedings in progress. These statements would also appear to exclude the hypothesis of any return to the Court prior to the termination of the agreement of November 1973, to seek judgment on the substantive dispute, which is agreed to be reserved.

. . . .

32. In effect the Judgment decides that Iceland did not have the right to extend its fisheries limits from 12 to 50 miles on grounds of conservation, which will be generally conceded, but this is to choose a ground which is not that of Iceland, after having avoided deciding that, in the present state of existing law, the extension to 50 miles is not opposable to the fishing States, whatever ground may be relied on for such an extension, including the interests of Iceland as it has explained them; but to disregard a line of argument amounts to rejecting it. Then, sticking to this single theme of conservation, the Court constructs for the two parties to a dispute a system of consultation on conservation problems as if the solution of these could take the place of the only decision which was contemplated in 1961, namely that on the lawfulness of any fresh extension of limits beyond 12 miles. To respond to a dispute over a claim to exclusive jurisdiction by giving guidelines for a conservation agreement is not a fulfillment of the Court's task; even if the Court thought that the question raised under the agreement was too narrow, it is the question which was defined by the parties. An agreement can never define anything other than what was subject to negotiation at the appropriate time between the parties who concluded it; as the Court has said: "no party can impose its terms on the other party" *(I.C.J. Reports 1950,* p. 139). Nor can a court impose its interpretation of an agreement on the States which concluded it, so as to make it saying something more than, or something different from, what it say. Here again the Court has already spoken:

> "... though it is certain that the Parties, being free to dispose of their rights, might ... embody in their agreement any provisions they might devise..., it in no way follows that the Court enjoys the same freedom; as this freedom, being contrary to the proper functions of the Court, could in any case only be enjoyed by it if such freedom resulted from a clear and explicit provision..." *(Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24,* p. 11).

33. By centering its decision around problems of conservation which are not the subject of the dispute which arose in 1972 as a result of Iceland's extension of its fisheries jurisdiction from 12 to 50 miles,the Court has raised an abstract question to which it has given, in the last part of the operative clause of the Judgment, an abstract reply. In contentious cases, the Court is bound by what it is asked to adjudge; when it applies Article 53 of the Statute, the rule is still stricter, since the Court must satisfy itself that it is not going further or in a direction other than what was agreed to by the State which is absent from the proceedings, in the instrument which established the competence of the tribunal. Thus the Court observed in the *Ambatielos* case that: "in the absence of a clear agreement between the Parties ... the Court has no jurisdiction to go into all the merits of the present case" *(I.C.J. Reports* 1952, p. 39); the least that can be said is that the problems of conservation were not the subject of such discussion in 1960 between the United Kingdom and Iceland, and that it is difficult to see by what unequivocal agreement it could have become a dispute in itself under the Exchange of Notes of 1961.

34. The Court has not fulfilled its mission in the present case, since it has not decided the legal question which the Parties to the 1961 agreement had envisaged laying before it, for purposes which they were free to decide upon, and since it has dealt with the problem of the conservation of Icelandic fisheries as being the substance of the dispute. Such a judgement cannot therefore be effective for the settlement of the real substantive dispute, even if there were an intention to achieve this, as appears from paragraph 48 and from certain covert allusions in the text.

The real task of the Court is still to "decide in accordance with international law such disputes as are submitted to it" (Art. 38 of the Statute). To introduce into international relations an idea that the decisions of the Court may be given according to what on each occasion the majority thought to be both just and convenient, would be to effect a profound transformation. It will be sufficient to quote the Court itself:

> "Having thus defined ... the legal relations between the Parties ..., the Court has completed its task. It is unable to give any practical advice as to the various courses which might be followed with a view to terminating the asylum, since, by doing so, it would depart from its judicial function. But it can be assumed that the Parties, now that their mutual legal relations have been made clear, will be able to find a practical ... solution ..." *(I.C.J. Reports 1951,* p. 83).

That this new concept must be rejected as in contradiction with the role of an international tribunal appears to me to be clear, simply from the observation that an international court is not a federal tribunal; the States - of which there are now not many - which come before the Court do not do so to receive advice, but to obtain judicial confirmation of the treaty commitments which they have entered into, according to established international law, in relation to a situation with which they are well acquainted. The court saw all this in the Judgment in the *Fisheries* case, in which the special nature of the situation was the dominant feature in the decision *(I.C.J. Reports 1951, Judgment of 18 December 1951);* by seeking to effect, under cover of a case limited to Icelandic fisheries, a pronouncement of universal effect, the Court contradicts its whole previous attitude. As long ago as 1963, Charles De Visscher wrote in his commentary on judicial interpretation:

> "The function of interpretation is not to perfect a legal instrument with a view to adapting it more or less precisely to what one may be tempted to envisage as the full realisation of an objective which was logically postulated, but to shed light on what was in fact the will of the Parties".

There could be no better response to the philosophy which inspires the Judgment and the postulates it contains (particularly paras. 44-48).

(Signed) André GROS.

DISSENTING OPINION OF JUDGE PETRÊN

[Translation]

It must be concluded that the interim agreement definitively regulated the conditions under which British vessels have the right to fish in the disputed area between 13 November 1973 and 13 November 1975. A judgment of the kind sought by the British government could therefore not be implemented before the expiry of the interim agreement. What the United Kingdom is requesting of the Court is to state the law which would have been applicable to the relations between the Parties in the event that they had not concluded that agreement. Yet the essence of the judicial function is to declare the law between the Parties as it exists, and not to declare what the law would have been if the existing law had not existed. The conclusion of the interim agreement has therefore had the effect of rendering the Application of

the United Kingdom without object so far as the period covered by the agreement is concerned.

As for the period which will begin on the expiry of the interim agreement, i.e., on 13 November 1975, it is clear to me, above all after the explanations obtained during the oral proceedings, that the application of the United Kingdom is tantamount to a request that the Court should define the customary international law which should govern the conditions under which British vessels will then be able to fish in the disputed area. Is it possible for the Court to accede to such a request?

Like all domains of law, the law of the sea is subject to evolution. New multilateral or bilateral international conventions come into being, and customary law is modified. It is undeniable that one of the possible results of the Third Conference on the Law of the Sea, which is being held at this moment, will be a clarification or modification of the rules governing the fisheries jurisdiction of coastal States.

. . . .

[G]iven the impossibility of foreseeing the changes which, even in the near future, may affect an actively evolving field of law, I find that there is no certainty on which the Court can base its judgment: there is a very real possibility that a claim which at the present moment has no legal justification may prove tomorrow to be well founded. The Court ought therefore to decline any request which in effect calls upon it to declare the customary law of the future.

I am unable to agree with the view, expounded in paragraph 41 of the Judgment, that for the Court to espouse the above conclusions would inevitably result in discouraging the making of interim arrangements in future disputes with the object of reducing friction and avoiding risk to peace and security. To my mind this argument, applied to the present case, overlooks the fact that the interim agreement between the Parties will remain in force after the delivery of the Judgment and that the Application does not request the Court to interpret a treaty of immutable verbal content but to pronounce upon the future of a customary law in active evolution. If the interim agreement were destined to expire on the date of the Judgment, no difficulty would have arisen, and if the dispute concerned the interpretation of a treaty, an interim agreement concerning its application over a given period would not hinder the Court from ruling before the end of that period on the interpretation and future application of the treaty.

However, in subparagraphs 3 and 4 of the operative part of the Judgment, the Court finds that the Parties are under mutual obligations to undertake negotiations concerning their respective fishery rights in the disputed area, negotiations in which they must take into account *inter alia* certain preferential rights attributable to Iceland. As the Court's jurisdiction to deal with the present case is founded solely on the jurisdictional clause of the 1961 Exchange of Notes, and as that clause concerns only the question whether a future extension by Iceland of its zone of exclusive fisheries jurisdiction would be in conformity with international law, I consider that the Court, by imposing on the Parties an obligation to negotiate in respect of something else, has exceeded the limits of its jurisdiction.

But that is not the only reason why I consider that the Court is not competent to prescribe negotiations between the Parties.

The written reply to a question put to the Agent of the United Kingdom reveals that the British negotiators first proposed the following form of words for paragraph 7 of the interim agreement of 13 November 1973:

> "The agreement will run for two years from the present date. The Governments will reconsider the position before that term expires unless they have in the meantime agreed to a settlement of the substantive dispute. In the absence of such a settlement, the termination of this agreement will not affect the legal position of either Government with respect to the substantive dispute".

The Government of Iceland, however, requested the deletion of the central portion of this text, and paragraph 7 was finally drafted in the following terms:

> "The agreement will run for two years from the present date. Its termination will not affect the legal position of either Government with respect to the substantive dispute".

To my mind, the deletion, at the request of the Icelandic Government, of the reference to a reconsideration of the position before the expiry of the interim agreement and to the possibility of agreeing in the meantime to a settlement of the substantive dispute constitutes incontrovertible evidence that Iceland did not accept any obligation to enter into fresh negotiations with the United Kingdom for so long as the interim agreement remained in force. Consequently, if Iceland prefers to concentrate upon the new Conference on the Law of the Sea without at the same time negotiating bilaterally with the United Kingdom, there is nothing to oblige it to enter into such negotiations.

In my view, it is impossible to overthrow this conclusion by quoting the *North Sea Continental Shelf* Judgment, as paragraph 75 of the present Judgment does. It must be recalled that the circumstances of the present case are very different from those of *North Sea Continental Shelf*, in which the Parties, by common agreement, had requested the Court to indicate the principles and rules of

international law applicable to their dispute and had undertaken to conclude an agreement in accordance with the Court's decision. Neither is it, I feel, possible to regard my interpretation of the interim agreement of 13 November 1973 as contrary to the Charter of the United Nations, which also is appealed to in paragraph 75 of the Judgment. However great the importance ascribed by the Charter to negotiations as a peaceful means for the settlement of disputes, States remain perfectly free to choose other peaceful means. There is nothing surprising in the fact that Iceland, on the eve of the new Conference on the Law of the Sea, should have refused to accept an obligation to continue negotiations with the United Kingdom at bilateral level. As for the Althing resolution of 15 February 1972, cited in paragraph 77 of the Judgment as ruling out my interpretation of the interim agreement, I consider, like my colleague Judge Gros and for the same reasons, that the Court attributes to this resolution a meaning which it does not possess. My view, in brief, is that the particular circumspection and special care with which the Court considers it has acted in regard to Iceland (see para. 17 of the Judgment) should have precluded its outright rejection of an interpretation of the agreement, on that point, which, given the prenatal history of that instrument, I personally find inescapable.

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For all these reasons, I consider that the Application of the United Kingdom is without object with regard both to the period from 13 November 1973 to 13 November 1975 and to the subsequent period.

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There remains the period between the putting into effect of the Icelandic Regulations which are in dispute (1 September 1972) and the coming into force of the interim agreement (13 November 1973). In my view, it is only so far as that period is concerned that is it necessary to consider whether Iceland's extension of its fishery zone was from the beginning, and subsequently remained, contrary to international law. It was, moreover, solely in relation to the situation during that period that I found it necessary to consider those aspects of the present case with which I dealt in the first part of this dissenting opinion.

As there does not exist between the two States any convention on which Icelandic decision could be founded, Iceland could seek its justification only in customary international law. The first two United Nations Conferences on the Law of the Sea amply demonstrated that no such general rule of customary international law existed in 1958-1960. If there is any general customary rule that Iceland can rely on, it must have come into being since 1960. Let us therefore consider what evolution may have taken place.

It is true that an increasing number of coastal States, whether by proclaiming the extension of their territorial waters or by claiming fishery zones beyond those waters, have claimed an exclusive fisheries jurisdiction extending up to the 50-mile or even the 200-mile limit. Nevertheless, even if one confines one's attention to the zone lying between the 12-mile and the 50-mile limits, the number of States that have claimed exclusive fisheries jurisdiction therein cannot be considered sufficiently large to justify the conclusion that a new rule of law, generally accepted as valid by the international community, is being applied. Furthermore, the States whose interests are threatened by these claims have constantly protested. Hence another agreement which is necessary to the formation of a new rule of customary law is missing, namely its acceptance by those States whose interests it affects.

In the course of the proceedings before the Court, attention has been drawn to the recent resolutions of the United Nations organs concerning permanent sovereignty over natural resources. In its resolution 3016 (XXVII) of 18 December 1972, the General Assembly reaffirmed the right of States to permanent sovereignty over all their natural resources, on land within their national boundaries as well as those found in the sea-bed and the subsoil thereof within their national jurisdiction *and in the superjacent waters.* Approved by 102 votes to 0 with 22 abstentions, this resolution was followed by a recommendation and another resolution in similar terms, the first being adopted by the Committee on Natural Resources of the Economic and Social Council, and the second by the Economic and Social Council itself. the content of these texts, which are of more recent date than the Application instituting the present proceedings, differs on one fundamental point from the Geneva Convention on the Continental Shelf, whose provisions are generally regarded as codifying the law accepted around 1958: the Convention does not attribute to the coastal State any exclusive fishing rights with regard to fish swimming in the waters above the continental shelf.

The General Assembly resolution is of special interest in the present proceedings, for Iceland has referred to the doctrine of the continental shelf as being the legal basis of the contested extension of its fishery zone. The question is therefore whether the innovation represented by the reference to superjacent waters in the General Assembly resolution has had the effect of conferring upon the coastal State a jurisdiction not inherent in the original concept of the continental shelf, which would be equivalent to the sudden creation of a new rule of customary law. Now, without having to go into the general question of whether a resolution of the General Assembly can create new law, I must at all events stress one prerequisite of such creation, namely that the States vot-

ing for the resolution must truly have envisaged and accepted the possibility of its immediately acquiring binding force. But the complexity of the circumstances in which resolution 3016 (XXVII) was adopted, the statements accompanying the vote and the well-known attitude of certain States regarding fishery zones do not justify the conclusion that the resolution was passed by a large majority of States with the intention of creating a new binding rule of law and of prejudging whatever decision the Third Conference on the Law of the Sea might take on the subject. However revelatory the resolution may be of a current of opinion flowing in favour of the claims of Iceland and other States, its adoption by the General Assembly could not have sufficed to transform the existing law and give birth to a new general rule of customary law conferring on the coastal State exclusive fisheries jurisdiction in the waters above its continental shelf. This remark applies *a fortiori* to the various expressions of doctrinal position or opinion volunteered by States during the preparatory stage before the Conference.

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For the foregoing reasons I consider that the submissions put forward and maintained by the United Kingdom should have been rejected as without object, except in relation to the period between Iceland's implementation of the extension of its zone of exclusive fisheries jurisdiction up to the 50-mile limit (1 September 1972) and the coming into force of the interim agreement between the Parties (13 November 1973). Considering as I do that the measure decided by Iceland was without foundation in international law, I find that its application to British fishing vessels during the above-mentioned period constituted an infringement of international law vis-à-vis the United Kingdom. In the light of the considerations I have put forward above, this finding does not mean that, on the termination of the interim agreement concluded between the Parties on 13 November 1973, the extension of Iceland's fishery zone should automatically be considered as still inconsistent with international law.

The system of the Judgment did not however enable me to cast a vote expressing my position in regard to the period from 1 September 1972 to 13 November 1973. The reason is twofold: no distinction is made between different periods of application of the Icelandic measure and, in declaring that measure non-opposable to the United Kingdom, the Court bases itself solely on considerations concerning the historic rights of the United Kingdom and studiously avoids pronouncing upon the only question in respect of which the 1961 agreement conferred jurisdiction upon it, that of the conformity with international law of the extension of Iceland's fishery zone.

No other course was therefore left to me but to vote against the Judgment in its entirety.

(Signed) S. PETRÉN.

DISSENTING OPINION OF JUDGE ONYEAMA

16. In the forefront of the submissions of the United Kingdom in the Application and in the Memorial on the merits was a request for a decision by the Court that there is no foundation in international law for the claim by Iceland to be entitled to extend its fisheries jurisdiction by establishing a zone of exclusive fisheries jurisdiction extending to 50 nautical miles. This, it seems to me, was the gravamen of the dispute, but the Court now declines to decide it. The decision appears to approach the dispute, not from the point of view of the conflict of the extension with any conventions or with customary international law, but from the point of view that the extension was an exercise of preferential rights which did not give due regard to established rights. This was not the dispute between the parties and it forms no part of the claim made by Iceland.

17. I am of the opinion that Article 2 of the High Seas Convention and Article 3 of the Continental Shelf Convention[2] provide a basis in positive international law for deciding that the extension has no basis in international law; and the Court, having found that the concept of the fishery zone, and the extension of that fishery zone up to a 12-mile limit from baselines, appear now to be generally accepted[3] as customary international law, should have drawn the conclusion that the unilateral extension to a 50-mile limit by Iceland with which this case is concerned is contrary to international law, and stated that conclusion in the operative clause of the Judgment.

By introducing the concept of preferential rights into the case and linking its Judgment[4] with this concept, the Court, in my view, took cognizance of matters which were not in dispute between the Parties and which were not covered by the compromissory clause of the Exchange of Notes of 1961.

As I have endeavoured to point out, the discussions preceding the Exchange of Notes did not indicate that any concern was felt about the future application of conservation measures outside the 12-mile limit then agreed.

[2] "The coastal State has no jurisdiction over the superjacent waters"[of the continental shelf] (*I.C.J. Reports 1969*, p. 37, para. 59).

[3] See para. 52 of the Judgment.

[4] Operative part, subparas. 3 and 4.

18. In the discussions after the promulgation of the Regulations which purported to extend Iceland's fishery jurisdiction to 50 miles form the existing baselines, Iceland appeared to be interested only in a temporary arrangements with the United Kingdom, and not in any permanent bilateral or multilateral conservation or catch-limitation arrangement in which it would be entitled to exercise preferential rights and other interested States would continue to fish in the area.

19. Thus, in a Note dated 11 August 1972, that is after the filing of the Application in this case and the hearing of oral argument on the Request for the indication of interim measures of protection, the Government of Iceland made certain proposals to the Government of the United Kingdom and requested "positive replies to two fundamental points"[1].

This Note forms part of a series of proposals and counter-proposals which passed between the two Governments in their endeavour to work out an acceptable interim arrangement "which would last only until the Court had given its decision on the legality of the proposed action by the Government of Iceland or until that question had been disposed of in some other way"[2].

It would, I think, be wrong to regard these proposals and counter-proposals, which were clearly related to negotiations for an interim régime, as indicative of the nature of the original dispute which had, in fact, crystallized with the filling of the Application.

20. Iceland's disinclination to contemplate the concept of preferential rights in the waters in question was brought out very sharply at the eleventh meeting of the North-East Atlantic Fisheries Commission in London on 9 May 1973. On the question of the activation of Article 7 (2)[3] of the Convention[4] the Summary Record of the Second Session has the following, *inter alia:*

"The Icelandic delegate reported that on account of the extension of Icelandic fishery limits to 50-miles and the activities of some countries within the limits the Icelandic Government had reconsidered the position and had decided to postpone the activation of Article 7(2). In reply to a question from the President, the Icelandic delegate said he was unable to say when his Government would ratify Article 7 (2) powers. *The Icelandic Government believed that coastal States had prime responsibility to manage and prior rights to use marine resources off their coasts. Catch quotas appeared to conflict with these rights* and the problem would be raised at next year's Law of the Sea Conference which was the only forum for discussion of it. It would be very difficult for Iceland to accept a catch quota system which did not harmonize with its policy in regard to fishery limits". (Emphasis added).

21. Iceland has not, so far as I can see, asserted any claim to preferential rights in the area in question; on the other hand, the United Kingdom has always stood ready to concede such rights if they were asserted on conservation grounds and in circumstances of catch-limitations. It does not appear to me to be possible to have a dispute where there is no difference on a common issue between the parties, or where a right is conceded. The Permanent Court of International Justice defines a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons[1]". As I understand it, for a dispute to exist, it should clearly appear that the claim of one party is positively opposed by the other, and it is not sufficient merely for it to appear that the interests of the two parties are in conflict.

22. The claim clearly put forward and positively opposed in this case is Iceland's entitlement under international law to extend its exclusive fishery jurisdiction to 50 miles from the baselines around its coast; that was the point which this Court decided it had jurisdiction to determine.

23. The Court derives its jurisdiction in this case from the compromissory clause of the Exchange of Notes of 1961. I think the words "in relation to such extension" in that clause cannot reasonably be interpreted as including disputes about conservation, catch-limitations and preferential rights (which are not susceptible of unilateral delimitation) within the range of disputes the Parties agreed to refer to the Court; and in deciding that the Parties were obliged to negotiate these matters, the Court, to my mind, exceeded the jurisdiction conferred on it by the Exchange of Notes and settled a non-existent dispute.

(Signed) Charles D. ONYEAMA

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[1] See Annex 10 to the Memorial on the merits.

[1] Memorial on the merits, para. 31.

[2] "Measures for regulating the amount of total catch, or the amount of fishing effort in any period, or any other kinds of measures for the purpose of the conservation of the fish stocks in the Convention area, may be added to the measures listed in paragraph 1 of this Article on a proposal adopted by not less than a two-thirds majority of the Delegations present and voting and subsequently accepted by all Contracting States in accordance with their respective constitutional procedures".

[4] The North-East Atlantic Fisheries Convention of 1959.

[1] P.C.I.J., Series A, No.2, p. 11.

CASE CONCERNING THE GABCIKOVO-NAGYMAROS PROJECT (HUNGARY/SLOVAKIA)

25 September 1997 General List No.92

Treaty of 16 September 1977 concerning the construction and operation of the Gabcikovo-Nagymaros System of Locks — "Related instruments".

Suspension and abandonment by Hungary, in 1989, of works on the Project — Applicability of the Vienna Convention of 1969 on the Law of Treaties — Law of treaties and law of State responsibility — State of necessity as a ground for precluding the wrongfulness of an act — "Essential interest" of the State committing the act — Environment — "Grave and imminent peril" — Act having to constitute the "only means" of safeguarding the interest threatened — State having "contributed to the occurrence of the state of necessity".

Czechoslovakia's proceeding, in November 1991, to "Variant C" and putting into operation, from October 1992, this Variant — Arguments drawn from a proposed principle of approximate application — Respect for the limits of the Treaty — Right to an equitable and reasonable share of the resources of an international watercourse — Commission of a wrongful act and prior conduct of a preparatory character — Obligation to mitigate damages — Principle concerning only the calculation of damages — Countermeasures — Response to an internationally wrongful act — Proportionality — Assumption of unilateral control of a shared resource.

Notification by Hungary, on 19 May 1992, of the termination of the 1977 Treaty and related instruments — Legal effects — Matter falling within the law of treaties — Articles 60 to 62 of the Vienna Convention on the Law of Treaties — Customary law — Impossibility of performance — Permanent disappearance or destruction of an "object" indispensable for execution — Impossibility of performance resulting from the breach, by the party invoking it, of an obligation under the Treaty — Fundamental change of circumstances — Essential basis of the consent of the parties — Extent of obligations still to be performed — Stability of treaty relations — Material breach of the Treaty — Date on which the breach occurred and date of notification of termination — Victim of a breach having itself committed a prior breach of the Treaty — Emergence of new norms of environmental law — Sustainable development — Treaty provisions permitting the parties, by mutual consent, to take account of those norms — Repudiation of the Treaty — Reciprocal non-compliance — Integrity of the rule pacta sunt servanda — Treaty remaining in force until terminated by mutual consent.

Legal consequences of the judgment of the Court — Dissolution of Czechoslovakia — Article 12 of the Vienna Convention of 1978 on Succession of States in respect of Treaties — Customary law — Succession of States without effect on a treaty creating rights and obligations "attaching" to the territory — Irregular state of affairs as a result of failure of both Parties to comply with their treaty obligations — Ex injuria jus non oritur — Objectives of the Treaty — Obligations overtaken by events — Positions adopted by the parties after conclusion of the Treaty — Good faith negotiations — Effects of the Project on the environment — Agreed solution to be found by the Parties — Joint regime — Reparation for acts committed by both Parties — Co-operation in the use of shared water resources — Damages — Succession in respect of rights and obligations relating to the Project — Intersecting wrongs — Settlement of accounts for the construction of the works.

JUDGMENT

Present: President SCHWEBEL; Vice-President WEERAMANTRY; Judges ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, PARRA-ARANGUREN, KOOIJMANS, REZEK; Judge ad hoc SKUBISZEWSKI; Registrar VALENCIA-OSPINA.

In the case concerning the Gabcikovo-Nagymaros Project,

between

the Republic of Hungary,

represented by

H.E. Mr. György Szénási, Ambassador, Head of the International Law Department, Ministry of Foreign Affairs,

as Agent and Counsel;

H.E. Mr. Dénes Tomaj, Ambassador of the Republic of Hungary to the Netherlands,

as Co-Agent;

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge,

Mr. Pierre-Marie Dupuy, Professor at the University Panthéon-Assas (Paris II) and Director of the *Institut des hautes études internationales* of Paris,

Mr. Alexandre Kiss, Director of Research, *Centre national de la recherche scientifique (ret.)*,

Mr. László Valki, Professor of International Law, Eötvös Loránd University, Budapest.

Mr. Boldizsár Nagy, Associate Professor of International Law, Eötvös Loránd University,

Ms Katherine Gorove, consulting Attorney,

as Counsel and Advocates;

Dr. Howard Wheater, Professor of Hydrology, Imperial College, London,

Dr. Gábor Vida, Professor of Biology, Eötvös Loránd University, Budapest, Member of the Hungarian Academy of Sciences,

Dr. Roland Carbiener, Professor emeritus of the University of Strasbourg,

Dr. Klaus Kern, consulting Engineer, Karlsruhe,

as Advocates;

Mr. Edward Helgeson,

Mr. Stuart Oldham,

Mr. Péter Molnár

as Advisers;

Dr. György Kovács

as Technical Advisers;

Dr. Attila Nyikos,

as Assistant;

Mr. Axel Gosseries, LL.M.,

as Translator,

Ms Éva Kocsis,

Ms Katinka Tomba,

as Secretaries,

and

the Slovak Republic,

represented by

H.E. Dr. Peter Tomka, Ambassador, Legal Adviser of the Ministry of Foreign Affairs,

as Agent;

Dr. Václav Mikulka, Member of the International Law Commission,

as Co-Agent, Counsel and Advocate;

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A., Whewell Professor emeritus of International Law at the University of Cambridge, Former Member of the International Law Commission,

as Counsel;

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, Former Member of the International Law Commission,

Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the Institute of Political Studies, Paris, Member of the International Law Commission,

Mr. Walter D. Sohier, Member of the Bar of the State of New York and of the District of Columbia,

Sir Arthur Watts, K.C.M.G., Q.C., Barrister, Member of the Bar of England and Wales,

Mr. Samuel S. Wordsworth, *avocat à la Cour d'appel de Paris*, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley, Paris,

as Counsel and Advocates;

Mr. Igor Mucha, Professor of Hydrogeology and Former Head of the Groundwater Department at the Faculty of Natural Sciences of Comenius University in Bratislava,

Mr. Karra Venkateswara Rao, Director of Water Resources Engineering, Department of Civil Engineering, City University, London,

Mr. Jens Christian Refsgaard, Head of Research and Development, Danish Hydraulic Institute, as Counsel and

Experts.

Dr. Cecilia Kandracova, Director of Department, Ministry of Foreign Affairs,

Mr. Ludek Krajhanzl, Attorney at Law, Vyroubal Krajhanzl Skácel and Partners, Prague,

Mr. Miroslav Liska, Head of the Division for Public Relations and Expertise, Water Resources Development State Enterprise, Bratislava,

Dr. Peter Vrsansky, Minister-Counsellor, Chargé d'affaires a.i., of the Embassy of the Slovak Republic, The Hague.

as Counsellors;

Miss Anouche Beaudouin,*allocataire de recherche* at the University of Paris X-Nanterre,

Ms Cheryl Dunn, Frere Cholmeley, Paris,

Ms Nikoleta Glindova, *attachée*, Ministry of Foreign Affairs,

Mr. Drahoslav Stefánek, *attaché*, Ministry of Foreign Affairs,

as Legal Assistants.

THE COURT

composed as above.

delivers the following Judgment:

1. By a letter dated 2 July 1993, filed in the Registry of the Court on the same day, the Ambassador of the Republic of Hungary (hereinafter called "Hungary") to the Netherlands and the Chargé d'affaires *ad interim* of the Slovak Republic (hereinafter called "Slovakia") to the Netherlands jointly notified to the Court a Special Agreement in English that had been signed at Brussels on 7 April 1993 and had entered into force on 28 June 1993, on the date of the exchange of instruments of ratification.

2. The text of the Special Agreement reads as follows:

"*The Republic of Hungary and the Slovak Republic*,

Considering that differences have arisen between the Czech and Slovak Federal Republic and the Republic of Hungary regarding the implementation and the termination of the Treaty on the Construction and Operation of the Gabcikovo-Nagymaros Barrage System signed in Budapest on 16 September 1977 and related instruments (hereinafter referred to as "the Treaty"), and on the construction and operation of the "provisional solution";

Bearing in mind that the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabcikovo-Nagymaros Project;

Recognizing that the Parties concerned have been unable to settle these differences by negotiations;

Having in mind that both the Czechoslovak and Hungarian delegations expressed their commitment to submit the differences connected with the Gabcikovo-Nagymaros Project in all its aspects to binding international arbitration or to the International Court of Justice;

Desiring that these differences should be settled by the International Court of Justice,

Have agreed as follows:

Article 1

The Parties submit the questions contained in Article 2 to the International Court of Justice pursuant to Article 40, paragraph 1, of the Statute of the Court.

Article 2

(1) The Court is requested to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable,

(a) whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the "provisional solution" and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

(c) what are the legal effects of the notification, on 19

May 1992, of the termination of the Treaty by the Republic of Hungary.

(2) The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this Article.

Article 3

(1) All questions of procedure and evidence shall be regulated in accordance with the provisions of the Statute and the Rules of Court.

(2) However, the Parties request the Court to order that the written proceedings should consist of:

(a) a Memorial presented by each of the Parties not later than ten months after the date of notification of this Special Agreement to the Registrar of the International Court of Justice;

(b) a Counter-Memorial presented by each of the Parties not later than seven months after the date on which each has received the certified copy of the Memorial of the other Party;

(c) a Reply presented by each of the Parties within such time-limits as the Court may order;

(d) The Court may request additional written pleadings by the Parties if it so determines.

(3) The above-mentioned parts of the written proceedings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the corresponding part of the proceedings from the said Party.

Article 4

(1) The Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management régime for the Danube.

(2) They further agree that, in the period before such a régime is established or implemented, if either Party believes its rights are endangered by the conduct of the other, it may request immediate consultation and reference, if necessary, to experts, including the Commission of the European Communities, with a view to protecting those rights; and that protection shall not be sought through a request to the Court under Article 41 of the Statute.

(3) This commitment is accepted by both Parties as fundamental to the conclusion and continuing validity of the Special Agreement.

(1) The Parties shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

(2) Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution.

(3) If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

Article 6

(1) The present Special Agreement shall be subject to ratification.

(2) The instruments of ratification shall be exchanged as soon as possible in Brussels.

(3) The present Special Agreement shall enter into force on the date of exchange of instruments of ratification. Thereafter it will be notified jointly to the Registrar of the Court.

In witness whereof the undersigned being duly authorized thereto, have signed the present Special Agreement and have affixed thereto their seals."

3. Pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the notification and of the Special Agreement were transmitted by the Registrar to the Secretary-General of the United Nations, Members of the United Nations and other States entitled to appear before the Court.

4. Since the Court included upon the Bench no judge of Slovak nationality, Slovakia exercised its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case; it chose Mr. Krzysztof Jan Skubiszewski.

5. By an Order dated 14 July 1993, the Court fixed 2 May 1994 as the time-limit for the filing by each of the Parties of a Memorial and 5 December 1994 for the filing by each of the Parties of a Counter-Memorial, having regard to the provisions of Article 3, paragraph 2 *(a)* and *(b)*, of the Special Agreement. Those pleadings were duly filed within the prescribed time-limits.

6. By an Order dated 20 December 1994, the President of the Court, having heard the Agents of the Parties, fixed 20 June 1995 as the time-limit for the filing of the Replies, having regard to the provisions of Article 3, paragraph 2 *(c)*, of the Special Agreement. The Replies were

duly filed within the time-limit thus prescribed and, as the Court had not asked for the submission of additional pleadings, the case was then ready for hearing.

7. By letters dated 27 January 1997, the Agent of Slovakia, referring to the provisions of Article 56, paragraph 1, of the Rules of Court, expressed his Government's wish to produce two new documents; by a letter dated 10 February 1997, the Agent of Hungary declared that his Government objected to their production. On 26 February 1997, after having duly ascertained the views of the two Parties, the Court decided, in accordance with Article 56, paragraph 2, of the Rules of Court, to authorize the production of those documents under certain conditions of which the Parties were advised. Within the time-limit fixed by the Court to that end, Hungary submitted comments on one of those documents under paragraph 3 of that same Article. The Court authorized Slovakia to comment in turn upon those observations, as it had expressed a wish to do so; its comments were received within the time-limit prescribed for that purpose.

8. Moreover, each of the Parties asked to be allowed to show a video cassette in the course of the oral proceedings. The Court agreed to those requests, provided that the cassettes in question were exchanged in advance between the Parties, through the intermediary of the Registry. That exchange was effected accordingly.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after having ascertained the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

10. By a letter dated 16 June 1995, the Agent of Slovakia invited the Court to visit the locality to which the case relates and there to exercise its functions with regard to the obtaining of evidence, in accordance with Article 66 of the Rules of Court. For his part, the Agent of Hungary indicated, by a letter dated 28 June 1995, that, if the Court should decide that a visit of that kind would be useful, his Government would be pleased to co-operate in organizing it. By a letter dated 14 November 1995, the Agents of the Parties jointly notified to the Court the text of a Protocol of Agreement, concluded in Budapest and New York the same day, with a view to proposing to the Court the arrangements that might be made for such a visit *in situ*; and, by a letter dated 3 February 1997, they jointly notified to it the text of Agreed Minutes drawn up in Budapest and New York the same day, which supplemented the Protocol of Agreement of 14 November 1995. By an Order dated 5 February 1997, the Court decided to accept the invitation to exercise its functions with regard to the obtaining of evidence at a place to which the case relates and, to that end, to adopt the arrangements proposed by the Parties. The Court visited the area from 1 to 4 April 1997; it visited a number of locations along the Danube and took note of the technical explanations given by the representatives who had been designated for the purpose by the Parties.

11. The Court held a first round of ten public hearings from 3 to 7 March and from 24 to 27 March 1997, and a second round of four public hearings on 10, 11, 14 and 15 April 1997, after having made the visit *in situ* referred to in the previous paragraph. During those hearings, the Court heard the oral arguments and replies of:

For Hungary:
H.E. Mr. Szénási,
Professor Valki,
Professor Kiss,
Professor Vida,
Professor Carbiener,
Professor Crawford,
Professor Nagy,
Dr. Kern,
Professor Wheater,
Ms Gorove,
Professor Dupuy,
Professor Sands.

For Slovakia:
H.E. Dr. Tomka,
Dr. Mikulka,
Mr. Wordsworth,
Professor McCaffrey,
Professor Mucha,
Professor Pellet,
Mr. Refsgaard,
Sir Arthur Watts.

12. The Parties replied orally and in writing to various questions put by Members of the Court. Referring to the provisions of Article 72 of the Rules of Court, each of the Parties submitted to the Court its comments upon the replies given by the other Party to some of those questions.

On behalf of Hungary,

in the Memorial, the Counter-Memorial and the Reply (*mutatis mutandis* identical texts):

"On the basis of the evidence and legal argument presented in the Memorial, Counter-Memorial and this Reply, the Republic of Hungary

Requests the Court to adjudge and declare

First, that the Republic of Hungary was entitled to suspend and subsequently abandon the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

Second, that the Czech and Slovak Federal Republic was not entitled to proceed to the 'provisional solution' (damming up of the Danube at river kilometres 1,851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

Third, that by its Declaration of 19 May 1992, Hungary validly terminated the Treaty on the Construction and Operation of the Gabcikovo-Nagymaros Barrage System of 16 September 1977;

Requests the Court to adjudge and declare further

that the legal consequences of these findings and of the evidence and the arguments presented to the Court are as follows:

(1) that the Treaty of 16 September 1977 has never been in force between the Republic of Hungary and the Slovak Republic;

(2) that the Slovak Republic bears responsibility to the Republic of Hungary for maintaining in operation the 'provisional solution' referred to above;

(3) that the Slovak Republic is internationally responsible for the damage and loss suffered by the Republic of Hungary and by its nationals as a result of the 'provisional solution';

(4) that the Slovak Republic is under an obligation to make reparation in respect of such damage and loss, the amount of such reparation, if it cannot be agreed by the Parties within six months of the date of the Judgment of the Court, to be determined by the Court;

(5) that the Slovak Republic is under the following obligations:

(a) to return the waters of the Danube to their course along the international frontier between the Republic of Hungary and the Slovak Republic, that is to say the main navigable channel as defined by applicable treaties;

(b) to restore the Danube to the situation it was in prior to the putting into effect of the provisional solution; and

(c) to provide appropriate guarantees against the repetition of the damage and loss suffered by the Republic of Hungary and by its nationals."

On behalf of Slovakia:

in the Memorial, the Counter-Memorial and the Reply (*mutatis mutandis* identical texts):

"On the basis of the evidence and legal arguments presented in the Slovak memorial, Counter-Memorial and in this Reply, and reserving the right to supplement or amend its claims in the light of further written pleadings, the Slovak Republic

Requests the Court to adjudge and declare:

1. That the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabcikovo/Nagymaros System of Locks, and related instruments, and to which the Slovak Republic is the acknowledged successor, is a treaty in force and has been so from the date of its conclusion; and that the notification of termination by the Republic of Hungary on 19 May 1992 was without legal effect.

2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabcikovo Project for which the 1977 Treaty attributed responsibility to the Republic of Hungary.

3. That the act of proceeding with and putting into operation Variant C, the 'provisional solution', was lawful.

4. That the Republic of Hungary must therefore cease forthwith all conduct which impedes the full and *bona fide* implementation of the 1977 Treaty and must take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty.

5. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary is liable to pay, and the Slovak Republic is entitled to receive, full compensation for the loss and damage caused to the Slovak Republic by those breaches, plus interest and loss of profits, in the amounts to be determined by the Court in a subsequent phase of the proceedings in this case."

14. In the oral proceedings, the following submissions were presented by the Parties

On behalf of Hungary,

at the hearing of 11 April 1997:

The submissions read at the hearing were *mutatis mutandis* identical to those presented by Hungary during the written proceedings.

On behalf of Slovakia:

at the hearing of 15 April 1997:

"On the basis of the evidence and legal arguments presented in its written and oral pleadings, the Slovak Republic,

Requests the Court to adjudge and declare:

1. That the Treaty, as defined in the first paragraph of the Preamble to the Compromise between the Parties, dated 7 April 1993, concerning the construction and operation of the Gabcikovo/Nagymaros System of Locks and related instruments, concluded between Hungary and Czechoslovakia and with regard to which the Slovak Republic is the successor State, has never ceased to be in force and so remains, and that the notification of 19 May 1992 of purported termination of the Treaty by the Republic of Hungary was without legal effect;

2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabcikovo Project for which the 1977 Treaty attributes responsibility to the Republic of Hungary;

3. That the Czech and Slovak Federal Republic was entitled, in November 1991, to proceed with the 'provisional solution' and to put this system into operation from October 1992; and that the Slovak Republic was, and remains, entitled to continue the operation of this system;

4. That the Republic of Hungary shall therefore cease forthwith all conduct which impedes the *bona fide* implementation of the 1977 Treaty and shall take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty, subject to any amendments which may be agreed between the Parties;

5. That the Republic of Hungary shall give appropriate guarantees that it will not impede the performance of the Treaty, and the continued operation of the system;

6. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary shall, in addition to immediately resuming performance of its Treaty obligations, pay to the Slovak Republic full compensation for the loss and damage, including loss of profits, caused by those breaches together with interest thereon;

7. That the Parties shall immediately begin negotiations with a view, in particular, to adopting a new timetable and appropriate measures for the implementation of the Treaty by both Parties, and to fixing the amount of compensation due by the Republic of Hungary to the Slovak Republic; and that, if the Parties are unable to reach an agreement within six months, either one of them may request the Court to render an additional Judgment to determine the modalities for executing its Judgment."

*
* *

15. The present case arose out of the signature, on 16 September 1977, by the Hungarian People's Republic and the Czechoslovak People's Republic, of a treaty "concerning the construction and operation of the Gabcikovo-Nagymaros System of Locks" (hereinafter called the "1977 Treaty"). The names of the two contracting States have varied over the years; hereinafter they will be referred to as Hungary and Czechoslovakia. The 1977 Treaty entered into force on 30 June 1978.

It provides for the construction and operation of a System of Locks by the parties as a "joint investment". According to its Preamble, the barrage system was designed to attain "the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties". The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding. At the same time, by the terms of the Treaty, the contracting parties undertook to ensure that the quality of water in the Danube was not impaired as a result of the Project, and that compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks would be observed.

16. The Danube is the second longest river in Europe, flowing along or across the borders of nine countries in its 2,860-kilometre course from the Black Forest eastwards to the Black Sea. For 142 kilometres, it forms the boundary between Slovakia and Hungary. The sector with which this case is concerned is a stretch of approximately 200 kilometres, between Bratislava in Slovakia and Budapest in Hungary. Below Bratislava, the river gradient decreases markedly, creating an alluvial plain of gravel and sand sediment. This plain is delimited to the north-east, in Slovak territory, by the Maly Danube and to the south-west, in Hungarian territory, by the Mosoni Danube. The boundary between the two States is constituted, in the major part of that region, by the main channel of the river. The area lying between the Maly Danube and that channel, in Slovak territory, constitutes the Zitny Ostrov; the area between the main channel and the Mosoni Danube, in Hungarian territory, constitutes the Szigetköz. Cunovo on the right bank and further downstream, Gabcikovo, are situated in this sector of the river on Slovak territory, Cunovo on the right

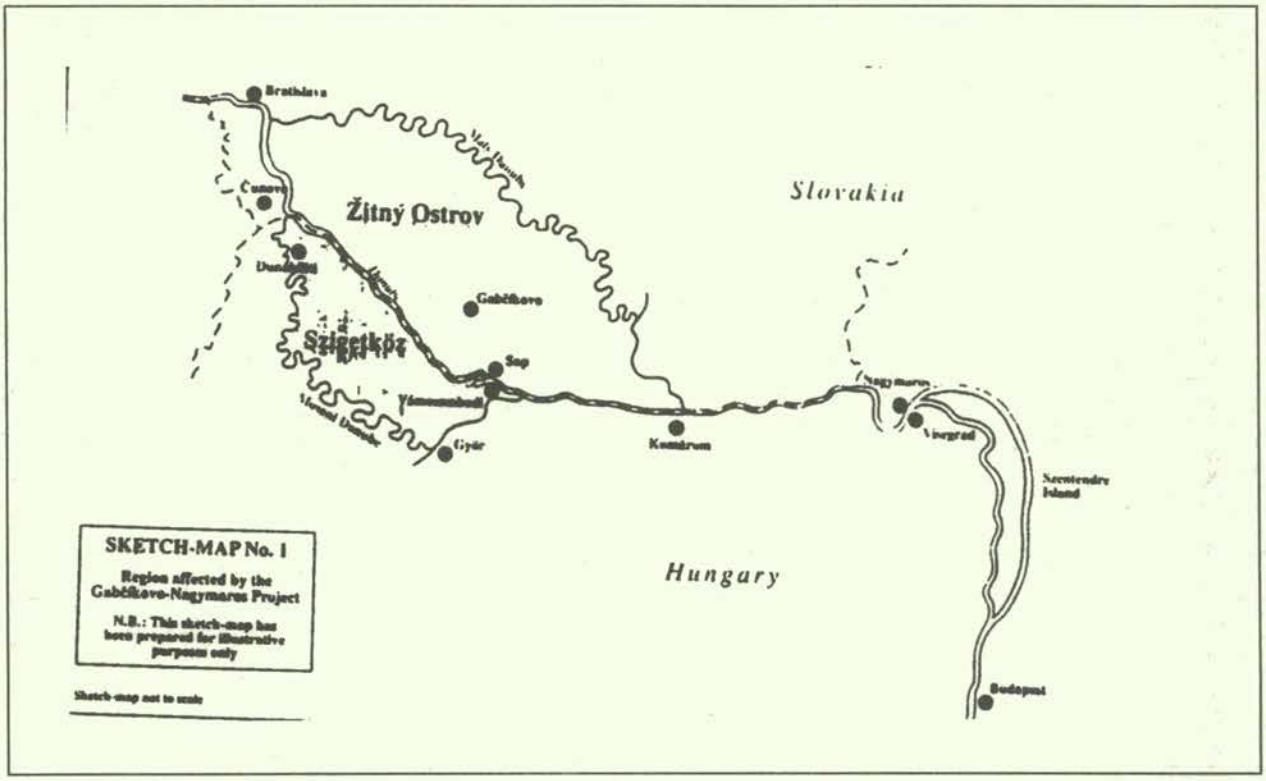
bank and Gabcikovo on the left. Further downstream, after the confluence of the various branches, the river enters Hungarian territory and the topography becomes hillier. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (see sketch-map No.1).

17. The Danube has always played a vital part in the commercial and economic development of its riparian States, and has underlined and reinforced their interdependence, making international co-operation essential. Improvements to the navigation channel have enabled the Danube, now linked by canal to the Main and thence to the Rhine, to become an important navigational artery connecting the North Sea to the Black Sea. In the stretch of river to which the case relates, flood protection measures have been constructed over the centuries, farming and forestry practised, and, more recently, there has been an increase in population and industrial activity in the area. The cumulative effects on the river and on the environment of various human activities over the years have not all been favourable, particularly for the water régime.

Only by international co-operation could action be taken to alleviate these problems. Water management projects along the Danube have frequently sought to combine navigational improvements and flood protection with the production of electricity through hydroelectric power plants. The potential of the Danube for the production of hydroelectric power has been extensively exploited by some riparian States. The history of attempts to harness the potential of the particular stretch of the river at issue in these proceedings extends over a 25-year period culminating in the signature of the 1977 Treaty.

18. Article 1, paragraph 1, of the 1977 Treaty describes the principal works to be constructed in pursuance of the Project. It provided for the building of two series of locks, one at Gabcikovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute "a single and indivisible operational system of works" (see sketch-map No.2). The Court will subsequently have occasion to revert in more detail to those works, which were to comprise, *inter alia*, a reservoir upstream of Dunakiliti, in Hungarian and Czechoslovak territory; a dam at Dunakiliti, in Hungarian territory; a bypass canal, in Czechoslovak territory, on which was to be constructed the Gabcikovo system of Locks (together with a hydroelectric power plant with an installed capacity of 720 megawatts (MW)); the deepening of the bed of the Danube downstream of the place at which the bypass canal was to rejoin the old bed of the river, a reinforcement of flood-control works along the Danube upstream of Nagymaros; the Nagymaros System of Locks, in Hungarian territory (with a hydroelectric power plant of a capacity of 158 MW); and the deepening of the bed of the Danube downstream.

Article 1, paragraph 4, of the Treaty further provided that the technical specifications concerning the system would be included in the "Joint Contractual Plan" which was to be drawn up in accordance with the Agreement signed by the two Governments for this purpose on 6



May 1976; Article 4, paragraph 1, for its part, specified that "the joint investment [would] be carried out in conformity with the joint contractual plan".

According to Article 3, paragraph 1,

"Operations connected with the realization of the joint investment and with the performance of tasks relating to the operation of the System of Locks shall be directed and supervised by the Governments of the Contracting Parties through ...(...'government delegates')."

Those delegates had, *inter alia*, "to ensure that construction of the System of Locks is ... carried out in accordance with the approved joint contractual plan and the Project work schedule". When the works were brought into operation, they were moreover "To establish the operating and operational procedures of the System of Locks and ensure compliance therewith."

Article 4, paragraph 4, stipulated that:

"Operations relating to the joint investment [should] be organized by the Contracting Parties in such a way that the power generation plants [would] be put into service during the period 1986-1990."

Article 5 provided that the cost of the joint investment would be borne by the contracting parties in equal measure. It specified the work to be carried out by each one of them. Article 8 further stipulated that the Dunakiliti dam, the bypass canal and the two series of locks at Gabcikovo and Nagymaros would be "jointly owned" by the contracting parties" in equal measure". Ownership of the other works was to be vested in the State on whose territory they were constructed.

The parties were likewise to participate in equal measure in the use of the system put in place, and more particularly in the use of the base-load and peak-load power generated at the hydroelectric power plants (Art. 9).

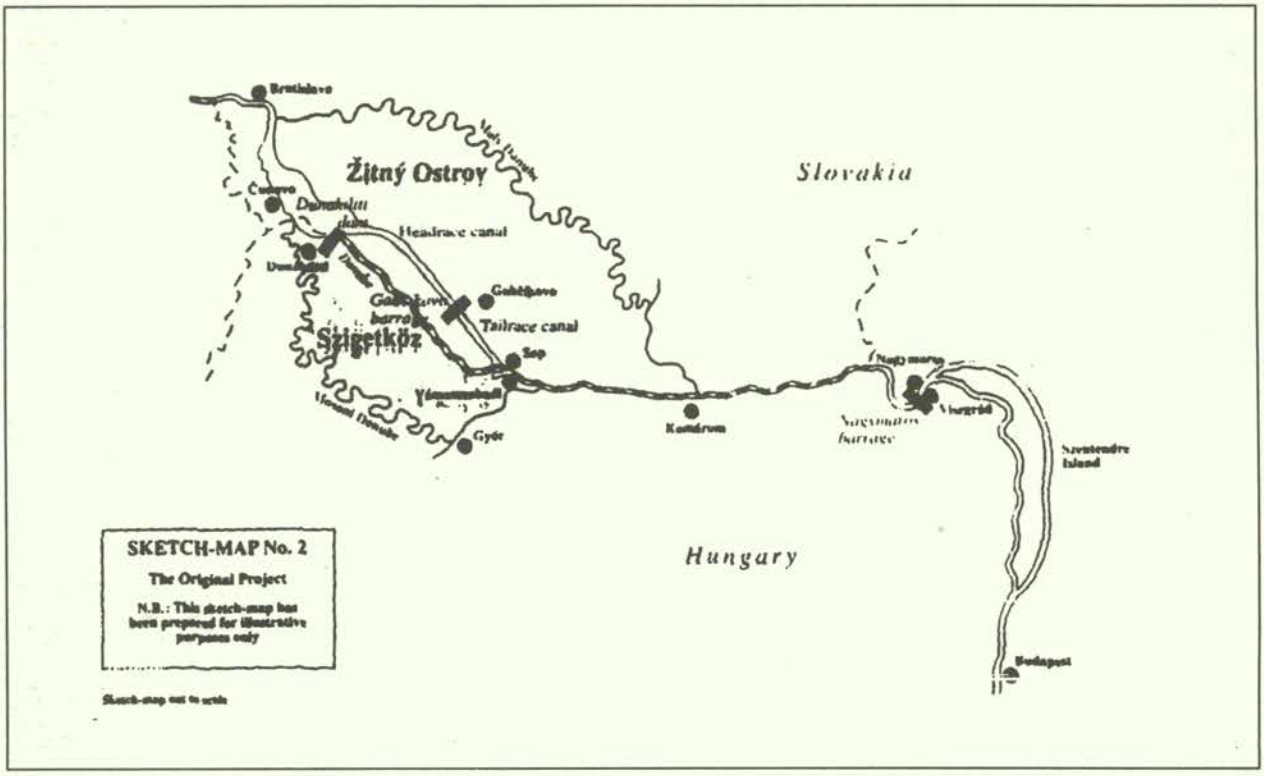
According to Article 10, the works were to be managed by the State on whose territory they were located, "in accordance with the jointly-agreed operating and operational procedures", while Article 12 stipulated that the operation, maintenance (repair) and reconstruction costs of jointly owned works of the System of Locks were also to be borne jointly by the contracting parties in equal measure.

According to Article 14,

"The discharge specified in the water balance of the approved joint contractual plan shall be ensured in the bed of the Danube [between Dunakiliti and Sap] unless natural conditions or other circumstances temporarily require a greater or smaller discharge."

Paragraph 3 of that Article was worded as follows:

"In the event that the withdrawal of water in the Hungarian-Czechoslovak section of the Danube exceeds the quantities of water specified in the water balance of the approved joint contractual plan and the excess withdrawal results in a decrease in the output of electric power, the



share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced."

Article 15 specified that the contracting parties "shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks".

Article 16 set forth the obligations of the contracting parties concerning the maintenance of the bed of the Danube.

Article 18, paragraph 1, provided as follows:

"The Contracting Parties, in conformity with the obligations previously assumed by them, and in particular with article 3 of the Convention concerning the regime of navigation on the Danube, signed at Belgrade on 18 August 1948, shall ensure uninterrupted and safe navigation on the international fairway both during the construction and during the operation of the System of Locks."

It was stipulated in Article 19 that:

"The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks."

Article 20 provided for the contracting parties to take appropriate measures, within the framework of their national investments, for the protection of fishing interests in conformity with the Convention concerning Fishing in the Waters of the Danube, signed at Bucharest on 29 January 1958.

According to Article 22, paragraph 1, of the Treaty, the contracting parties had, in connection with the construction and operation of the System of Locks, agreed on minor revision to the course of the State frontier between them as follows:

"(d) In the Dunakiliti-Hrusov head-water area, the State frontier shall run from boundary point 161. V.O.á. to boundary stone No.1.5, in a straight line in such a way that the territories affected, to the extent of about 10-10 hectares shall be offset between the two States."

It was further provided, in paragraph 2, that the revision of the State frontier and the exchange of territories so provided for should be effected "by the Contracting Parties on the basis of a separate treaty". No such treaty was concluded.

Finally a dispute settlement provision was contained in Article 27, worded as follows:

"1. The settlement of disputes in matters relating to the realization and operation of the System of Locks shall be a function of the government delegates.

2. If the government delegates are unable to reach agreement on the matters in dispute, they shall refer them to the Governments of the Contracting Parties for decision."

19. The Joint Contractual Plan, referred to in the previous paragraph, set forth, on a large number of points, both the objectives of the system and the characteristics of the works. In its latest version it specified in paragraph 6.2 that the Gabcikovo bypass canal would have a discharge capacity of 4,000 cubic metres per second (m^3/s). The power plant would include "Eight ...turbines with 9.20m diameter running wheels" and would "mainly operate in peak-load time and continuously during high water". This type of operation would give an energy production of 2,650 gigawatt/hours (GWh) per annum. The plan further stipulated in paragraph 4.4.2:

"The low waters are stored every day, which ensures the peak load time operation of the Gabcikovo hydropower plant ... a minimum of 50 m^3/s additional water is provided for the old bed [of the Danube] besides the water supply of the branch system."

The Plan further specified that, in the event that the discharge into the bypass canal exceeded 4,000-4,500m^3/s, the excess amounts of water would be channelled into the old bed. Lastly, according to paragraph 7.7 of the Plan:

"The common operational regulation stipulates that concerning the operation of the Dunakiliti barrage in the event of need during the growing season 200 m^3/s discharge must be released into the old Danube bed, in addition to the occasional possibilities for rinsing the bed."

The Joint contractual Plan also contained "Preliminary Operating and Maintenance Rules", Article 23 of which specified that "The final operating rules [should] be approved within a year of the setting into operation of the system." (Joint Contractual Plan, Summary Documentation, Vol.O-I-A.)

Nagymaros, with six turbines, was, according to paragraph 6.3 of the Plan, to be a "hydropower station... type of a basic power-station capable of operating in peak-load time for five hours at the discharge interval between 1,000-2,500 m^3/s" per day. The intended annual production was to be 1,025 GWh (i.e., 38 per cent of the production of Gabcikovo, for an installed power only equal to 21 per cent of that of Gabcikovo).

20. Thus, the Project was to have taken the form of an integrated joint project with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty. In particular, Hungary would have had control of the sluices at Dunakiliti and the works at Nagymaros, whereas Czechoslovakia would have had control of the works at Gabcikovo.

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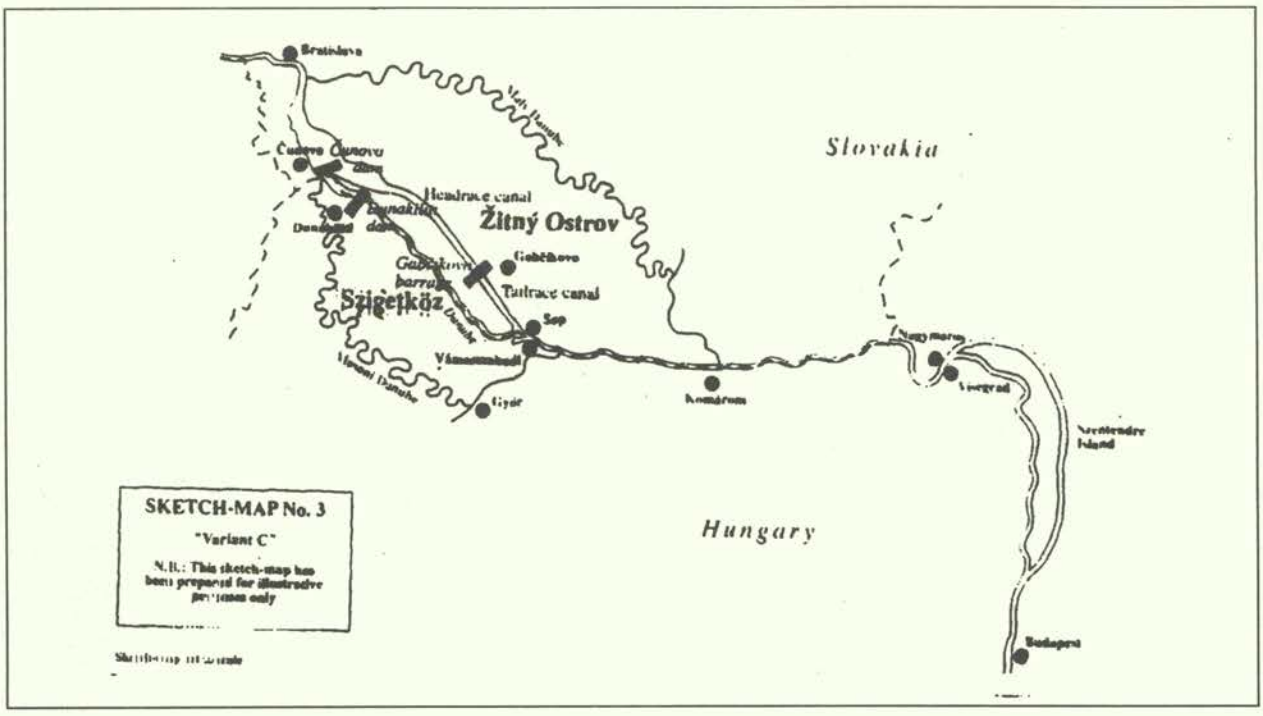
21. This schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977, at the same time as the Treaty itself. The Agreement moreover made some adjustments to the allocation of the works between the parties as laid down by the Treaty.

Work on the Project started in 1978. On Hungary's initiative, the two parties first agreed, by two Protocols signed on 10 October 1983 (one amending article 4, paragraph 4, of the 1977 Treaty and the other the Agreement on mutual assistance), to slow the work down and to postpone putting into operation the power plants, and then, by a Protocol signed on 6 February 1989 (which amended the Agreement on mutual assistance), to accelerate the Project.

22. As a result of intense criticism which the Project had generated in Hungary, the Hungarian Government decided on 13 May 1989 to suspend the works at Nagymaros pending the completion of various studies which the competent authorities were to finish before 31 July 1989. On 21 July 1989, the Hungarian Government extended the suspension of the works at Nagymaros until 31 October 1989, and, in addition, suspended the works at Dunakiliti until the same date. Lastly, on 27 october 1989, Hungary decided to abandon the works at Nagymaros and to maintain the status quo at Dunakiliti.

23. During this period, negotiations were being held between the parties. Czechoslovakia also started investigating alternative solutions. One of them, subsequently known as "Variant C", entailed a unilateral diversion of the Danube by Czechoslovakia on its territory some 10 kilometres upstream of Dunakiliti (see sketch-map No.3). In its final stage, Variant C included the construction at Cunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. The corresponding reservoir was to have a smaller surface area and provide approximately 30 per cent less storage than the reservoir initially contemplated. Provision was made for ancillary works, namely: an intake structure to supply the Mosoni Danube; a weir to enable, *inter alia*, floodwater to be directed along the old bed of the Danube; an auxiliary shiplock; and two hydroelectric power plants (one capable of an annual production of 4 GWh on the Mosoni Danube, and the other with a production of 174 GWh on the old bed of the Danube). The supply of water to the side-arms of the Danube on the Czechoslovak bank was to be secured by means of two intake structures in the bypass canal at Dobrohost and Gabcikovo. A solution was to be found for the Hungarian bank. Moreover, the question of the deepening of the bed of the Danube at the confluence of the bypass canal and the old bed of the river remained outstanding.



On 23 July 1991, the Slovak Government decided "to begin, in September 1991, construction to put the Gabcikovo Project into operation by the provisional solution". That decision was endorsed by the Federal Czechoslovak Government on 25 July. Work on Variant C began in November 1991. Discussions continued between the two parties but to no avail, and, on 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Note Verbale terminating the 1977 Treaty with effect from 25 May 1992. On 15 October 1992, Czechoslovakia began work to enable the Danube to be closed and, starting on 23 October, proceeded to the damming of the river.

24. On 23 October 1992, the Court was seised of an "Application of the Republic of Hungary v The Czech and Slovak Federal Republic on The Diversion of the Danube River"; however, Hungary acknowledged that there was no basis on which the Court could have founded its jurisdiction to entertain that application, on which Czechoslovakia took no action. In the meanwhile, the Commission of the European Communities had offered to mediate and, during a meeting of the two parties with the Commission held in London on 28 October 1992, the parties entered into a series of interim undertakings. They principally agreed that the dispute would be submitted to the International Court of Justice, that a tripartite fact-finding mission should report on Variant C not later than 31 October, and that a tripartite group of independent experts would submit suggestions as to emergency measures to be taken.

25. On 1 January 1993 Slovakia became an independent State. On 7 April 1993, the "Special Agreement for Submission to the International court of Justice of the Differences Between the Republic of Hungary and the Slovak Republic Concerning the Gabcikovo-Nagymaros Project" was signed in Brussels, the text of which is reproduced in paragraph 2 above. After the Special Agreement was notified to the Court, Hungary informed the Court, by a letter dated 9 August 1993, that it considered its "initial Application [to be] now without object, and ... lapsed".

According to Article 4 of the Special Agreement, "The Parties [agreed] that, pending the final Judgment of the Court, they [would] establish and implement a temporary water management régime for the Danube." However, this régime could not easily be settled. The filling of the Cunovo dam had rapidly led to a major reduction in the flow and in the level of the flow and in the level of the downstream waters in the old bed of the Danube as well as in the side-arms of the river. On 26 August 1993, Hungary and Slovakia reached agreement on the setting up of a tripartite group of experts (one expert designated by each party and three independent experts designated by the Commission of the European Communities) "In order to provide reliable and undisputed data on the most important effects of the current water discharge and the remedial measures already undertaken as well as to make recommendations for appropriate measures."

On 1 December 1993, the experts designated by the Commission of the European Communities recommended the adoption of various measures to remedy the situation on a temporary basis. The Parties were unable to agree on these recommendations. After lengthy negotiations, they finally concluded an Agreement concerning Certain Temporary Technical Measures and Discharges in the Danube and Mosoni branch of the Danube", on 19 April 1995. That Agreement raised the discharge of water into the Mosoni Danube to 43 m^3/s. It provided for an annual average of 400 m^3/s in the old bed (not including flood waters). Lastly, it provided for the construction by Hungary of a partially underwater weir near to Dunakiliti with a view to improving the water supply to the side-arms of the Danube on the Hungarian side. It was specified that this temporary agreement would come to an end 14 days after the Judgment of the Court.

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26. The first sub-paragraph of the Preamble to the Special Agreement covers the disputes arising between Czechoslovakia and Hungary concerning the application and termination, not only of the 1977 Treaty, but also of "related instruments", the sub-paragraph specifies that, for the purposes of the Special Agreement, the 1977 Treaty and the said instruments shall be referred to as "the Treaty". "The Treaty" is expressly referred to in the wording of the questions submitted to the Court in Article 2, paragraph 1, sub-paragraphs *(a)* and *(c)*, of the Special Agreement.

The Special Agreement however does not define the concept of "related instruments", nor does it list them. As for the Parties, they gave some consideration to that question — essentially in the written proceedings — without reaching agreement as to the exact meaning of the expression or as to the actual instruments referred to. The Court notes however that the Parties seemed to agree to consider that expression covers at least the instruments linked to the 1977 Treaty which implement it, such as the Agreement on mutual assistance of 16 September 1977 and its amending Protocols dated, respectively, 10 October 1983 and 6 February 1989 (see paragraph 21 above), and the Agreement as to the common operational regulations of Plenipotentiaries fulfilling duties related to the construction and operation of the Gabcikovo-Nagymaros Barrage System signed in Bratislava on 11 October 1979. The Court notes that Hungary, unlike Slovakia, declined to apply the description of related in-

struments to the 1977 Treaty to the Joint Contractual Plan (see paragraph 19 above), which it refused to see as "an agreement at the same level as the other [...] related Treaties and interState agreements".

Lastly the Court notes that the Parties, in setting out the replies which should in their view be given to the questions put in the Special Agreement, concentrated their reasoning on the 1977 Treaty; and that they would appear to have extended their arguments to "related instruments" in considering them as accessories to a whole treaty system, whose fate was in principle linked to that of the main part, the 1977 Treaty. The Court takes note of the positions of the Parties and considers that it does not need to go into this matter further at this juncture.

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27. The Court will now turn to a consideration of the questions submitted by the Parties. In terms of Article 2, paragraph 1 *(a)*, of the Special Agreement, the Court is requested to decide first

"whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the Treaty attributed responsibility to the Republic of Hungry".

28. The Court would recall that the Gabcikovo-Nagymaros System of Locks is characterized in Article 1, paragraph 1, of the 1977 Treaty as a "single and indivisible operational system of works".

The principal works which were to constitute this system have been described in general terms above (see paragraph 18). Details of them are given in paragraphs 2 and 3 of Article 1 of the Treaty.

For Gabcikovo, paragraph 2 lists the following works:

"(a) The Dunakiliti-Hrusov head-water installations in the Danube sector at r.km. (river kilometre(s)) 1860-1842, designed for a maximum flood stage of 131.10 m.B. (metres above sea-level, Baltic system), in Hungarian and Czechoslovak territory;

(b) The Dunakiliti dam and auxiliary navigation lock at r.km. 1842, in Hungarian territory;

(c) The by-pass canal (head-water canal and tail-water canal) at r.km. 1842-1811, in Czechoslovak territory;

(d) Series of locks on the by-pass canal, in Czechoslovak territory, consisting of a hydroelectric power plant with installed capacity of 720 MW, double navigation locks and appurtenances thereto;

(e) Improved old bed of the Danube at r.km. 1842-1811, in the joint Hungarian-Czechoslovak section;

(f) Deepened and regulated bed of the Danube at r.km. 1811-1791, in the joint Hungarian-Czechoslovak section."

For Nagymaros, paragraph 3 specifies the following works:

"(a) Head-water installations and flood-control works in the Danube sector at r.km. 1791-1696.25 and in the sectors of tributaries affected by flood waters, designed for a maximum flood stage of 107.83 m.B., in Hungarian and Czechoslovak territory;

(b) Series of locks at r.km. 1696.25, in Hungarian territory, consisting of a dam, a hydroelectric power plant with installed capacity of 158 MW, double navigation locks and appurtenances thereto;

(c) Deepened and regulated bed of the Danube, in both its branches, at r.km. 1696 25-1657, in the Hungarian section."

29. Moreover, the precise breakdown of the works incumbent on each party was set out in Article 5, paragraph 5, of the 1977 Treaty, as follows:

"5. The labour and supplies required for the realization of the joint investment shall be apportioned between the Contracting Parties in the following manner.

(a) The Czechoslovak party shall be responsible for:

(1) The Dunakiliti-Hrusov head-water installations on the left bank, in Czechoslovak territory;

(2) The head-water canal of the by-pass canal, in Czechoslovak territory

(3) The Gabcikovo series of locks, in Czechoslovak territory;

(4) The flood-control works of the Nagymaros head-water installations, in Czechoslovak territory, with the exception of the lower Ipel district;

(5) Restoration of vegetation in Czechoslovak territory;

(b) The Hungarian Party shall be responsible for:

(1) The Dunakiliti-Hrusov head-water installations on the right bank, in Czechoslovak territory, including the connecting weir and the diversionary weir,

(2) The Dunakiliti-Hrusov head-water installations on the right bank, in Hungarian territory;

(3) The Dunakiliti dam, in Hungarian territory;

(4) The tail-water canal of the by-pass canal, in Czechoslovak territory;

(5) Deepening of the bed of the Danube below Palkovicovo, in Hungarian and Czechoslovak territory;

(6) Improvement of the old bed of the Danube, in Hungarian and Czechoslovak terriroty;

(7) Operational equipment of the Gabcikovo system of locks (transport equipment, maintenance machinery), in Czechoslovak territory;

(8) The flood-control works of the Nagymaros head-water installations in the lower Ipel district, in Czechoslovak territory;

(9) The flood-control works of the Nagymaros head-water installations, in Hungarian territory;

(10) The Nagymaros series of locks, in Hungarian territory;

(11) Deepening of the tail-water bed below the Nagymaros system of locks, in Hungarian territory;

(12) Operational equipment of the Nagymaros system of locks (transport equipment, maintenance machinery), in Hungarian territory;

(13) Restoration of vegetation in Hungarian territory."

30. As the Court has already indicated (see paragraph 18 above), Article 1, paragraph 4, of the 1977 Treaty stipulated in general terms that the "technical specifications" concerning the System of Locks would be included in the "joint contractual plan". The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977 (see paragraph 21 above). In accordance with the provisions of Article 1, paragraph 1, of that Agreement, the whole of the works of the barrage system were to have been completed in 1991. As indicated in paragraph 2 of that same article, a summary construction schedule was appended to the Agreement, and provision was made for a more detailed schedule to be worked out in the Joint Contractual Plan. The Agreement of 16 September 1977 was twice amended further. By a protocol signed on 10 October 1983, the parties agreed first to postpone the works and the putting into operation of the power plants for four more years; then, by a Protocol signed on 6 February 1989, the parties decided, conversely, to bring them forward by 15 months, the whole system having to be operational in 1994. A new summary construction schedule was appended to each of those Protocols; those schedules were in turn to be implemented by means of new detailed schedules, included in the Joint Contractual Plan.

31. In spring 1989, the work on the Gabcikovo sector was well advanced: the Dunakiliti dam was 90 per cent complete, the Gabcikovo dam was 85 per cent complete, and the bypass canal was between 60 per cent complete (downstream of Gabcikovo) and 95 per cent complete (upstream of Gabcikovo) and the dykes of the Dunakiliti-Hrusov reservoir were between 70 and 98 per cent complete, depending on the location. This was not the case in the Nagymaros sector where, although dykes had been built, the only structure relating to the dam itself was the coffer-dam which was to facilitate its construction.

32. In the wake of the profound political and economic changes which occurred at this time in central Europe, the Gabcikovo-Nagymaros Project was the object, in Czechoslovakia and more particularly in Hungary, of increasing apprehension, both within a section of public opinion and in some scientific circles. The uncertainties not only about the economic viability of the Project, but also, and more so, as to the guarantees it offered for preservation of the environment, engendered a climate of growing concern and opposition with regard to the Project.

33. It was against this background that, on 13 May 1989, the Government of Hungary adopted a resolution to suspend works at Nagymaros, and ordered:

"the Ministers concerned to commission further studies in order to place the Council of Ministers in a position where it can make well-founded suggestions to the Parliament in connection with the amendment of the international treaty on the investment. In the interests of the above, we must examine the international and legal consequences, the technical considerations, the obligations related to continuous navigation on the Danube and the environmental/ecological and seismic impacts of the eventual stopping of the Nagymaros investment. To be further examined are the opportunities for the replacement of the lost electric energy and the procedures for minimizing claims for compensation."

The suspension of the works at Nagymaros was intended to last for the duration of these studies, which were to be completed by 31 July 1989. Czechoslovakia immediately protested and a document defining the position of Czechoslovakia was transmitted to the Ambassador of Hungary in Prague on 15 May 1989. The Prime Ministers of the two countries met on 24 May 1989, but their talks did not lead to any tangible result. On 2 June, the Hungarian Parliament authorized the Government to

begin negotiations with Czechoslovakia for the purpose of modifying the 1977 Treaty.

34. At a meeting held by the Plenipotentiaries on 8 and 9 June 1989, Hungary gave Czechoslovakia a number of assurances concerning the continuation of works in the Gabcikovo sector, and the signed Protocol which records that meeting contains the following passage:

"The Hungarian Government Commissioner and the Hungarian Plenipotentiary stated, that the Hungarian side will complete construction of the Gabcikovo Project in the agreed time and in accordance with the project plans. Directives have already been given to continue works suspended in the area due to misunderstanding."

These assurances were reiterated in a letter that the Commissioner of the Government of Hungary addressed to the Czechoslovak Plenipotentiary on 9 June 1989.

35. With regard to the suspension of work at Nagymaros, the Hungarian Deputy-Prime Minister, in a letter dated 24 June 1989 addressed to his Czechoslovak counterpart, expressed himself in the following terms:

"The Hungarian Academy of Sciences (HAS) has studied the environmental, ecological and water quality as well as the seismological impacts of abandoning or implementing the Nagymaros Barrage of the Gabcikovo-Nagymaros Barrage System (GNBS)

Having studied the expected impacts of the construction in accordance with the original plan, the Committee *[ad hoc]* of the Academy [set up for this purpose] came to the conclusion that we do not have adequate knowledge of the consequences of environmental risks.

In its opinion, the risk of constructing the Barrage System in accordance with the original plan cannot be considered acceptable. Of course, it cannot be stated either that the adverse impacts will ensue for certain, therefore, according to their recommendation, further thorough and time consuming studies are necessary."

36. The Hungarian and Czechoslovak Prime Ministers met again on 20 July 1989 to no avail. Immediately after that meeting, the Hungarian Government adopted a second resolution, under which the suspension of work at Nagymaros was extended to 31 October 1989. However, this resolution went further, as it also prescribed the suspension, until the same date, of the "Preparatory works on the closure of the riverbed at ... Dunakiliti"; the purpose of this measure was to invite "international scientific institutions [and] foreign scientific institutes and experts" to co-operate with "the Hungarian and Czechoslovak institutes and experts" with a view to an assessment of the ecological impact of the Project and the "development of a technical and operational water quality guarantee system and ... its implementation".

37. In the ensuing period, negotiations were conducted at various levels between the two States, but proved fruitless. Finally, by a letter dated 4 October 1989, the Hungarian Prime Minister formally proposed to Czechoslovakia that the Nagymaros sector of the Project be abandoned and that an agreement be concluded with a view to reducing the ecological risks associated with the Gabcikovo sector of the Project. He proposed that agreement should be concluded before 30 July 1990.

The two Heads of Government met on 26 October 1989, and were unable to reach agreement. By a Note Verbale dated 30 October 1989, Czechoslovakia, confirming the views it had expressed during those talks, proposed to Hungary that they should negotiate an agreement on a system of technical, operational and ecological guarantees relating to the Gabcikovo-Nagymaros Project, "on the assumption that the Hungarian party will immediately commence preparatory work on the refilling of the Danube's bed in the region of Dunakiliti". It added that the technical principles of the agreement could be initialled within two weeks and that the agreement itself ought to be signed before the end of March 1993. After the principles had been initialled, Hungary "[was to] start the actual closure of the Danube bed". Czechoslovakia further stated its willingness to "conclu[de]... a separate agreement in which both parties would oblige themselves to limitations or exclusion of peak hour operation mode of the ... System". It also proposed "to return to deadlines indicated in the Protocol of October 1983", the Nagymaros construction deadlines being thus extended by 15 months, so as to enable Hungary to take advantage of the time thus gained to study the ecological issues and formulate its own proposals in due time. Czechoslovakia concluded by announcing that, should Hungary continue unilaterally to breach the Treaty, Czechoslovakia would proceed with a provisional solution.

In the meantime, the Hungarian Government had on 27 October adopted a further resolution, deciding to abandon the construction of the Nagymaros dam and to leave in place the measures previously adopted for suspending the works at Dunakiliti. Then, by Notes Verbales dated 3 and 30 November 1989, Hungry proposed to Czechoslovakia a draft treaty incorporating its earlier proposals, relinquishing peak power operation of the Gabcikovo power plant and abandoning the construction of the Nagymaros dam. The draft provided for the conclusion of an agreement on the completion of Gabcikovo in exchange for guarantees on protection of the environment. It finally envisaged the possibility of one or other party seizing an arbitral tribunal or the International Court of Justice in the event that differences of view arose and persisted between the two Governments about the construction and operation of the Gabcikovo dam, as well

as measures to be taken to protect the environment. Hungary stated that it was ready to proceed immediately "with the preparatory operations for the Dunakiliti bed-decanting", but specified that the river would not be dammed at Dunakiliti until the agreement on guarantees had been concluded.

38. During winter 1989-1990, the political situation in Czechoslovakia and Hungary alike was transformed, and the new Governments were confronted with many new problems.

In spring 1990, the new Hungarian Government, in presenting its National Renewal Programme, announced that the whole of the Gabcikovo-Nagymaros Project was a "mistake" and that it would initiate negotiations as soon as possible with the Czechoslovak Government "on remedying and sharing the damages". On 20 December 1990, the Hungarian Government adopted a resolution for the opening of negotiations with Czechoslovakia on the termination of the Treaty by mutual consent and the conclusion of an agreement addressing the consequences of the termination. On 15 February 1991, that "the G/N Project [was] not acceptable to cancel the treaty ... and negotiate later on".

During the ensuing period, Hungary refrained from completing the work for which it was still responsible at Dunakiliti. Yet it continued to maintain the structures it had already built and, at the end of 1991, completed the works relating to the railrace canal of the bypass canal assigned to it under Article 5, paragraph 5 *(b)*, of the 1977 Treaty.

39. The two Parties to this case concur in recognizing that the 1977 Treaty, the above-mentioned Agreement on mutual assistance of 1977 and the Protocol of 1989 were validly concluded and were duly in force when the facts recounted above took place.

Further, they do not dispute the fact that, however flexible they may have been, these texts did not envisage the possibility of the signatories unilaterally suspending or abandoning the work provided for therein, or even carrying it out according to a new schedule not approved by the two partners.

40. Throughout the proceedings, Hungary contended that, although it did suspend or abandon certain works, on the contrary, it never suspended the application of the 1977 Treaty itself. To justify its conduct, it relied essentially on a "state of ecological necessity".

Hungary contended that the various installations in the Gabcikovo-Nagymaros System of Locks had been designed to enable the Gabcikovo power plant to operate in peak mode. Water would only have come through the plant twice each day, at times of peak power demand. Operation in peak mode required the vast expanse (60 km^2) of the planned reservoir at Dunakiliti, as well as the Nagymaros dam, which was to alleviate the tidal effects and reduce the variation in the water level downstream of Gabcikovo. Such a system, considered to be more economically profitable than using run-of-the-river plants, carried ecological risks which it found unacceptable.

According to Hungary, the principal ecological dangers which would have been caused by this system were as follows: At Gabcikovo/Dunakiliti, under the original Project, as specified in the Joint Contractual Plan, the residual discharge into the old bed of the Danube was limited to 50 m^3/s, in addition to the water provided to the system of side-arms. That volume could be increased to 200 m^3/s during the growing season. Additional discharges, and in particular a number of artificial floods, could also be effected, at an unspecified rate. In these circumstances, the groundwater level would have fallen in most of the Szigetköz. Furthermore, the groundwater would then no longer have been supplied by the Danube — which, on the contrary, would have acted as a drain — but by the reservoir of stagnant water at Dunakiliti and the side-arms which would have become silted up. In the long term, the quality of water would have been seriously impaired. As for the surface water, risks of eutrophication would have arisen, particularly in the reservoir, instead of the old Danube there would have been a river choked with sand, where only a relative trickle of water would have flowed. The network of arms would have been for the most part cut off from the principal bed. The fluvial fauna and flora, like those in the alluvial plains, would have been condemned to extinction.

As for Nagymaros, Hungary argued that, if that dam had been built, the bed of the Danube upstream would have silted up and, consequently, the quality of the water collected in the bank-filtered wells would have deteriorated in this sector. What is more, the operation of the Gabcikovo power plant in peak mode would have occasioned significant daily variations in the water level in the reservoir upstream, which would have constituted a threat to aquatic habitats in particular. Furthermore, the construction and operation of the Nagymaros dam would have caused the erosion of the riverbed downstream, along Szentendre Island. The water level of the river would therefore have fallen in this section and the yield of the bank-filtered wells providing two-thirds of the water supply of the city of Budapest would have appreciably diminished. The filter layer would also have shrunk or perhaps even disappeared, and fine sediments would have been deposited in certain pockets in the river. For this twofold reason, the quality of the infiltrating water would have been severely jeopardized.

From all these predictions, in support of which it quoted a variety of scientific studies, Hungary concluded that a "state of ecological necessity" did indeed exist in 1989.

41. In its written pleadings, Hungary also accused Czechoslovakia of having violated various provisions of the 1977 Treaty from before 1989 — in refusing to take account of the now evident ecological dangers and insisting that the works be continued, notably at Nagymaros. In this context Hungary contended that, in accordance with the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 concerning the Joint Contractual Plan, Czechoslovakia bore responsibility for research into the Project's impact on the environment; Hungary stressed that the research carried out by Czechoslovakia had not been conducted adequately, the potential effects of the Project on the environment of the construction having been assessed by Czechoslovakia only from September 1990. However, in the final stage of its argument, Hungary does not appear to have sought to formulate this complaint as an independent ground formally justifying the suspension and abandonment of the works for which it was responsible under the 1977 Treaty. Rather, it presented the violations of the Treaty prior to 1989, which it imputes to Czechoslovakia, as one of the elements contributing to the emergence of a state of necessity.

42. Hungary moreover contended from the outset that its conduct in the present case should not be evaluated only in relation to the law of treaties. It also observed that, in accordance with the provisions of Article 4, the Vienna Convention of 23 May 1969 on the Law of Treaties could not be applied to the 1977 Treaty, which was concluded before that Convention entered into force as between the parties. Hungary has indeed acknowledged, with reference to the jurisprudence of the Court, that in many respects the convention reflects the existing customary law. Hungary nonetheless stressed the need to adopt a cautious attitude, while suggesting that the Court should consider, in each case, the conformity of the prescriptions of the Convention with customary international law.

43. Slovakia, for its part, denied that the basis for suspending or abandoning the performance of a treaty obligation can be found outside the law of treaties. It acknowledged that the 1969 Vienna convention could not be applied as such to the 1977 Treaty, but at the same time stressed that a number of its provisions are a reflection of pre-existing rules of customary international law and specified that this is, in particular, the case with the provisions of Part V relating to invalidity, termination and suspension of the operation of treaties. Slovakia has moreover observed that, after the Vienna Convention had entered into force for both parties, Hungary affirmed its accession to the substantive obligations laid down by the 1977 Treaty when it signed the Protocol of 6 February 1989 that cut short the schedule of work; and this led it to conclude that the Vienna Convention was applicable to the "contractual legal regime" constituted by the network of interrelated agreements of which the Protocol of 1989 was a part.

44. In the course of the proceedings, Slovakia argued at length that the state of necessity upon which Hungry relied did not constitute a reason for the suspension of a treaty obligation recognized by the law of treaties. At the same time, it cast doubt upon whether "ecological necessity" or "ecological risk" could, in relation to the law of State responsibility, constitute a circumstance precluding the wrongfulness of an act.

In any event, Slovakia denied that there had been any kind of "ecological state of necessity" in this case either in 1989 or subsequently. It invoked the authority of various scientific studies when it claimed that Hungry had given an exaggeratedly pessimistic description of the situation. Slovakia did not, of course, deny that ecological problems could have arisen. However, it asserted that they could to a large extent have been remedied. It accordingly stressed that no agreement had been reached with respect to the modalities of operation of the Gabcikovo power plant in peak mode, and claimed that the apprehensions of Hungary related only to operating conditions of an extreme kind. In the same way, it contended that the original Project had undergone various modifications since 1977 and that it would have been possible to modify it even further, for example with respect to the discharge of water reserved for the old bed of the Danube, or the supply of water to the side-arms by means of underwater weirs.

45. Slovakia moreover denied that it in any way breached the 1977 Treaty — particularly its Articles 15 and 19 — and maintained, *inter alia*, that according to the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 relating to the Joint Contractual Plan — research into the impact of the Project on the environment was not the exclusive responsibility of Czechoslovakia but of either one of the parties, depending on the location of the works.

Lastly, in its turn, it reproached Hungary with having adopted its unilateral measures of suspension and abandonment of the works in violating of the provisions of Article 27 of the 1977 Treaty (see paragraph 18 above), which it submits required prior recourse to the machinery for dispute settlement provided for in that Article.

* *

46. The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The court takes the view that in many respects this apples to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62 (see *Legal Consequences for States of the Continued*

Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)). Advisory Opinion, I.C.J. Reports 1971, p.47 and Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 18; see also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, pp. 95-96).*

Neither has the Court lost sight of the fact that the Vienna Convention is in any event applicable to the Protocol of 6 February 1989 whereby Hungary and Czechoslovakia agreed to accelerate completion of the works relating to the Gabcikovo-Nagymaros Project.

47. Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties,involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.

Thus the Vienna Convention of 1969 on the Law of Treaties confines itself to defining — in a limitative manner — the conditions in which a treaty may lawfully be denounced or suspended; while the effects of a denunciation or suspension seen as not meeting those conditions are, on the contrary, expressly excluded from the scope of the Convention by operation of Article 73. It is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect (cf. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950,* p.228; and see Article 17 of the Draft Articles on State Responsibility provisionally adopted by the International Law Commission on first reading, *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p.32).

48. The Court cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as "single and indivisible".

The Court moreover observes that, when it invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful. The state of necessity claimed by Hungary — supposing it to have been established — thus could not permit of the conclusion that, in 1989, it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.

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49. The Court will now consider the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments.

50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading. That provision is worded as follows:

"Article 33. State of necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness;

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity (*Yearbook of the International Law Commission*. 1980, vol. II, Party 2, p.34.)

In its Commentary, the Commission defined the "state of necessity" as being

"the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State"(*ibid.*, para.1).

It concluded that "the notion of state of necessity is ... deeply rooted in general legal thinking" (*ibid.*, p.49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft

"in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception — and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness ..." (*ibid.*, p. para.40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

52. In the present case, the following basic conditions set forth in Draft Article 33 are relevant; it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity. Those conditions reflect customary international law.

The Court will now endeavour to ascertain whether those conditions had been met at the time of the suspension and abandonment, by Hungary, of the works that it was to carry out in accordance with the 1977 Treaty.

53. The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabcikovo-Nagymaros Project related to an "essential interest" of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.

The Commission, in its Commentary, indicated that one should not, in that context, reduce an "essential interest" to a matter only of the "existence" of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see *Yearbook of the International Law Commission,* 1980, Vol. II, Part 2, p. 49, para.32); at the same time, it included among the situations that could occasion a state of necessity, "a grave danger to ... the ecological preservation of all or some of [the] territory [of a State]" (*ibid.*, p. 39, para.14.)

The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind.

"the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the Corpus of international law relating to the environment." *(Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* pp.241-242, para. 29.)

54. The verification of the existence, in 1989, of the "peril" invoked by Hungary, of its "grave and imminent" nature, as well as of the absence of any "means" to respond to it, other than the measures taken by Hungary to suspend and abandon the works, are all complex processes.

As the Court has already indicated (see paragraphs 33 *et seq.* above), Hungary on several occasions expressed, in 1989, its "uncertainties" as to the ecological impact of putting in place the Gabcikovo-Nagymaros barrage system, which is why it asked insistently for new scientific studies to be carried out.

The Court considers, however, that, serious though these

uncertainties might have been they could not, alone, establish the objective existence of a "peril" in the sense of a component element of a state of necessity. The word "peril" certainly evokes the idea of "risk"; that is precisely what distinguishes "peril" from material damage. But a state of necessity could not exist without a "peril" duly established at the relevant point in time; the mere apprehension of a possible "peril" could not suffice in that respect. It could moreover hardly be otherwise, when the "peril" constituting the state of necessity has at the same time to be "grave" and "imminent". "Imminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility". As the International Law Commission emphasized in its commentary, the "extremely grave and imminent" peril must "have been a threat to the interest at the actual time" (*Yearbook of the International Law Commission,* 1980, Vol. Ii, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

The Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, "grave" and "imminent" "peril" existed in 1989 and that the measures taken by Hungary were the only possible response to it.

Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that, as will be shown below, it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.

55. The Court will begin by considering the situation at Nagymaros. As has already been mentioned (see paragraph 40 above), Hungary maintained that, if the works at Nagymaros had been carried out as planned, the environment — and in particular the drinking water resources — in the area would have been exposed to serious dangers on account of problems linked to the upstream reservoir on the one hand and, on the other, the risks of erosion of the riverbed downstream.

The Court notes that the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain. Even though the Joint Contractual Plan envisaged that the Gabcikovo power plant would "mainly operate in peak-load time and continuously during high water", the final rules of operation had not yet been determined (see paragraph 19 above); however, any dangers associated with the putting into service of the Nagymaros portion of the Project would have been closely linked to the extent to which it was operated in peak mode and to the modalities of such operation. It follows that, even if it could have been established — which, in the Court's appreciation of the evidence before it, was not the case — that the reservoir would ultimately have constituted a "grave peril" for the environment in the area, one would be bound to conclude that the peril was not "imminent" at the time at which Hungary suspended and then abandoned the works relating to the dam.

With regard to the lowering of the riverbed downstream of the Nagymaros dam, the danger could have appeared at once more serious and more pressing, in so far as it was the supply of drinking water to the city of Budapest which would have been affected. The Court would however point out that the bed of the Danube in the vicinity of Szentendre had already been deepened prior to 1980 in order to extract building materials, and that the river had from that time attained, in that sector, the depth required by the 1977 Treaty. The peril invoked by Hungary had thus already materialized to a large extent for a number of years, so that it could not, in 1989, represent a peril arising entirely out of the project. The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could for example have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two Parties expressly recognized that possibility remained open even though — and this is not determinative of the state of necessity — the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique.

56. The Court now comes to the Gabcikovo sector. It will recall that Hungary's concerns in this sector related on the one had to the quality of the surface water in the Dunakiliti reservoir, with its effects on the quality of the groundwater in the region, and on the other hand, more generally, to the level, movement and quality of both the surface water and the groundwater in the whole of the Szigetköz, with their effects on the fauna and flora in the alluvial plain of the Danube (see paragraph 40 above).

Whether in relation to the Dunakiliti site or to the whole of the Szigetköz, the Court finds here again, that the peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it apprehended had primarily to be the result of some relatively slow natural processes, the effects of which could not

easily be assessed.

Even if the works were more advanced in this sector than at Nagymaros, they had not been completed in July 1989 and, as the Court explained in paragraph 34 above, Hungary expressly undertook to carry on with them, early in June 1989. The report dated 23 June 1989 by the *ad hoc* Committee of the Hungarian Academy of Sciences, which was also referred to in paragraph 35 of the present Judgment, does not express any awareness of an authenticated peril — even in the form of a definite peril, whose realization would have been inevitable in the long term — when it states that:

"The measuring results of an at least five-year monitoring period following the completion of the Gabcikovo construction are indispensable to the trustworthy prognosis of the ecological impacts of the barrage system. There is undoubtedly a need for the establishment and regular operation of a comprehensive monitoring system, which must be more developed than at present. The examination of biological indictor objects that can sensitively indicate the changes happening in the environment, neglected till today, have to be included."

The report concludes as follows:

"It can be stated, that the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period until today. Because of the complexity of the ecological processes and lack of the measured data and the relevant calculations the environmental impacts cannot be evaluated.

The data of the monitoring system newly operating on a very limited area are not enough to forecast the impacts probably occurring over a longer term. In order to widen and to make the data more frequent a further multi-year examination is necessary to decrease the further degradation of the water quality playing a dominant role in this question. The expected water quality influences equally the aquatic ecosystems, the soils and the recreational and tourist land-use."

The Court also notes that, in these proceedings, Hungary acknowledged that, as a general rule, the quality of the Danube waters had improved over the past 20 years, even if those waters remained subject to hypertrophic conditions.

However "grave" it might have been, it would accordingly have been difficult, in the light of what is said above, to see the alleged peril as sufficiently certain and therefore "imminent" in 1989.

The Court moreover considers that Hungary could, in this context also, have resorted to other means in order to respond to the dangers that it apprehended. In particular, within the framework of the original Project, Hungary seemed to be in a position to control at least partially the distribution of the water between the by-pass canal, the old bed of the Danube and the side-arms. It should not be overlooked that the Dunakiliti dam was located in Hungarian territory and that Hungry could construct the works needed to regulate flows along the old bed of the Danube and the side-arms. Moreover, it should be borne in mind that Article 14 of the 1977 Treaty provided for the possibility that each of the parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan, while making it clear that, in such an event, "the share of electric power of the Contracting Party benefitting from the excess withdrawal shall be correspondingly reduced".

57. The Court concludes from the foregoing that, with respect to both Nagymaros and Gabcikovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation "characterized so aptly by the maxim *summum jus summa injuria*" (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 31).

Moreover, the Court notes that Hungary decided to conclude the 1977 Treaty, a Treaty which — whatever the political circumstances prevailing at the time of its conclusion — was treated by Hungary as valid and in force until the date declared for its termination in May 1992. As can be seen from the material before the Court, a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty. Hungry contended before the Court that those studies had been inadequate and that the state of knowledge at that time was not such as to make possible a complete evaluation of the ecological implications of the Gabcikovo-Nagymaros Project. It is nonetheless the case that although the principal object of the 1977 Treaty was the constructiion of a System of Locks for the production of electricity, improvement of navigation on the Danube and protection against flooding, the need to ensure the protection of the environment had not escaped the parties, as can be seen from Articles 15, 19 and 20 of the Treaty.

What is more, the Court cannot fail to note the positions

taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the works under the Treaty should go forward more slowly, for reasons that were essentially economic but also, subsidiarily, related to ecological concerns. In 1989, when, according to Hungary itself, the state of scientific knowledge had undergone a significant development, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court is not however unaware that profound changes were taking place in Hungary in 1989, and that, during that transitory phase, it might have been more than usually difficult to co-ordinate the different points of view prevailing from time to time.

The Court infers from all these elements that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

58. It follows that the Court has no need to consider whether Hungary, by proceeding as it did in 1989, "seriously impair[ed] an essential interest" of Czechoslovakia, within the meaning of the aforementioned Article 33 of the Draft of the International Law Commission — a finding which does not in any way prejudge the damage Czechoslovakia claims to have suffered on account of the position taken by Hungary.

Nor does the Court need to examine the argument put forward by Hungry, according to which certain breaches of Articles 15 and 19 of the 1977 Treaty, committed by Czechoslovakia even before 1989, contributed to the purported state of necessity; and neither does it have to reach a decision on the argument advanced by Slovakia, according to which Hungry breached the provisions of Article 27 of the Treaty, in 1989, by taking unilateral measures without having previously had recourse to the machinery of dispute settlement for which that Article provides.

* *

59. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(a)*, of the Special Agreement (see paragraph 27), finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

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60. By the terms of Article 2, paragraph 1 *(b)*, of the Special Agreement, the Court is asked in the second place to decide

"(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course)".

61. The Court will recall that, as soon as Hungary suspended the works at Nagymaros on 13 May 1989 and extended that suspension to certain works to be carried out at Dunakiliti, Czechoslovakia informed Hungry that it would feel compelled to take unilateral measures if Hungary were to persist in its refusal to resume the works. This was *inter alia* expressed as follows in Czechoslovakia's Note Verbale of 30 October 1989 to which reference is made in paragraph 37 above:

"Should the Republic of Hungry fail to meet its liabilities and continue unilaterally to breach the Treaty and related legal documents then the Czechoslovak party will be forced to commence a provisional, substitute project on the territory of the Czechoslovak Socialist Republic in order to prevent further losses. Such a provisional project would entail directing as much water into the Gabcikovo dam as agreed in the Joint Construction Plan."

As the Court has already indicated (see paragraph 23 above), various alternative solutions were contemplated by Czechoslovakia. In September 1990, the Hungarian authorities were advised of seven hypothetical alternatives defined by the firm of Hydroconsult of Bratislava. All of those solutions implied an agreement between the parties, with the exception of one variant, subsequently known as "Variant C", which was presented as a provisional solution which could be brought about without Hungarian co-operation. Other contacts between the parties took place, without leading to a settlement of the dispute. In March 1991, Hungary acquired information according to which perceptible progress had been made in finalizing the planning of Variant C, it immediately gave expression to the concern this caused.

62. Inter-governmental negotiation meetings were held on 22 April and 15 July 1991.

On 22 April 1991, Hungary proposed the suspension, until September 1993, of all the works begun on the basis of the 1977 Treaty, on the understanding that the parties undertook to abstain from any unilateral action, and

that joint studies would be carried out in the interval. Czechoslovakia maintained its previous position according to which the studies contemplated should take place within the framework of the 1977 Treaty and without any suspension of the works.

On 15 July 1991, Czechoslovakia confirmed its intention of putting the Gabcikovo power plant into service and indicated that the available data enabled the effects of four possible scenarios to be assessed, each of them requiring the co-operation of the two Governments. At the same time, it proposed the setting up of a tripartite committee of experts (Hungary, Czechoslovakia, European Communities) which would help in the search for technical solutions to the problems arising from the entry into operation of the Gabcikovo sector. Hungary, for its part, took the view that

> "In the case of a total lack of understanding the so-called C variation or 'theoretical opportunity' suggested by the Czecho-slovak party as a unilateral solution would be such a grave transgression of Hungarian territorial integrity and International Law for which there is no precedent even in the practices of the formerly socialist countries for the past 30 years";

it further proposed the setting up of a bilateral committee for the assessment of environmental consequences, subject to work on Czechoslovak territory being suspended.

63. By a letter dated 24 July 1991, the Government of Hungary communicated the following message to the Prime Minister of Slovakia:

"Hungarian public opinion and the Hungarian Government anxiously and attentively follows the [Czechoslovakian] press reports of the unilateral steps of the Government of the Slovak Republic in connection with the barrage system.

The preparatory works for diverting the water of the Danube near the Dunakiliti dam through unilaterally are also alarming. These steps are contrary to the 1977 Treaty and to the good relationship between our nations."

On 30 July 1991 the Slovak Prime Minister informed the Hungarian Prime Minister of

"the decision of the Slovak Government and of the Czech and Slovak Federal Government to continue work on the Gabcikovo power plant, as a provisional solution, which is aimed at the commencement of operations on the territory of the Czech and Slovak Federal Republic".

On the same day, the government of Hungary protested, by a Note Verbale, against the filling of the headrace canal by the Czechoslovak construction company, by pumping water from the Danube.

By a letter dated 9 August 1991 and addressed to the Prime Minister of Slovakia, the Hungarian authorities strenuously protested against "any unilateral step that would be in contradiction with the interests of our [two] nations and international law" and indicated that they considered it "very important [to] receive information as early as possible on the details of the provisional solution". For its part, Czechoslovakia, in a Note Verbale dated 27 August 1991, rejected the argument of Hungry that the continuation of the works under those circumstances constituted a violation of international law, and made the following proposal;

"Provided the Hungarian side submits a concrete technical solution aimed at putting into operation the Gabcikovo system of locks and a solution of the system of locks based on the 1977 Treaty in force and the treaty documents related to it, the Czechoslovak side is prepared to implement the mutually agreed solution."

64. The construction permit for Variant C was issued on 30 October 1991. In November 1991 construction of a dam started at Cunovo, where both banks of the Danube are on Czechoslovak (now Slovak) territory.

In the course of a new inter-governmental negotiation meeting, on 2 December 1991, the parties agreed to entrust the task of studying the whole of the question of the Gabcikovo-Nagymaros project to a Joint Expert Committee which Hungary agreed should be complemented with an expert from the European Communities. However whereas, for Hungary, the work of that committee would have been meaningless if Czechoslovakia continued construction of Variant C, for Czechoslovakia, the suspension of the construction, even on a temporary basis, was unacceptable.

The meeting was followed by a large number of exchanges of letters between the parties and various meetings between their representatives at the end of 1991 and early in 1992. On 23 January 1992, Czechoslovakia expressed its readiness "to stop work on the provisional solution and continue the construction upon mutual agreement" if the tripartite committee of experts whose constitution it proposed, and the results of the test operation of the Gabcikovo part, were to "confirm that negative ecological effects exceed its benefits". However, the positions of the parties were by then comprehensively defined, and would scarcely develop any further. Hungary considered, as it indicated in a Note Verbale of 14 February 1992, that Variant C was in contravention.

> "of [the Treaty of 1977]... and the convention ratified in 1976 regarding the water management of boundary waters
>
> .....
>
> with the principles of sovereignty, territorial integrity, with the inviolability of State borders, as well as

> with the general customary norms on international rivers and the spirit of the 1948 Belgrade Danube Convention";

and the suspension of the implementation of Variant C was, in its view, a prerequisite. As for Czechoslovakia, it took the view that recourse to Variant C had been rendered inevitable, both for economic and ecological as well as navigational reasons, because of the unlawful suspension and abandonment by Hungary of the works for which provision was made in the 1977 Treaty. Any negotiation had, in its view, to be conducted within the framework of the Treaty and without the implementation of Variant C — described as "provisional" — being called into question.

65. On 5 August 1992, the Czechoslovak representative to the Danube Commission informed it that "work on the severance cutting through of the Danube's flow will begin on 15 October 1992 at the 1.851.759-kilometre line" and indicated the measures that would be taken at the time of the "severance". The Hungarian representative on the Commission protested on 17 August 1992, and called for additional explanations.

During the autumn of 1992, the implementation of Variant C was stepped up. The operations involved in damming the Danube at Cunovo had been scheduled by Czechoslovakia to take place during the second half of October 1992, at a time when the waters of the river are generally at their lowest level. On the initiative of the Commission of the European Communities, trilateral negotiations took place in Brussels on 21 and 22 October 1992, with a view to setting up a committee of experts and defining its terms of reference. On that date, the first phase of the operations leading to the damming of the Danube (the reinforcement of the riverbed and the a narrowing of the principal channel) had been completed. The closure of the bed was begun on 23 October 1992 and the construction of the actual dam continued from 24 to 27 October 1992: a pontoon bridge was built over the Danube on Czechoslovak territory using river barges, large stones were thrown into the riverbed and reinforced with concrete, while 80 to 90 percent of the waters of the Danube were directed into the canal designed to supply the Gabcikovo power plant. The implementation of Variant C did not, however, come to an end with the diversion of the waters, as there still remained outstanding both reinforcement work on the dam and the building of certain auxiliary structures.

The Court has already referred in paragraph 24 above to the meeting held in London on 28 October 1992 under the auspices of the European Communities, in the course of which the parties to the negotiations agreed, *inter alia*, to entrust a tripartite Working Group composed of independent experts (i.e., four experts designated by the European Commission, one designated by Hungary and another by Czechoslovakia) with the task of reviewing the situation created by the implementation of Variant C and making proposals as to urgent measures to adopt. After having worked for one week in Bratislava and one week in Budapest, the Working Group filed its report on 23 November 1992.

66. A summary description of the constituent elements of Variant C appears at paragraph 23 of the present Judgment. For the purposes of the question put to the Court, the official description that should be adopted is, according to Article 2, paragraph 1 *(b)*, of the Special Agreement, the one given in the aforementioned report of the Working Group of independent experts, and it should be emphasized that, according to the Special Agreement, "Variant C" must be taken to include the consequences "on water and navigation course" of the dam closing off the bed of the Danube.

In the section headed "Variant C Structures and Status of Ongoing Work", one finds, in the report of the Working Group, the following passage:

"In both countries the original structures for the Gabcikovo scheme are completed except for the closure of the Danube river at Dunakiliti and the

(1) Completion of the hydropower station (installation and testing of turbines) at Gabcikovo.

Variant C consists of a complex of structures, located in Czecho-Slovakia ... The construction of these are planned for two phases. The structures include ....

(2) By-pass weir controlling the flow into the river Danube.

(3) Dam closing the Danubian river bed.

(4) Floodplain weir (weir in the inundation).

(5) Intake structure for the Mosoni Danube.

(6) Intake structure in the power canal.

(7) Earth barrages/dykes connecting structures.

(8) Ship lock for smaller ships (15 m x 80 m).

(9) Spillway weir.

(10) Hydropower station.

The construction of the structures 1-7 are included in Phase 1, while the remaining 8-10 are a part of Phase 2 scheduled for construction 1993-1995."

* *

67. Czechoslovakia had maintained that proceeding to Variant C and putting it into operation did not constitute internationally wrongful acts; Slovakia adopted this argument. During the proceedings before the Court Slovakia contended that Hungary's decision to suspend and subsequently abandon the construction of works at Dunakiliti had made it impossible for Czechoslovakia to carry out the works as initially contemplated by the 1977 Treaty and that the latter was therefore entitled to proceed with a solution which was as close to the original Project as possible. Slovakia invoked what it described as a "principle of approximate application" to justify the construction and operation of Variant C. It explained that this was the only possibility remaining to it "of fulfilling not only the purposes of the 1977 Treaty, but the continuing obligation to implement it in good faith".

68. Slovakia also maintained that Czechoslovakia was under a duty to mitigate the damage resulting from Hungary's unlawful actions. It claimed that a State which is confronted with a wrongful act of another State is under an obligation to minimize its losses and, thereby, the damages claimable against the wrong-doing State. It argued furthermore that "Mitigation of damages is also an aspect of the performance of obligations in good faith." For Slovakia, these damages would have been immense in the present case, given the investments made and the additional economic and environmental prejudice which would have resulted from the failure to complete the works at Dunakiliti/Gabcikovo and to put the system into operation. For this reason, Czechoslovakia was not only entitled, but even obliged, to implement Variant C.

69. Although Slovakia maintained that Czechoslovakia's conduct was lawful, it argued in the alternative that, even were the Court to find otherwise, the putting into operation of Variant C could still be justified as a countermeasure.

70. Hungary for its part contended that Variant C was a material breach of the 1977 Treaty. It considered that Variant C also violated Czechoslovakia's obligations under other treaties, in particular the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters concluded at Budapest, and its obligations under general international law.

71. Hungary contended that Slovakia's arguments rested on an erroneous presentation of the facts and the law. Hungary denied, *inter alia*, having committed the slightest violation of its treaty obligations which could have justified the putting into operation of Variant C. It considered that "no such rule" of "approximate application" of a treaty exists in international law; as to the argument derived from "mitigation of damage[s]", it claimed that this has to do with the quantification of loss, and could not serve to excuse conduct which is substantively unlawful. Hungary furthermore stated that Variant C did not satisfy the conditions required by international law for countermeasures, in particular the condition of proportionality.

* *

72. Before dealing with the arguments advanced by the Parties, the Court wishes to make clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary's decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty. Vast investments had been made, the construction at Gabcikovo was all but finished, the bypass canal was completed, and Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect in completing work on the tailrace canal. It emerges from the report, dated 31 October 1992, of the tripartite fact-finding mission the Court has referred to in paragraph 24 of the present Judgment, that not using the system would have led to considerable financial losses, and that it could have given rise to serious problems for the environment.

73. Czechoslovakia repeatedly denounced Hungary's suspension and abandonment of works as a fundamental breach of the 1977 Treaty and consequently could have invoked this breach as a ground for terminating the Treaty; but this would not have brought the Project any nearer to completion. It therefore chose to insist on the implementation of the Treaty by Hungry, and on many occasions called upon the latter to resume performance of its obligations under the Treaty.

When Hungry steadfastly refused to do so — although it had expressed its willingness to pay compensation for damage incurred by Czechoslovakia — and when negotiations stalled owing to the diametrically opposed positions of the parties, Czechoslovakia decided to put the Gabcikovo system into operation unilaterally, exclusively under its own control and for its own benefit.

74. That decision went through various stages and, in the Special Agreement, the Parties asked the Court to decide whether Czechoslovakia "was entitled to proceed, in November 1991" to Variant C, and "to put [it] into operation from October 1992".

75. With a view to justifying those actions, Slovakia invoked what it described as "the principle of approximate application", expressed by Judge Sir Hersch Lauterpacht in the following terms:

"It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to

give effect to the instrument — to change it." *(Admissibility of Hearings of Petitioners by the Committee on South West Africa,* separate opinion of Sir Hersch Lauterpacht, *I.C.J. Reports 1956.* p. 46.)

It claimed that this is a principle of international law and a general principle of law.

76. It is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of "approximate application: because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty.

77. As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabcikovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabcikovo-Nagymaros project and for the operation of this joint property as a co-ordinated single unit. By definition all this could not be carried out by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics.

78. Moreover, in practice, the operation of Variant C led Czechoslovakia to appreciate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river.

Czechoslovakia submitted that Variant C was essentially no more than what Hungary had already agreed to and that the only modifications made were those which had become necessary by virtue of Hungary's decision not to implement its treaty obligations. It is true that Hungry, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation; but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse.

The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

79. The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decisions to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.

Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act" (see for example the Commentary on Article 41 of the Draft Articles on State Responsibility, "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10),* p.141 and *Yearbook of the International Law Commission,* 1993, Vol. II, Part 2, p. 57, para. 14).

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80. Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained."

It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.

81. Since the Court has found that the putting into operation of Variant C constituted an internationally wrongful act, the duty to mitigate damage invoked by Slovakia does not need to be examined further.

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82. Although it did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful, Slovakia stated that "Variant C could be presented as a justified countermeasure to Hun-

gary's illegal acts".

The Court has concluded, in paragraph 78 above, that Czechoslovakia committed an internationally wrongful act in putting Variant C into operation. Thus, it now has to determine whether such wrongfulness may be precluded on the ground that the measure so adopted was in response to Hungry's prior failure to comply with its obligations under international law.

83. In order to be justifiable, a countermeasure must meet certain conditions (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgment, I.C.J. Reports 1986,* p. 127, para. 249. See also *Arbitral Award of 9 December 1978 in the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France,* United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XVIII, pp.443 *et seq.*; also Articles 47 to 50 of the Draft Articles on State Responsibility adopted by the International Law Commission on first reading, "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", *Official Records of the General Assembly, Fifty-first Session, Supplement No.10* (A/51/10), pp. 144-145.)

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary's suspension and abandonment of works and that it was directed against that State; and it is equally clear, in the Court's view, that Hungary's actions were internationally wrongful.

84. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. It is clear from the facts of the case, as recalled above by the Court (see paragraphs 61 *et seq.*), that Czechoslovakia requested Hungary to resume the performance of its treaty obligations on many occasions.

85. In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

"[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others" *"Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929," .C.I.J., Series A, No. 23, p.27).*

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz — failed to respect the proportionality which is required by international law.

86. Moreover, as the Court has already pointed out (see paragraph 78), the fact that Hungary had agreed in the context of the original Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube) cannot be understood as having authorized Czechoslovakia to proceed with a unilateral diversion of this magnitude without Hungary's consent.

87. The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate. It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.

* *

88. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(b)*, of the Special Agreement (see paragraph 60), finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

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89. By the terms of Article 2, paragraph 1 *(c)*, of the Special Agreement, the Court is asked, thirdly, to determine

"what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary".

The Court notes that it has been asked to determine what are the legal effects of the notification given on 19 May 1992 of the termination of the Treaty. It will consequently confine itself to replying to this question.

90. The Court will recall that, by early 1992, the respective parties to the 1977 Treaty had made clear their positions with regard to the recourse by Czechoslovakia to Variant C. Hungary in a Note Verbale of 14 February 1992 had made clear its view that Variant C was a contravention of the 1977 Treaty (see paragraph 64 above); Czechoslovakia insisted on the implementation of Variant C as a condition for further negotiation. On 26 February 1992, in a letter to his Czechoslovak counterpart, the Prime Minister of Hungary described the impending diversion of the Danube as "a serious breach of international law" and stated that, unless work was suspended while further enquiries took place, "the Hungarian Government [would] have no choice but to respond to this situation of necessity by terminating the 1977 inter-State Treaty". In a Note Verbale dated 18 March 1992, Czechoslovakia reaffirmed that, while it was prepared to continue negotiations "on every level", it could not agree "to stop all work on the provisional solution".

On 24 March 1992, the Hungarian Parliament passed a resolution authorizing the Government to terminate the 1977 Treaty if Czechoslovakia did not stop the works by 30 April 1992. On 13 April 1992, the Vice-President of the Commission of the European Communities wrote to both parties confirming the willingness of the Commission to chair a committee of independent experts including representatives of the two countries, in order to assist the two Governments in identifying a mutually acceptable solution. Commission involvement would depend on each Government not taking "any steps... which would prejudice possible actions to be undertaken on the basis of the report's findings". The Czechoslovak Prime Minister stated in a letter to the Hungarian Prime Minister dated 23 April 1992, that his Government continued to be interested in the establishment of the proposed committee "without any preliminary conditions"; criticizing Hungary's approach, he refused to suspend work on the provisional solution, but added, "in my opinion, there is still time, until the damming of the Danube (i.e., until October 31, 1992), for resolving disputed questions on the basis of agreement of both States".

On 7 May 1992, Hungary, in the very resolution in which it decided on the termination of the Treaty, made a proposal, this time to the Slovak Prime Minister, for a six-month suspension of work on Variant C. The Slovak Prime Minister replied that the Slovak Government remained ready to negotiate, but considered preconditions "inappropriate".

91. On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Declaration notifying it of the termination by Hungary of the 1977 Treaty as of 25 May 1992. In a letter of the same date from the Hungarian Prime Minister to the Czechoslovak Prime Minister, the immediate cause for termination was specified to be Czechoslovakia's refusal, expressed in its letter of 23 April 1992, to suspend the work on Variant C during mediation efforts of the Commission of the European Communities. In its Declaration, Hungary stated that it could not accept the deleterious effects for the environment and the conservation of nature of the implementation of Variant C which would be practically equivalent to the dangers caused by the realization of the original Project. It added that Variant C infringed numerous international agreements and violated the territorial integrity of the Hungarian State by diverting the natural course of the Danube.

* *

92. During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

93. On the first point, Hungary states that, as Czechoslovakia had "remained inflexible" and continued with its implementation of Variant C, "a temporary state of necessity eventually became permanent, justifying termination of the 1977 Treaty".

Slovakia, for its part, denied that a state of necessity existed on the basis of what it saw as the scientific facts; and argued that even if such a state of necessity had existed, this would not give rise to a right to terminate the Treaty under the Vienna Convention of 1969 on the Law of Treaties.

94. Hungary's second argument relied on the terms of Article 61 of the Vienna Convention, which is worded as follows:

"Article 61

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object in-

dispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."

Hungary declared that it could not be "obliged to fulfil a practically impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage". It concluded that

"By May 1992 the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two parties jointly — had permanently disappeared, and the Treaty had thus become impossible to perform."

In Hungary's view, the "object indispensable for the execution of the treaty", whose disappearance or destruction was required by Article 61 of the Vienna Convention, did not have to be a physical object, but could also include, in the words of the International Law Commission, "a legal situation which was the raison d'être of the rights and obligations".

Slovakia claimed that Article 61 was the only basis for invoking impossibility of performance as a ground for termination, that paragraph 1 of that Article clearly contemplated physical "disappearance or destruction" of the object in question, and that, in any event, paragraph 2 precluded the invocation of impossibility "if the impossibility is the result of a breach by that party ... of an obligation under the treaty".

95. As to "fundamental change of circumstances", Hungary relied on Article 62 of the Vienna Convention on the Law of Treaties which states as follows:

"Article 62

Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) If the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

Hungary identified a number of "substantive elements" present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of "socialist integration", for which the Treaty had originally been a "vehicle", but which subsequently disappeared; the "single and indivisible operational system", which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both States into a market economy; the attitude of Czechoslovakia which had turned the "framework treaty" into an "immutable norm"; and, finally, the transformation of a treaty consistent with environmental protection into "a prescription for environmental disaster".

Slovakia, for its part, contended that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them.

Slovakia, for its part, contended that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them.

96. Hungary further argued that termination of the Treaty was justified by Czechoslovakia's material breaches of the Treaty, and in this regard it invoked Article 60 of the Vienna Convention on the Law of Treaties, which provides:

"Article 60

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either;

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties:

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against person protected by such treaties."

Hungary claimed in particular that Czechoslovakia violated the 1977 Treaty by proceeding to the construction and putting into operation of Variant C, as well as failing to comply with its obligations under Articles 15 and 19 of the Treaty. Hungary further maintained that Czechoslovakia had breached other international conventions (among them the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters) and general international law.

Slovakia denied that there had been, on the part of Czechoslovakia or on its part, any material breach of the obligations to protect water quality and nature, and claimed that Variant C, far from being a breach, was devised as "the best possible approximate application" of the Treaty. It furthermore denied that Czechoslovakia had acted in breach of other international conventions or general international law.

97. Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the "precautionary principle". On this basis, Hungry argued, its termination was "forced by the other party's refusal to suspend work on Variant C".

Slovakia argued, in reply, that none of the intervening developments in environmental law gave rise to norms of *jus cogens* that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather "to the language of self-help or reprisals".

* *

98. The question, as formulated in Article 2, paragraph 1 (c), of the Special Agreement, deals with treaty law since the Court is asked to determine what the legal effects are of the notification of termination of the Treaty. The question is whether Hungary's notification of 19 May 1992 brought the 1977 Treaty to an end, or whether it did not meet the requirements of international law, with the consequence that it did not terminate the Treaty.

99. The Court has referred earlier to the question of the applicability to the present case of the Vienna Convention of 1969 on the Law of Treaties. The Vienna Convention is not directly applicable to the 1977 Treaty inasmuch as both States ratified that Convention only after the Treaty's conclusion. Consequently only those rules which are declaratory of customary law are applicable to the 1977 Treaty. As the Court has already stated above (see paragraph 46), this is the case, in many respects, with Articles 60 to 62 of the Vienna Convention, relating to termination or suspension of the operation of a treaty. On this, the Parties, too, were broadly in agreement.

100. The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime of joint

investment and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

101. The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but — unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.

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102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary's interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties (*Official Records of the United Nations Conference on the Law of Treaties. First Session, Vienna, 26 March-24 May 1968,* Doc. A/CONF.39/11, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp.361-365). Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103. Hungary contended that the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly — had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term "object" in Article 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it would have to conclude that in this instance that régime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from that treaty.

104. Hungary further argued that it was entitled to entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above).

The Court recalls that, in the *Fisheries Jurisdiction* case (*I.C.J. Reports 1973,* p.63, para.36), it stated that,

"Article 62 of the Vienna Convention on the Law of Treaties.... may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances".

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such development

and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

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105. The Court will now examine Hungary's argument that it was entitled to terminate the 1977 Treaty on the ground that Czechoslovakia had violated its Articles 15, 19 and 20 (as well as a number of other conventions and rules of general international law); and that the planning, construction and putting into operation of Variant C also amounted to a material breach of the 1977 Treaty.

106. As to that part of Hungary's argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.

107. Hungary contended that Czechoslovakia had violated Articles 15, 19 and 20 of the Treaty by refusing to enter into negotiations with Hungary in order to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment. Articles 15, 19 and 20 oblige the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests.

Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party. The Court has not found sufficient evidence to conclude that Czechoslovakia had consistently refused to consult with Hungary about the desirability or necessity of measures for the preservation of the environment. The record rather shows that, while both parties indicated, in principle, a willingness to undertake further studies, in practice Czechoslovakia refused to countenance a suspension of the works at Dunakiliti and, later, on Variant C, while Hungary required suspension as a prior condition of environmental investigation because it claimed continuation of the work would prejudice the outcome of negotiations. In this regard it cannot be left out of consideration that Hungary itself, by suspending the works at Nagymaros and Dunakiliti, contributed to the creation of a situation which was not conducive to the conduct of fruitful negotiations.

108. Hungary's main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. As the Court has found in paragraph 79 above, Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully.

In the Court's view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

109. In this regard, it should be noted that, according to Hungary's Declaration of 19 May 1992, the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later. Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. As the Court stated in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (in which case the Vienna Convention did not apply):

"Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith." *I.C.J. Reports 1980,* p. 96, para. 49)

The termination of the Treaty by Hungry was to take effect six days after its notification. On neither of these dates had Hungary suffered injury resulting from acts of Czechoslovakia. The Court must therefore confirm its conclusion that Hungary's termination of the Treaty was premature.

110. Nor can the Court overlook that Czechoslovakia

committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct. As was stated by the Permanent Court of International Justice:

"It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him." (*Factory at Chorzów, Jurisdiction. Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p.31.*)

Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.

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111. Finally, the Court will address Hungary's claim that it was entitled to terminate the 1977 Treaty because new requirements of international law for the protection of the environment precluded performance of the Treaty.

112. Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.

It is all the more important to do this because as the Court recalled in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings including generations unborn" (*I.C.J. Reports* 1996, para.19; see also paragraph 53 above).

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20.

113. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-part involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

114. Finally, Hungary maintained that by their conduct both parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties cannot survive. The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.

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115. In the light of the conclusions it has reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(c)*, of the Special Agreement (see paragraph 89), finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

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116. In Article 2, paragraph 2, of the Special Agreement, the Court is requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions formulated in paragraph 1. In Article 5 of the Special Agreement the Parties agreed to enter into negotiations on the modalities for the execution of the Judgment immedi-

ately after the Court has rendered it.

117. The Court must first turn to the question whether Slovakia became a party to the 1977 Treaty as successor to Czechoslovakia. As an alternative argument, Hungary contended that, even if the Treaty survived the notification of termination, in any event it ceased to be in force as a treaty on 31 December 1992, as a result of the "disappearance of one of the parties". On that date Czechoslovakia ceased to exist as a legal entity, and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence.

118. According to Hungary, "There is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a party" and such a treaty will not survive unless another State succeeds to it by express agreement between that State and the remaining party. While the second paragraph of the Preamble to the Special Agreement recites that "the Slovak Republic is one the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabcikovo-Nagymaros Project". Hungary sought to distinguish between, on the one hand, rights and obligations such as "continuing property rights" under the 1977 Treaty, and, on the other hand, the treaty itself. It argued that, during the negotiations leading to signature of the Special Agreement, Slovakia had proposed a text in which it would have been expressly recognized "as the successor to the government of the CSFR" with regard to the 1977 Treaty, but that Hungary had rejected that formulation. It contended that it had never agreed to accept Slovakia as successor to the 1977 Treaty. Hungary referred to diplomatic exchanges in which the two Parties had each submitted to the other lists of those bilateral treaties which they respectively wished should continue in force between them, for negotiation on a case-by-case basis; and Hungary emphasized that no agreement was ever reached with regard to the 1977 Treaty.

119. Hungary claimed that there was no rule of succession which could operate in the present case to override the absence of consent.

Referring to Article 34 of the Vienna Convention of 23 August 1978 on succession of States in respect of Treaties, in which "a rule of automatic succession to all treaties is provided for", based on the principle of continuity, Hungary argued not only that it never signed or ratified the Convention, but that the "concept of automatic succession" contained in that article was not and is not, and has never been accepted as, a statement of general international law.

Hungary further submitted that the 1977 Treaty did not create "obligations and rights... relating to the regime of a boundary" within the meaning of Article 11 of that Convention, and noted that the existing course of the boundary was unaffected by the Treaty. It also denied that the Treaty was a "localized" treaty, or that it created rights "considered as attaching to [the] territory" within the meaning of Article 12 of the 1978 Convention, which would, as such, be unaffected by a succession of States. The 1977 Treaty was, Hungary insisted, simply a joint investment. Hungary's conclusion was that there is no basis on which the Treaty could have survived the disappearance of Czechoslovakia so as to be binding as between itself and Slovakia.

120. According to Slovakia, the 1977 Treaty, which was not lawfully terminated by Hungary's notification in May 1992, remains in force between itself, as successor State, and Hungary.

Slovakia acknowledged that there was no agreement on succession to the Treaty-between itself and Hungary. It relied instead, in the first place, on the "general rule of continuity which applies in the case of dissolution"; it argued, secondly, that the Treaty is one "attaching to [the] territory" within the meaning of article 12 of the 1978 Vienna Convention, and that it contains provisions relating to a boundary.

121. In support of its first argument Slovakia cited Article 34 of the 1978 Vienna Convention, which it claimed is a statement of customary international law, and which imposes the principle of automatic succession as the rule applicable in the case of dissolution of a State where the predecessor State has ceased to exist. Slovakia maintained that State practice in cases of dissolution tends to support continuity as the rule to be followed with regard to bilateral treaties. Slovakia having succeeded to part of the territory of the former Czechoslovakia, this would be the rule applicable in the present case.

122. Slovakia's second argument rests on "the principle of *ipso jure* continuity of treaties of a territorial or localized character". This rule, Slovakia said, is embodied in Article 12 of the 1978 Convention, which in part provides as follows:

"Article 12

Other territorial regimes

2. A succession of States does not as such affect:

(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and con-

sidered as attaching to that territory.

....."

According to Slovakia. "[this] article [too] can be considered to be one of those provisions of the Vienna Convention that represent the codification of customary international law". The 1977 Treaty is said to fall within its scope because of its "specific characteristics ... which place it in the category of treaties of a localized or territorial character". Slovakia also described the Treaty as one "which contains boundary provisions and lays down a specific territorial régime" which operates in the interest of all Danube riparian States; and as "a dispositive treaty, creating rights *in rem*, independently of the legal personality of its original signatories". Here, Slovakia relied on the recognition by the International Law Commission of the Existence of a "special rule" whereby treaties "intended to establish an objective regime" must be considered as binding on a successor State *(Official Records of the United Nations Conference on the Succession of States in respect of Treaties*, Vol. III, Doc. A/CONF.80/16/Add.2, p.34). Thus, in Slovakia's view, the 1977 Treaty was not one which could have been terminated through the disappearance of one of the original parties.

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123. The Court does not find it necessary for the purposes of the present case to enter into a discussion of whether or not Article 34 of the 1978 Convention reflects the state of customary international law. More relevant to its present analysis is the particular nature and character of the 1977 Treaty. An examination of this Treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational régime for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the by-pass canal. In so doing, it inescapably created a situation in which the interests of other users of the Danube were affected. Furthermore, the interests of third States were expressly acknowledged in Article 18, whereby the parties undertook to ensure "uninterrupted and safe navigation on the international fairway" in accordance with their obligations under the Convention of 18 August 1948 concerning the Régime of Navigation on the Danube.

In its Commentary on the Draft Articles on Succession of States in respect of Treaties, adopted at its twenty-sixth session, the International Law Commission identified "treaties of a territorial character" as having been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States (*Official Records of the United Nations Conference on the Succession of States in respect of Treaties,* Vol. III, Doc. A/CONF 80/16/Add.2, p.27, para.2). The draft text of Article 12, which reflects this principle, was subsequently adopted unchanged in the 1978 Vienna Convention. The Court considers that Article 12 reflects a rule of customary international law; it notes that neither of the Parties disputed this. Moreover, the Commission indicated that "treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties" *ibid.*, p.33, para. 26). The Court observes that Article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However the Court concludes that this formulation was devised rather to take account of the fact that, in many cases, treaties which had established boundaries or territorial régimes were no longer in force *(ibid.* pp.26-37). Those that remained in force would nonetheless bind a successor State.

Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of Article 12 of 1978 Vienna Convention. It created rights and obligations "attaching to" the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

124. It might be added that Slovakia also contended that, while still a constituent part of Czechoslovakia, it played a role in the development of the Project, as it did later, in the most critical phase of negotiations with Hungary about the fate of the Project. The evidence shows that the Slovak Government passed resolutions prior to the signing of the 1977 Treaty in preparation for its implementation; and again, after signature, expressing its support for the Treaty. It was the Slovak Prime Minister who attended the meeting held in Budapest on 22 April 1991 as the Plenipotentiary of the Federal Government to discuss questions arising out of the Project. It was his successor as Prime Minister who notified his Hungarian counterpart by letter on 30 July 1991 of the decision of the Government of the Slovak Republic, as well as of the Government of the Czech and Slovak Federal Republic, to proceed with the "provisional solution" (see paragraph 63 above); and who wrote again on 18 December 1991 to the Hungarian Minister without Portfolio, renewing an earlier suggestion that a joint commission be set up under the auspices of the European Communities to consider possible solutions. The Slovak Prime Minister also wrote to the Hungarian Prime Minister in May 1992 on the subject of the decision taken by the Hungarian Government to terminate the Treaty, in-

forming him of resolutions passed by the Slovak Government in response.

It is not necessary, in the light of the conclusions reached in paragraph 123 above, for the Court to determine whether there are legal consequences to be drawn from the prominent part thus played by the Slovak Republic. Its role does, however, deserve mention.

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125. The Court now turns to the other legal consequences arising from its Judgment.

As to this, Hungary argued that future relations between the Parties, as far as Variant C is concerned, are not governed by the 1977 Treaty. It claims that it is entitled, pursuant to the Convention of 1976 on the Regulation of Water Management Issues of Boundary Waters, to "50% of the natural flow of the Danube at the point at which it crosses the boundary below Cunovo" and considers that the Parties

"are obliged to enter into negotiations in order to produce the result that the water conditions along the area from below Cunovo to below the confluence at Sap become jointly defined water conditions as required by Article 3 *(a)* of the 1976 Convention".

Hungary moreover indicated that any mutually accepted long-term discharge régime must be "capable of avoiding damage, including especially damage to biodiversity prohibited by the [1992 Rio Convention on Biological Diversity]". It added that "a joint environmental impact assessment of the region and of the future of Variant C structures in the context of the sustainable development of the region" should be carried out.

126. Hungary also raised the question of financial accountability for the failure of the original project and stated that both Parties accept the fact that the other has "proprietary and financial interests in the residues of the original Project and that an accounting has to be carried out". Furthermore, it noted that:

"Other elements of damage associated with Variant C on Hungarian territory also have to be brought into the accounting ...., as well as electricity production since the diversion"

and that

"The overall situation is a complex one, and it may be most easily resolved by some form of lump sum settlement."

127. Hungary stated that Slovakia had incurred international responsibility and should make reparation for the damage caused to Hungary by the operation of Variant C. In that connection, it referred, in the context of reparation of the damage to the environment, to the rule of *restitutio in integrum*, and called for the re-establishment of "joint control by the two States over the installations maintained as they are now", and the "re-establishment of the flow of [the] waters to the level at which it stood prior to the unlawful diversion of the river". It also referred to reparation of the damage to the fauna, the flora, the soil, the sub-soil, the groundwater and the aquifer, the damages suffered by the Hungarian population on account of the increase in the uncertainties weighing on its future *(pretium doloris)*, and the damage arising from the unlawful use, in order to divert the Danube, of installations over which the two Parties exercised joint ownership.

Lastly, Hungary called for the "cessation of the continuous unlawful acts" and a "guarantee that the same actions will not be repeated", and asked the Court to order "the permanent suspension of the operation of Variant C".

128. Slovakia argued for its part that Hungary should put an end to its "flexibility and of the important possibilities of development for which it provides, or even of such amendments as might be made to it by agreement between the Parties, further to future negotiations". It stated that joint operations could resume on a basis jointly agreed upon and emphasized the following:

"whether Nagymaros is built as originally planned, or built elsewhere in a different form, or, indeed, not built at all, is a question to be decided by the Parties some time in the future.

Provided the bypass canal and the Gabcikovo Power-station and Locks — both part of the original Treaty, and not party of Variant C — remain operational and economically viable and efficient, Slovakia is prepared to negotiate over the future roles of Dunakiliti and Cunovo, bearing Nagymaros in mind."

It indicated that the Gabcikovo power plant would not operate in peak mode "if the evidence of environmental damage [was] clear and accepted by both Parties". Slovakia noted that the Parties appeared to agree that an accounting should be undertaken "so that, guided by the Court's findings on responsibility, the Parties can try to reach a global settlement". It added that the Parties would have to agree on how the sums due are to be paid.

129. Slovakia stated that Hungary must make reparation for the deleterious consequences of its failure to comply with its obligations, "whether they relate to its unlawful suspensions and abandonments of works or to

its formal repudiation of the Treaty as from May 1992", and that compensation should take the form of a *restitutio in integrum*. It indicated that "Unless the Parties come to some other arrangement by concluding an agreement, *restitutio in integrum* ought to take the form of a *return* by Hungary, *at a future time*, to its obligations under the Treaty" and that "For compensation to be 'full'..., to 'wipe out all the consequences of the illegal act'..., a payment of compensation must ... *be added* to the *restitutio*..." Slovakia claims compensation which must include both interest and loss of profits and should cover the following heads of damage, which it offers by way of guidance:

(1) Losses caused to Slovakia in Gabcikovo sector; costs incurred from 1990 to 1992 by Czechoslovakia in protecting the structures of the G/N project and adjacent areas; the cost of maintaining the old bed of the River Danube pending the availability of the new navigation canal, from 1990 to 1992; losses to the Czechoslovak navigation authorities due to the unavailability of the bypass canal from 1990 to 1992; construction costs of Variant C (1990-1992).

(2) Losses caused to Slovakia in the Nagymaros sector; losses in the field of navigation and flood protection incurred since 1992 by Slovakia due to the failure of Hungary to proceed with the works.

(3) Loss of electricity production.

Slovakia also calls for Hungary to "give the appropriate guarantees that it will abstain from preventing the application of the Treaty and the continuous operation of the system". It argued from that standpoint that it is entitled "to be given a formal assurance that the internationally wrongful acts of Hungary will not recur", and it added that "the maintenance of the closure of the Danube at Cunovo constitutes a guarantee of that kind", unless Hungary gives an equivalent guarantee "within the framework of the negotiations that are to take place between the Parties".

130. The Court observes that the part of its Judgment which answers the questions in Article 2, paragraph 1, of the Special Agreement has a declaratory character. It deals with the *past* conduct of the Parties and determines the lawfulness or unlawfulness of that conduct between 1989 and 1992 as well as its effects on the existence of the Treaty.

131. Now the Court has, on the basis of the foregoing findings, to determine what the *future* conduct of the Parties should be. This part of the Judgment is prescriptive rather than declaratory because it determines what the rights and obligations of the Parties are. The Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement.

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132. In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*.

133. The Court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation — or the practical possibilities and impossibilities to which it gives rise— when deciding on the legal requirements for the future conduct of the Parties.

This does not mean that facts — in this case facts which flow from wrongful conduct — determine the law. The principle *ex injuria jus non origur* is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct.

What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.

134. What might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997. The Court cannot ignore the fact that the Gabcikovo power plant has been in operation for nearly five years, that the bypass canal which feeds the plant receives its water from a significantly smaller reservoir formed by a dam which is built not at Dunakiliti but at Cunovo, and that the plant is operated in a run-of-the-river mode and not in a peak hour mode as originally foreseen. Equally, the Court cannot ignore the fact that, not only has Nagymaros not been built, but that, with the effective discarding by both Parties of peak power operation, there is no longer any point in building it.

135. As the Court has already had occasion to point out, the 1977 Treaty was not only a joint investment project

for the production of energy, but it was designed to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment. None of these objectives has been given absolute priority over the other, in spite of the emphasis which is given in the Treaty to the construction of a System of Locks for the production of energy. None of them has lost its importance. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance, and obligations of result.

136. It could be said that part of the obligations of performance which related to the construction of the System of Locks — in so far as they were not yet implemented before 1992 — have been overtaken by events. It would be an administration of the law altogether out of touch with reality if the Court were to order those obligations to be fully reinstated and the works at Cunovo to be demolished when the objectives of the Treaty can be adequately served by the existing structures.

137. Whether this is indeed the case is, first and foremost, for the Parties to decide. Under the 1977 Treaty its several objectives must be attained in an integrated and consolidated programme, to be developed in the Joint Contractual Plan. The Joint Contractual Plan was, until 1989, adapted and amended frequently to better fit the wishes of the parties. This Plan was also expressly described as the means to achieve the objectives of maintenance of water quality and protection of the environment.

138. The 1977 Treaty never laid down a rigid system, albeit that the construction of a system of locks at Gabcikovo and Nagymaros was prescribed by the Treaty itself. In this respect, however, the subsequent positions adopted by the parties should be taken into consideration. Not only did Hungary insist on terminating construction at Nagymaros, but Czechoslovakia stated, on various occasions in the course of negotiations, that it was willing to consider a limitation or even exclusion of operation in peak how mode. In the latter case the construction of the Nagymaros dam would have become pointless. The explicit terms of the Treaty itself were therefore in practice acknowledged by the parties to be negotiable.

139. The Court is of the opinion that the Parties are under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty can best be served, keeping in mind that all of them should be fulfilled.

140. It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties — even if their conclusions are often contradictory — provide abundant evidence that this impact and these implications are considerable.

In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature.

The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

141. It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses. The Court will recall in this context that, as it said in the *North Sea Continental Shelf* cases:

"[the Parties] 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", *(I.C.J. Reports 1969,* p.47, para. 85).

142. What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the co-operative context of the Treaty.

Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.

143. During this dispute both Parties have called upon the assistance of the Commission of the European Communities. Because of the diametrically opposed positions the Parties took with regard to the required outcome of the trilateral talks which were envisaged, those talks did not succeed. When, after the present Judgment is given, bilateral negotiations without pre-conditions are held, both Parties can profit from the assistance and expertise of a third party. The readiness of the Parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court.

144. The 1977 Treaty not only contains a joint investment programme, it also establishes a régime. According to the Treaty, the main structures of the System of Locks are the joint property of the Parties; their operation will take the form of a co-ordinated single unit; and the benefits of the project shall be equally shared.

Since the Court has found that the Treaty is still in force and that, under its terms, the joint regime is a basic element, it considers that, unless the Parties agree otherwise, such a régime should be restored.

145. Article 10, paragraph 1, of the Treaty states that works of the System of Locks constituting the joint property of the contracting parties shall be operated, as a co-ordinated single unit and in accordance with jointly-agreed operating and operational procedures, by the authorized operating agency of the contracting party in whose territory the works are built. Paragraph 2 of that Article states that works on the System of Locks owned by one of the contracting parties shall be independently operated or maintained by the agencies of that Contracting Party in the jointly prescribed manner.

The Court is of the opinion that the works at Cunovo should become a jointly operated unit within the meaning of Article 10, paragraph 1, in view of their pivotal role in the operation of what remains of the Project and for the water-management régime. The dam at Cunovo has taken over the role which was originally destined for the works at Dunakiliti, and therefore should have a similar status.

146. The Court also concludes that Variant C, which it considers operates in a manner incompatible with the Treaty, should be made to conform to it. By associating Hungary, on an equal footing, in its operation, management and benefits, Variant C will be transformed from a *de facto* status into a treaty-based régime.

It appears from various parts of the record that, given the current state of information before the Court, Variant C could be made to function in such a way as to accommodate both the economic operation of the system of electricity generation and the satisfaction of essential environmental concerns.

Regularization of Variant C by making it part of a single and indivisible operational system of works also appears necessary to ensure that Article 9 of the Treaty, which provides that the contracting parties shall participate in the use and in the benefits of the System of Locks in equal measure, will again become effective.

147. Re-establishment of the joint régime will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty, in concordance with Article 5, paragraph 2, of the Convention on the Law of the Non-Navigational Uses of International Watercourses, according to which:

"Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention." (General Assembly Doc. A/51/869 of 11 April 1997.)

* *

148. Thus far the Court has indicated what in its view should be the effects of its finding that the 1977 Treaty is still in force. Now the Court will turn to the legal consequences of the internationally wrongful acts committed by the Parties.

149. The Permanent Court of International Justice stated in its Judgment of 16 September 1928 in the case concerning the *Factory at Chorzow*:

"reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" *P.C.I.J., Series A. No. 17. p.47).*

150. Reparation must, "as far as possible", wipe out all the consequences of the illegal act. In this case, the consequences of the wrongful acts of both Parties will be wiped out "as far as possible" if they resume their co-operation in the utilization of the shared water resources of the Danube, and if the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner. What it is possible for the Parties to do is to re-establish co-operative administration of what remains of the Project. To that end, it is open to them to agree to maintain the works at Cunovo, with changes in the mode of operation in respect of the allocation of water and electricity, and not to build works at Nagymaros.

151. The Court has been asked by both Parties to determine the consequences of the Judgment as they bear upon payment of damages. According to the Preamble to the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabcikovo-Nagymaros Project. Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.

152. The Court has not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid. Both Parties claimed to have suffered considerable financial losses and both claim pecuniary compensation for them.

It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation.

Slovakia is accordingly entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary's decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti, as those actions caused the postponement of the putting into operation of the Gabcikovo power plant, and changes in its mode of operation once in service.

Hungary is entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in the shared water resources, and exploited those resources essentially for their own benefit.

153. Given the fact, however, that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims.

154. At the same time, the Court wishes to point out that the settlement of accounts for the construction of the works is different from the issue of compensation, and must be resolved in accordance with 1977 Treaty and related instruments. If Hungary is to share in the operation and benefits of the Cunovo complex, it must pay a proportionate share of the building and running costs.

* *

155. For these reasons,

THE COURT

(1) Having regard to Article 2, paragraph 1, of the Special Agreement,

A. *Finds*, by fourteen votes to one, that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the Treaty of 16 September 1977 and related instruments attributed responsibility to it;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judge* Herczegh;

B. *Finds*, by nine votes to six, that Czechoslovakia was entitled to proceed, in November 1991, to the "provisional solution" as described in the terms of the Special Agreement;

IN FAVOUR: *Vice-President* Weeramantry; *Judges* Oda, Guillaume, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

AGAINST: *President* Schwebel; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek;

C. *Finds*, by ten votes to five, that Czechoslovakia was not entitled to put into operation, from October 1992, this "provisional solution";

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Kooijmans, Rezek;

AGAINST: *Judges* Oda, Koroma, Vereshchetin, Parra-Aranguren; *Judge* ad hoc Skubiszewski;

D. *Finds*, by eleven votes to four, that the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them;

IN FAVOUR: *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin. Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

AGAINST: *President* Schwebel; *Judges* Herczegh, Fleischhauer, Rezek;

*2) Having regard to Article 2, paragraph 2, and Article 5 of the Special Agreement,

A. *Finds*, by twelve votes to three, that Slovakia, as successor to Czechoslovakia, became a party to the Treaty of 16 September 1977 as from 1 January 1993;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski:

AGAINST: *President* Schwebel; *Judges* Herczegh, Fleischhauer, Rezek;

B. *Finds*, by thirteen votes to two, that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda,Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski: *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer;

C. *Finds*, by thirteen votes to two, that, unless the Parties otherwise agree, a joint operational régime must be established in accordance with the Treaty of 16 September 1977;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer;

D. Finds, by twelve votes to three, that, unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Oda, Koroma, Vereshchetin;

E. *Finds*, by thirteen votes to two, that the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty of 16 September 1977 and related instruments, taking due account of such measures as will have been taken by the Parties in application of points 2 B and C of the present operative paragraph.

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda,Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fifth day of September, one thousand nine hundred and ninety-seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Hungary and the Government of the Slovak Republic, respectively.

(Signed) Stephen M. SCHWEBEL,
President.

(Signed) Eduardo VALENCIA-OSPINA
Registrar.

President SCHWEBEL and Judge REZEK append declarations to the Judgment of the Court.

Vice-President WEERAMANTRY, Judges BEDJAOUI

and KOROMA append separate opinions to the Judgment of the Court.

Judges ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, VERESHCHETIN and PARRA-ARANGUREN, and Judge *ad hoc* SKUBISZEWSKI append dissenting opinions to the Judgment of the Court.

(Initialled) S.M.S.

(Initialled) E.V.O.

DECLARATION OF PRESIDENT SCHWEBEL

I am largely in agreement with the Court's Judgment and accordingly I have voted for most of its operative paragraphs. I have voted against operative paragraph 1 B essentially because I view the construction of "Variant C:, the "provisional solution:, as inseparable from its being put into operation. I have voted against operative paragraph 1 D essentially because I am not persuaded that Hungary's position as the Party initially in breach deprived it of a right to terminate the Treaty in response to Czechoslovakia's material breach, a breach which in my view (as indicated by my vote on paragraph 1 B) was in train when Hungary gave notice of termination.

At the same time, I fully support the conclusions of the Court as to what should be the future conduct of the Parties and as to disposition of issues of compensation.

SEPARATE OPINION OF VICE-PRESIDENT WEERAMANTRY

INTRODUCTION

This case raises a rich array of environmentally related legal issues. A discussion of some of them is essential to explain my reasons for voting as I have in this very difficult decision. Three issues on which I wish to make some observations, supplementary to those of the Court, are the role played by the principle of sustainable development in balancing the competing demands of development and environmental protection; the protection given to Hungary by what I would describe as the principle of continuing environmental impact assessment; and the appropriateness of the use of *inter partes* legal principles, such as estoppel, for the resolution of problems with an *erga omnes* connotation such as environmental damage.

A. The Concept of Sustainable Development

Had the possibility of environmental harm been the only consideration to be taken into account in this regard, the contentions of Hungary could well have proved conclusive.

Yet there are other factors to be taken into account — not the least important of which is the developmental aspect, for the Gabcikovo scheme is important to Slovakia from the point of view of development. The Court must hold the balance even between the environmental considerations and the developmental considerations raised by the respective Parties. The principle that enables the Court to do so is the principle of sustainable development.

The Court has referred to it as a concept in paragraph 140 of its Judgment. However, I consider it to be more than a mere concept, but as a principle with normative value which is crucial to the determination of this case. Without the benefits of its insights, the issues involved in this case would have been difficult to resolve.

Since sustainable development is a principle fundamental to the determination of the competing considerations in this case, and since, although it has attracted attention only recently in the literature of international law, it is likely to play a major role in determining important environmental disputes of the future, it calls for consideration in some detail. Moreover, this is the first occasion on which it has received attention in the jurisprudence of this Court.

When a major scheme, such as that under consideration in the present case, is planned and implemented, there is always the need to weigh considerations of development against environmental considerations, as their underlying juristic bases — the right to development and the right to environmental protection — are important principles of current international law.

In the present case we have, on the one hand, a scheme which, even in the attenuated form in which it now remains, is important to the welfare of Slovakia and its people, who have already strained their own resources and those of their predecessor State to the extent of over two billion dollars to achieve these benefits. Slovakia, in fact, argues that the environment would be improved through the operation of the project as it would help to stop erosion of the river bed, and that the scheme would be an effective protection against floods. Further, Slovakia has traditionally been short of electricity, and the power generated would be important to its economic development. Moreover, if the project is halted in its tracks, vast structural works constructed at great expense,

even prior to the repudiation of the Treaty, would be idle and unproductive, and would pose an economic and environmental problem in themselves.

On the other hand, Hungary alleges that the project produces, or is likely to produce, ecological damage of many varieties, including harm to river bank fauna and flora, damage to fish breeding, damage to surface water quality, eutrophication, damage to the groundwater regime, agriculture, forestry and soil, deterioration of the quality of drinking water reserves, and sedimentation. Hungary alleges that many of these dangers have already occurred and more will manifest themselves, if the scheme continues in operation. In the material placed before the Court, each of these dangers is examined and explained in considerable detail.

How does one handle these considerations? Does one abandon the project altogether for fear that the latter consequences might emerge? Does one proceed with the scheme because for the national benefits it brings, regardless of the suggested environmental damage? Or does one steer a course between, with due regard to both considerations, but ensuring always a continuing vigilance in respect of environmental harm?

It is clear that a principle must be followed which pays due regard to both considerations. Is there such a principle, and does it command recognition in international law? I believe the answer to both questions is in the affirmative. The principle is the principle of sustainable development and, in my view, it is an integral part of modern international law. It is clearly of the utmost importance, both in this case and more generally.

I would observe, moreover, that both Parties in this case agree on the applicability to this dispute of the principle of sustainable development. Thus, Hungary states in its pleadings that:

"Hungary and Slovakia agree that the principle of sustainable development, as formulated in the Brundtland Report, the Rio Declaration and Agenda 21 is applicable to this dispute...

International law in the field of sustainable development is now sufficiently well established, and both Parties appear to accept this."[1]

Slovakia states that "inherent in the concept of sustainable development is the principle that developmental needs are to be taken into account in interpreting and applying environmental obligations"[2]

Their disagreement seems to be not as to the existence of the principle but, rather, as to the way in which it is to be applied to the facts of this case[3].

The problem of steering a course between the needs of development and the necessity to protect the environment is a problem alike of the law of development and of the law of the environment. Both these vital and developing areas of law require, and, indeed assume, the existence of a principle which harmonizes both needs.

To hold that no such principle exists in the law is to hold that current law recognizes the juxtaposition of two principles which could operate in collision with each other, without providing the necessary basis of principle for their reconciliation. The untenability of the supposition that the law sanctions such a state of normative anarchy suffices to condemn a hypothesis that leads to so unsatisfactory a result.

Each principle cannot be given free rein, regardless of the other. The law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development.

This case offers a unique opportunity for the application of that principle, for it arises from a Treaty which had development as its objective, and has been brought to a standstill over arguments concerning environmental considerations

The people of both Hungary and Slovakia are entitled to development for the furtherance of their happiness and welfare. They are likewise entitled to the preservation of their human right to the protection of their environment. Other cases raising environmental questions have been considered by this Court in the context of environmental pollution arising from such sources as nuclear explosions, which are far removed from development projects. The present case thus focuses attention, as no other case has done in the jurisprudence of this Court, on the question of the harmonization of developmental and environmental concepts.

(a) Development as a Principle of International Law

Article 1 of the Declaration on the Right to Development, 1986, asserted that "The right to development is an inalienable human right". This Declaration had the overwhelming support of the international community[4]

[1] See HR, paras. 1.45 and 1.47.

[2] SCM, para. 9.53. See also paras. 9.54-9.59.

[3] HR, para. 1.45.

[4] 146 votes in favour, with one vote against.

and has been gathering strength since then[5]. Principle 3 of the Rio Declaration, 1992, reaffirmed the need for the right to development to be fulfilled.

"Development" means, of course, development not merely for the sake of development and the economic gain it produces, but for its value in increasing the sum total of human happiness and welfare[6]. That could perhaps be called the first principle of the law relating to development.

To the end of improving the sum total of human happiness and welfare, it is important and inevitable that development projects of various descriptions, both minor and major, will be launched from time to time in all parts of the world.

(b) Environmental Protection as a Principle of International Law

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

While, therefore, all people have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment.

(c) Sustainable Development as a Principle of International Law

After the early formulations of the concept of development, it has been recognized that development cannot be pursued to such a point as to result in substantial damage to the environment within which it is to occur. Therefore development can only be prosecuted in harmony with the reasonable demands of environmental protection. Whether development is sustainable by reason of its impact on the environment will, of course, be a question to be answered in the context of the particular situation involved.

It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment. The right to development as thus refined is clearly part of modern international law. It is compendiously referred to as sustainable development.

The concept of sustainable development can be traced back, beyond the Stockholm Conference of 1972, to such events as the Founex meeting of experts in Switzerland in June 1971[7]; the conference on environment and development in Canberra in 1971; and United Nations General Assembly resolution 2849 (XXVI). It received a powerful impetus from the Stockholm Declaration which, by Principle II, stressed the essentiality of development as well as the essentiality of bearing environmental considerations in mind in the developmental process. Moreover, many other Principles of that Declaration[8] provided a setting for the development of the concept of sustainable development[9] and more than one-third of the Stockholm Declaration related to the harmonization of environment and development[10]. The Stockholm Conference also produced an Action Plan for the Human Environment[11].

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[5] Many years prior to the Declaration of 1986, this right had received strong support in the field of human rights. As early as 1972, at the Third Session of the Institut international de Droits de l'Homme. Judge Kéba Mbaye, President of the Supreme Court of Senegal and later to be a Vice-President of this Court, argued strongly that such a right existed. He adduced detailed argument in support of his contention from economic, political and moral standpoints (See K. Mbaye. "Le droit au développement comme un droit de l'homme", *5 Revue des Droits de l'homme* (1972), p. 503.)
Nor was the principle without influential voices in its support from the developed world as well. Indeed, the genealogy of the idea can be traced much further back even to the conceptual stages of the Universal Declaration of Human Rights, 1948.

Mrs. Eleanor Roosevelt, who from 1946 to 1952 served as the Chief United States representative to Committee III, Humanitarian, Social and Cultural Affairs, and was the first Chairperson, from 1946-1951, of the United Nations Human Rights Commission, had observed in 1947, "We will have to bear in mind that we are writing a bill of rights for the world and that one of the most important rights is the opportunity for development". (M. Glen Johnson, "The Contribution of Eleanor and Franklin Roosevelt to the Development of the International Protection for Human Rights", 9 *Human Rights Quarterly* (1987), p. 19, quoting Mrs. Roosevelt's column, "My Day". 6 Feb. 1947.)
General Assembly resolution 642 (VII) of 1952, likewise, referred expressly to "integrated economic and social development".

[6] The Preamble to the Declaration on the Right to Development (1986) recites that development is a comprehensive, economic, social and cultural process which aims at the constant improvement and well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

[7] See *Sustainable Development in International Law*, Winfried Lang (ed.), 1995, p. 143.

[8] For example, Principles 2, 3, 4, 5, 8, 9, 12, 13, and 14.

[9] These principles are thought to be based to a large extent on the Founex Report - see *Sustainable Development and International Law*. Winfried Lang (ed.). *supra, p. 144.*

[10] *Ibid.*

[11] Action Plan for the Human Environment, UN Doc. A/CONF.48/14/Rev. 1. See especially Chapter II which devoted its final section to development and the environment.

The international community had thus been sensitized to this issue even as early as the early 1970s, and it is therefore no cause for surprise that the 1977 Treaty, in Articles 15 and 19, made special reference to environmental considerations. Both Parties to the Treaty recognized the need for the developmental process to be in harmony with the environment and introduced a dynamic element into the Treaty which enabled the Joint Project to be kept in harmony with developing principles of international law.

Since then, it has received considerable endorsement from all sections of the international community, and at all levels.

Whether in the field of multilateral treaties[12], international declarations[13]; the foundation documents of international organizations[14]; the practices of international financial institutions[15]; regional declarations and planning documents[16]; or State practice[17], there is a wide and general recognition of the concept. The Bergen ECE Ministerial Declaration on Sustainable Development of 15 May 1990, resulting from a meeting of Ministers from 34 countries in the ECE region, and the Commissioner for the Environment of the European Community, addressed "The challenge of sustainable development of humanity" (para. 6), and prepared a Bergen Agenda for Action which included a consideration of the Economics of Sustainability, Sustainable Energy Use, Sustainable Industrial Activities, and Awareness Raising and Public Participation. It sought to encourage investors to apply environmental standards required in their home country to investments abroad. It also sought to encourage UNEP, UNIDO, UNDP, IBRD, ILO, and appropriate international organizations to support member countries in ensuring environmentally sound industrial investment, observing that industry and government should cooperate for this purpose (para. 15 *(f)*)[18]. A Resolution of the Council of Europe, 1990, propounded a European Conservation Strategy to meet, *inter alia*, the legitimate needs and aspirations of all Europeans by seeking to base economic, social and cultural development on a rational and sustainable use of natural resources, and to suggest how sustainable development can be achieved[19].

The concept of sustainable development is thus a principle accepted not merely by the developing countries, but one which rests on a basis of worldwide acceptance.

In 1987, the Brundtland Report brought the concept of sustainable development to the forefront of international attention. In 1992, the Rio Conference made it a central feature of its Declaration, and it has been a focus of attention in all questions relating to development in the developing countries.

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[12] For example, the United Nations Convention to Combat Desertification (The United Nations Convention to Combat Desertification in those Countries Experiencing Serious Droughts and/or Desertification, Particularly in Africa), 1994, Preamble, Art. 9(1), the United Nations Framework Convention on Climate Change, 1992, (XXXI ILM (1992) 849, Arts. 2 and 3), and the Convention on Biological Diversity (XXXI ILM (1992) 818, Preamble, Arts. 1 and 10 — "sustainable use of biodiversity").

[13] For example, the Rio Declaration on Environment and Development, 1992, emphasizes sustainable development in several of its Principles (e.g., Principles 4, 5, 7, 8, 9, 20, 21, 22, 24 and 27 refer expressly to "sustainable development" which can be described as the central concept of the entire document); and the Copenhagen Declaration, 1995 (paras. 6 & 8), following on the Copenhagen World Summit for Social Development, 1995.

[14] For example, the North American Free Trade Agreement (Canada, Mexico, United States) (NAFTA, Preamble, XXXII ILM (1993). p. 289); the World Trade Organization (WTO) (paragraph 1 of the Preamble of the Marrakesh Agreement of 15 April 1994, establishing the World Trade Organization speaks of the "optimal use of the world's resources in accordance with the objective of sustainable development" — XXXIII ILM (1994), pp. 1143-1144); and the European Union (Art. 2 of the ECT).

[15] For example, the World Bank Group, the Asian Development Bank, the African Development Bank, the Inter-American Development Bank, and the European Bank for Reconstruction and Development all subscribe to the principle of sustainable development. Indeed, since 1993, the World Bank has convened an annual conference related to advancing environmentally and socially sustainable development (ESSD).

[16] For example, the Langkawi Declaration on the Environment, 1989, adopted by the "Heads of Government of the Commonwealth representing a quarter of the world's population" which adopted "sustainable development" as its central theme; Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific, Bangkok, 1990 (Doc. 38a, p. 567); and Action Plan for the Protection and Management of the Marine and Coastal Environment of the South Asian Seas Region, 1983 (para. 10 — "sustainable environmentally sound development").

[17] For example, in 1990, the Dublin Declaration by the European Council on the Environmental Imperative stated that there must be an acceleration of effort to ensure that economic development in the Community is "sustainable and environmentally sound" (*Bulletin of the European Communities*, 6-1990, Ann. II, p. 18). It urged the Community and Member States to play a major role to assist developing countries in their efforts to achieve "long-term sustainable development" (*ibid*, p. 19). It said, in regard to countries of Central and Eastern Europe, that remedial measures must be taken "to ensure that their future economic development is sustainable" (*ibid.*). It also expressly recited that: "As Heads of State or Government of the European Community, ... [w]e intend that action by the Community and its Member States will be developed ... on the principles of sustainable development and preventive and precautionary action" (*ibid*, Conclusions of the Presidency, Point 1.36, pp. 17-18).

[18] *Basic Documents of International Environmental Law*, Harald Hohmann (ed.), Vol. 1, 1992, p. 558.

[19] *Ibid*, p. 598.

The principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.

The concept has a significant role to play in the resolution of environmentally related disputes. The components of the principle come from well-established areas of international law — human rights, State responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights, good neighbourliness — to mention a few. It has also been expressly incorporated into a number of binding and far-reaching international agreements, thus giving it binding force in the context of those agreements. It offers an important principle for the resolution of tensions between two established rights. It reaffirms in the arena of international law that there must be both development and environmental protection, and that neither of these rights can be neglected.

The general support of the international community does not of course mean that each and every member of the community of nations has given its express and specific support to the principle — nor is this a requirement for the establishment of a principle of customary international law.

As Brierly observes:

> "It would hardly ever be practicable, and all but the strictest of positivists admit that it is not necessary, to show that every state has recognized a certain practice, just as in English law the existence of a valid local custom or custom of trade can be established without proof that every individual in the locality, or engaged in the trade, has practised the custom. This test of *general* recognition is necessarily a vague one; but it is of the nature of customary law, whether national or international..."[20]

Evidence appearing in international instruments and State practice (as in development assistance and the practice of international financial institutions) likewise amply supports a contemporary general acceptance of the concept.

Recognition of the concept could thus, fairly, be said to be worldwide[21].

(d) The Need for International Law to Draw upon the World's Diversity of Cultures in Harmonizing Development and Environmental Protection

This case, which deals with a major hydraulic project, is an opportunity to tap the wisdom of the past and draw from it some principles which can strengthen the concept of sustainable development, for every development project clearly produces an effect upon the environment, and humanity has lived with this problem for generations.

This is a legitimate source for the enrichment of international law, which source is perhaps not used to the extent which its importance warrants.

In drawing into international law the benefits of the insights available from other cultures, and in looking to the past for inspiration, international environmental law would not be departing from the traditional methods of international law, but would, in fact, be following in the path charted out by Grotius. Rather than laying down a set of principles *a priori* for the new discipline of international law, he sought them also *a posteriori* from the experience of the past, searching through the whole range of cultures available to him for this purpose[22]. From them, he drew the durable principles which had weathered the ages, on which to build the new international order of the future. Environmental law is now in a formative stage, not unlike international law in its early stages. A wealth of past experience from a variety of cultures is available to it. It would be pity indeed if it were left untapped merely because of attitudes of formalism which see such approaches as not being entirely *de rigueur*.

I cite in this connection an observation of Sir Robert Jennings that, in taking note of different legal traditions and cultures, the International Court (as it did in the *Western Sahara* case).

> "was asserting, not negating, the Grotian subjection of the totality of international relations to international law. It seems to the writer, indeed, that at the present juncture in the development of the international legal system it may be more important to stress the imperative need to develop international law to comprehend within itself the rich diversity of cultures, civilizations and legal traditions..."[23].

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[20] J. Brierly, *The Law of Nations*, 6th ed, 1963, p. 61; emphasis supplied.

[21] See, further, L. Krämer, *E.C. Treaty and Environmental Law*, 2nd ed., 1995, p. 63, analysing the environmental connotation in the word "sustainable" and tracing it to the Brundtland Report.

[22] Julius Stone, *Human Law and Human Justice*, 1965, p. 66: "It was for this reason that Grotius added to his theoretical deductions such a mass of concrete examples from history."

[23] Sir Robert Y. Jennings, "Universal International Law in a Multicultural World", in *International Law and The Grotian Heritage: A commemorative Colloquium on the occasion of the fourth centenary of the birth of Hugo Grotius*, ed. & published by the T.M.C. Asser Institute, The Hague, 1985, p. 195.

Moreover, especially at the frontiers of the discipline of international law, it needs to be multi-disciplinary, drawing from other disciplines such as history, sociology, anthropology, and psychology such wisdom as may be relevant for its purpose. On the need for the international law of the future to be interdisciplinary, I refer to another recent extra-judicial observation of that distinguished former President of the Court that:

> "there should be a much greater, and a practical, recognition by international lawyers that the rule of law in international affairs, and the establishment of international justice, are inter-disciplinary subjects"[24].

Especially where this Court is concerned, "the essence of true universality"[25] of the institution is captured in the language of Article 9 of the Statute of the International Court of Justice which requires the "representation of the *main forms of civilization* and of the principal legal systems of the world" (emphasis added). The struggle for the insertion of the italicized words in the Court's Statute was a hard one, led by the Japanese representative, Mr. Adatci[26], and, since this concept has thus been integrated into the structure and the Statute of the Court, I see the Court as being charged with a duty to draw upon the wisdom of the world's several civilizations, where such a course can enrich its insights into the matter before it. The Court cannot afford to be monocultural, especially where it is entering newly developing areas of law.

This case touches an area where many such insights can be drawn to the enrichment of the developing principles of environmental law and to a clarification of the principles the Court should apply.

It is in this spirit that I approach a principle which, for the first time in its jurisprudence, the Court is called upon to apply — a principle which will assist in the delicate task of balancing two considerations of enormous importance to the contemporary international scene and, potentially, of even greater importance to the future.

(e) Some Wisdom from the Past Relating to Sustainable Development

There are some principles of traditional legal systems that can be woven into the fabric of modern environmental law. They are specially pertinent to the concept of sustainable development which was well recognized in those systems. Moreover, several of these systems have particular relevance to this case, in that they relate to the harnessing of streams and rivers and show a concern that these acts of human interference with the course of nature should always be conducted with due regard to the protection of the environment. In the context of environmental wisdom generally, there is much to be derived from ancient civilizations and traditional legal systems in Asia, the Middle East, Africa, Europe, the Americas, the Pacific, and Australia — in fact, the whole world. This is a rich source which modern environmental law has left largely untapped.

As the Court has observed, "Throughout the ages mankind has, for economic and other reasons, constantly interfered with nature." (Para.140.)

The concept of reconciling the needs of development with the protection of the environment is thus not new. Millennia ago these concerns were noted and their twin demands well reconciled in a manner so meaningful as to carry a message to our age.

I shall start with a system with which I am specially familiar, which also happens to have specifically articulated these two needs — development and environmental protection — in its ancient literature. I refer to the ancient irrigation-based civilization of Sri Lanka[27]. It is a system which, while recognizing the need for development and vigorously implementing schemes to this end, at the same time specifically articulated the need for environmental protection and ensured that the technology it employed paid due regard to environmental considerations. This concern for the environment was reflected not only in its literature and its technology, but also in its legal system, for the felling of certain forests was prohibited, game sanctuaries were established, and royal edicts decreed that the natural resource of water was to be used to the last drop without any wastage.

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[24] International Lawyers and the Progressive Development of International Law", *Theory of International Law at the Threshold of the 21st Century*, Jerry Makarczyk (ed.), 1996, p. 423.

[25] Jennings, "Universal International Law in a Multicultural World", *supra*, p. 189.

[26] On this subject of contention, see *Procès-Verbaux of the Proceedings of the Committee, 16 June-24 July 1920, esp. p. 136.*

[27] This was not an isolated civilization, but one which maintained international relations with China, on the one hand, and with Rome (1st C) and Byzantium (4th C), on the other. The presence of its ambassadors at the Court of Rome is recorded by Pliny (lib. vi c.24), and is noted by Grotius - *De Jure Praedae Commentarius*, G.L. Williams and W.H. Zeydol (eds.), Classics of International Law, James B. Scott (ed.), 1950. pp.240-241. This diplomatic representation also receives mention in world literature (e.g., Milton, *Paradise Regained*, Book IV). See also Grotius reference to the detailed knowledge of Ceylon possessed by the Romans - Grotius, *Mare Liberum (Freedom of the Seas)*, tr. R. van Deman Magoffin, p.12. The island was known as Taprobane to the Greeks, Serendib to the Arabs, Lanka to the Indians, Ceilao to the Portuguese, and Zeylan to the Dutch. Its trade with the Roman Empire and the Far East was noted by Gibbon.

[28] It is an aid to the recapitulation of the matters mentioned that the edicts and works I shall refer to have been the subject of written records, maintained contemporaneously and over the centuries. See note 41 below.

This system, some details of which I shall touch on[28], is described by Arnold Toynbee in his panoramic survey of civilizations. Referring to it as an "amazing system of waterworks"[29], Toynbee describes[30] how hill streams were tapped and their water guided into giant storage tanks, some of them four thousand acres in extent[31], from which channels ran on to other larger tanks[32]. Below each great tank and each great channel were hundreds of little tanks, each the nucleus of a village.

The concern for the environment shown by this ancient irrigation system has attracted study in a recent survey of the Social and Environmental Effects of Large Dams[33], which were built in the jungle above the village, not for the purpose of irrigating land, but to provide waster to wild animals[34].

This system of tanks and channels, some of them two thousand years old, constitute in their totality several multiples of the irrigation works involved in the present scheme. They constituted development as it was understood at the time, for they achieved in Toynbee's words, "the arduous feat of conquering the parched plains of Ceylon for agriculture"[35]. Yet they were executed with meticulous regard for environmental concerns, and showed that the concept of sustainable development was consciously practised over two millennia ago with much success.

Under this irrigation system, major rivers were dammed and reservoirs created, on a scale and in a manner reminiscent of the damming which the Court saw on its inspection of the dams in this case. This ancient concept of development was carried out on such a large scale that, apart from the major reservoirs[36], of which there were several dozen, between 25,000 and 30,000 minor reservoirs were fed from these reservoirs through an intricate network of canals[37].

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[29] Arnold J. Toynbee. *A Study of History,* Somervell's Abridgment, 1960, Vol. 1, p.257.

[30] *Ibid.* p.81, citing John Still, *The Jungle Tide*.

[31] Several of these are still in use, e.g., the *Tissawewa* (3rd C, B.C.); the *Nuwarawewa* (3rd C.B.C.); the *Minneriya* Tank (275 A.D.); the *Kalawewa* (5th C, A.D.); and the *Parakrama Samudra* (Sea of Parakrama, 11th C, A.D.).

[32] The technical sophistication of this irrigation system has been noted also in Joseph Needham's monumental work on *Science and Civilization in China*. Needham, in describing the ancient irrigation works of China, makes numerous references to the contemporary irrigation works of Ceylon, which he discusses at some length. See especially, Vol. 4, *Physics and Physical Technology*, 1971, pp.368 *et seq.* Also p.215: "We shall see how skilled the ancient Ceylonese were in this art."

[33] Edward Goldsmith and Nicholas Hildyard, *The Social and Environmental Effects of Large Dams,* 1985, pp.291-304.

[34] For these details, see Goldsmith and Hildyard, *ibid*, pp.291 and 296. The same authors observe:

"Sri Lanka is covered with a network of thousands of man-made lakes and ponds, known locally as *tanks* (after *tanque*, the Portuguese word for reservoir). Some are truly massive, many are thousands of years old, and almost all show a high degree of sophistication in their construction and design. Sir James Emerson Tennent, the nineteenth century historian, marvelled in particular at the numerous channels that were dug underneath the bed of each lake in order to ensure that the flow of water was constant and equal as long as any water remained in the tank."

[35] Toynbee, *supra.* p.81. Andrew Carnegie, the donor of the Peace Palace, the seat of this Court, has described this ancient work of development in the following terms: "The position held by Ceylon in ancient days as the great granary of Southern Asia explains the precedence accorded to agricultural pursuits. Under native rule the whole island was brought under irrigation by means of artificial lakes, constructed by dams across ravines, many of them of great extent — one still existing is twenty miles in circumference — but the system has been allowed to fall into decay." (Andrew Carnegie, *Round the World*, 1879, (1933 ed.), pp.155-160.)

[36] The first of these major tanks was thought to have been constructed in 504 B.C. (Sir James Emerson Tennent, *Ceylon*. 1859, Vol. 1, p.367). A few examples, straddling 15 centuries, were:

– the *Vavunik-kulam* (3rd C, B.C.) (1,975 acres water surface, 596 million cubic feet water capacity); the *Pavatkulam* (3rd or 2nd C, B.C.) (2,029 acres water surface, 770 million cubic feet water capacity)—Parker, *Ancient Ceylon,* 1909, pp.363, 373.

– the *Tissawewa* (3rd c, B.C.); and the *Nuwarawewa* (3rd C, B.C.), both still in service and still supplying water to the ancient capital Anuradhapura, which is now a provincial capital);

– the *Minneriya tank* (275 A.D.) ["The reservoir upwards of twenty miles in circumference ... the great embankment remains nearly perfect" — Tennent, *supra,* Vol. II, p.600];

– the *Topawewa* (4th C, A.D.), area considerably in excess of 1,000 acres;

– the *Kalawewa* (5th C, A.D.), embankment 3.25 miles long, rising to a height of 40 feet, tapping the river Kala Oya and supplying water to the capital Anuradhapura through a canal 50 miles in length;

– the *Yodawewa* (5th C, A.D.), Needham describes this as "A most grandiose conception... the culmination of Ceylonese hydraulics... an artificial lake with a six-and-a-half mile embankment on three sides of a square, sited on a sloping plain and not in a river valley at all." It was fed by a 50-mile canal from the river Malvatu-Oya;

– the *Parakrama Samudra* (Sea of Parakrama) (11th C, A.D.), embankment 9 miles long, up to 40 feet high, enclosing 6,000 acres of water area. (Brohier, *Ancient Irrigation Works in Ceylon*, 1934, p.9.)

[37] On the irrigation systems, generally, see H. Parker, *Ancient Ceylon, supra*; R.L. Brohier, *Ancient Irrigation Works in Ceylon*, 1934; Edward Goldsmith and Nicholas Hildyard, *op. cit.*, pp.291-304. Needham, describing the ancient canal system of China, observes that"it was comparable only with the irrigation contour canals of Ceylon, not with any work in Europe" (*op. cu*, Vol. 4, p.359).

The philosophy underlying this gigantic system[38], which for upwards of two thousand years served the needs of man and nature alike, was articulated in a famous principle laid down by an outstanding monarch[39] that "not even a little water that comes from the rain is to flow into the ocean without being made useful to man"[40]. According to the ancient chronicles[41], these works were undertaken "for the benefit of the country", and "out of compassion for all living creatures"[42]. This complex of irrigation works was aimed at making the entire country a granary. They embodied the concept of development *par excellence.*

Just as development was the aim of this system, it was accompanied by a systematic philosophy of conservation dating back to at least the third century, B.C. The ancient chronicles record that when the King (Devanampiya Tissa, 247-207 B.C.) was on a hunting trip (around 223 B.C.), the Arahat[43] Mahinda, son of the Emperor Asoka of India, preached to him a sermon on Buddhism which converted the king. Here are excerpts from that sermon:

> "O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it.[44]"

This sermon, which indeed contained the first principle of modern environmental law — the principle of trusteeship of earth resources — caused the king to start sanctuaries for wild animals — a concept which continued to be respected for over twenty centuries. The traditional legal system's protection of fauna and flora, based on this Buddhist teaching, extended well into the 18th century[45].

The sermon also pointed out that even birds and beasts have a right to freedom from fear[46].

The notion of not causing harm to others and hence *sic utere tuo ut alienum non laedas* was a central notion of Buddhism. It translated well into environmental attitudes. "*Alienum*" in this context would be extended by Buddhism to future generations as well, and to other component elements of the natural order beyond man himself, for the Buddhist concept of duty had an enormously long reach.

This marked concern with environmental needs was reflected also in royal edicts, dating back to the third century B.C., which ordained that certain primeval forests should on no account be felled. This was because adequate forest cover in the highlands was known to be crucial to the irrigation system as the mountain jungles intercepted and stored the monsoon rains[47]. They attracted the rain which fed the river and irrigation systems of the country, and were therefore considered vital.

Environmental considerations were reflected also in the actual work of construction and engineering. The ancient engineers devised an answer to the problem of silting (which has assumed much importance in the present case), and they invented a device (the *bisokotuwa* of valve

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[38] "So vast were the dimensions of some of these gigantic tanks that many still in existence cover an area from fifteen to twenty miles in circumference" (Tennent *supra*, Vol. 1, p.364).

[39] King Parakrama Bahu (1153-1186 A.D.). This monarch constructed or restored 163 major tanks, 2,376 minor tanks, 3,910 canals, and 165 dams. His masterpiece was the Sea of Parakrama, referred to in note 36. All of this was conceived within the environmental philosophy of avoiding any wastage of natural resources.

[40] See Toynbee's reference to this. The idea underlying the system was very great. It was intended by the tank-building kings that none of the rain which fell in such abundance in the mountains should reach the sea without paying tribute to man on the way." (Toynbee, *op cit.*, p. 81.)

[41] *The Mahavamsa*, Turnour's translation. Chap.xxxvii, p. 242. *The Mahavamsa* was the ancient historical chronicle of Sri Lanka, maintained contemporaneously by Buddhist monks, and an important source of dating for South Asian history. Commencing at the close of the 4th century, A.D., and incorporating earlier chronicles and oral traditions dating back a further eight centuries, this constitutes a continuous record for over 15 centuries — *see The Mahavamsa or The Great Chronicle of Ceylon*, translated into English by Wilhelm Geiger, 1912, Introduction, pp. ix-xii. The King's statement, earlier referred to, is recorded in the *Mahavamsa* as follows:
"In the realm that is subject to me are...but few fields which are dependent on rivers with permanent flow... Also by many mountains, thick jungles and by widespread swamps my kingdom is much straitened. Truly, in such a country not even a little water that comes from the rain must flow into the ocean without being made useful to man." (*Ibid.*, Chap. LXVIII, verses 8-12.)

[42] See also, on this matter, Emerson Tennent, *supra*, Vol. 1, p.311.

[43] A person who has attained a very high state of enlightenment. For its more technical meaning, see Walpola Rahula, *History of Buddhism in Ceylon*, 1956, pp.217-221.

[44] This sermon is recorded in the *Mahavamsa*, Chap.14.

[45] See K. N. Jayatilleke, "The Principles of International Law in Budhist Doctrine", 120 *Recueil des Cours* (1967-1), p.558.

[46] For this idea in the scriptures of Buddhism, see *Digha Nikaya*, III, Pali Text Society, p.850.

[47] Goldsmith and Hildyard, *supra*. p.299. See, also, R.L. Brohier. "The Interrelation of Groups of Ancient Reservoirs and Channels in Ceylon", *Journal of the Royal Asiatic Society (Ceylon)*, Vol. 34, No. 90, 1937, p.65. Brohier's study is one of the foremost authorities on the subject.

pit), the counterpart of the sluice, for dealing with this environmental problem[48], by controlling the pressure and the quantity of the outflow of water when it was released from the reservoir[49]. Weirs were also built, as in the case of the construction involved in this case, for raising the levels of river water and regulating its flow[50].

This juxtaposition in this ancient heritage of the concepts of development and environmental protection invites comment immediately from those familiar with it. Anyone interested in the human future would perceive the connection between the two concepts and the manner of their reconciliation.

Nor merely from the legal perspective does this become apparent, but even from the approaches of other disciplines.

Thus Arthur C. Clarke, the noted futurist, with that vision which has enabled him to bring high science to the service of humanity, put his finger on the precise legal problem we are considering when he observed: "the small Indian Ocean island... provides textbook examples of many modern dilemmas: *development versus environment*"[51], and proceeds immediately to recapitulate the famous sermon, already referred to, relating to the trusteeship of land, observing, "For as King Devanampiya Tissa was told three centuries before the birth of Christ, we are its guardians — *not* its owners"[52].

The task of the law is to convert such wisdom into practical terms — and the law has often lagged behind other disciplines in so doing. Happily for international law, there are plentiful indications, as recited earlier in this opinion, of that degree of "general recognition among states of a certain practice as obligatory"[53] to give the principle of sustainable development the nature of customary law.

This reference to the practice and philosophy of a major irrigation civilization of the pre-modern world[54] illustrates that when technology on this scale was attempted it was accompanied by a due concern for the environment. Moreover, when so attempted, the necessary response from the traditional legal system, as indicated above, was one of affirmative steps for environmental protection, often taking the form of royal decrees, apart from the practices of a sophisticated system of customary law which regulated the manner in which the irrigation facilities were to be used and protected by individual members of the public.

The foregoing is but one illustrative example of the concern felt by prior legal systems for the preservation and protection of the environment. There are other examples of complex irrigation systems that have sustained themselves for centuries, if not millennia.

My next illustration comes from two ancient cultures of

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[48] H. Parker, *Ancient Ceylon, supra.* p.379:

"Since about the middle of the last century, open wells, called 'valve towers' when they stand clear of the embankment or 'valve pits' when they are in it, have been built in numerous reservoirs in Europe. Their duty is to hold the valves, and the lifting-gear for working them, by means of which the outward flow of water is regulated or totally stopped. Such also was the function of the *bisokotuwa* of the Sinhalese engineers; they were the first inventors of the valve-pit more than 2,100 years ago."

[49] H. Parker, op, cit. Needham observes:

"Already in the first century, A.D. they [the Sinhalese engineers] understood the principle of the oblique weir ... But perhaps the most striking invention was the intake-towers or valve towers *(Bisakotuwa)* which were fitted in the reservoirs perhaps from the 2nd Century B.C. onwards, certainly from the 2nd Century A.D... In this way silt and scum-free water could be obtained and at the same time the pressure-head was so reduced as to make the outflow controllable." (Joseph Needham, *Science and Civilization in China, op. cit.,* Vol. 4, p.372.)

[50] K.M. de Silva, *A History of Sri Lanka,* 1981, p.30.

[51] *National Geographic* magazine, Aug. 1983, No.2, p.254; emphasis added.

[52] Arthur C. Clarke has also written:

"Of all Ceylon's architectural wonders, however, the most remarkable — and certainly the most useful — is the enormous irrigation system which, for over two thousand years, has brought prosperity to the rice farmers in regions where it may not rain for six months at a time. Frequently ruined, abandoned and rebuilt, this legacy of the ancient engineers is one of the island's most precious possessions. Some of its artificial lakes are ten or twenty kilometres in circumference, and abound with birds and wildlife." (*The View from Serendip*, 1977, p.121.)

[53] J. Brierly, *The Law of Nations, supra,* p.61.

[54] It is possible that in no other part of the world are there to be found within the same space the remains of so many works for irrigation, which are at the same time of such great antiquity and of such vast magnitude as in Ceylon..."(Bailey, *Report on Irrigation in Uva*, 1859; see also R.L. Brohier, *Ancient Irrigation Works in Ceylon, supra,*p.1);

"No people in any age or country had so great practice and experience in the construction of works for irrigation." (Sir James Emerson Tennent, op, cit., Vol. 1, p.468);

"The stupendous ruins of their reservoirs are the proudest monuments which remain of the former greatness of their country ... Excepting the exaggerated dimensions of Lake Moeris in Central Egypt, and the mysterious 'Basin of Al Aram'... no similar constructions formed by any race, whether ancient or modern, exceed in colossal magnitude the stupendous tanks of Ceylon." (Sir Emerson Tennent, quoted in Brohier, *supra*, p.1.)

sub-Saharan Africa — those of the Sonjo and the Chagga, both Tanzanian tribes[55]. Their complicated networks of irrigation furrows, collecting water from the mountain streams and transporting it over long distances to the fields below, have aroused the admiration of modern observers not merely for their technical sophistication, but also for the durability of the complex irrigation systems they fashioned. Among the Sonjo, it was considered to be the sacred duty of each generation to ensure that the system was kept in good repair and all able-bodied men in the villages were expected to take part[56]. The system comprised a fine network of small canals, reinforced by a superimposed network of larger channels. The water did not enter the irrigation area unless it was strictly required, and was not allowed to pass through the plots in the rainy season. There was thus no over-irrigation, salinity was reduced, and water-borne diseases avoided[57].

Sir Charles Dundas, who visited the Chagga in the first quarter of this century, was much impressed by the manner in which, throughout the long course of the furrows, society was so organized that law and order prevailed[58]. Care of the furrows was a prime social duty, and if a furrow was damaged, even accidentally, one of the elders would sound a horn in the evening (which was known as the call to the furrows), and next morning everyone would leave their normal work and set about the business of repair[59]. The furrow was a social asset owned by the clan[60].

Another example is that of the *qanats*[61] of Iran, of which there were around 22,000. comprising more than 170,000 miles[62] of underground irrigation channels built thousands of years ago, and many of them still functioning[63]. Not only is the extent of this system remarkable, but also the fact that it has functioned for thousands of years and, until recently, supplied Iran with around 75 per cent of the water used for both irrigation and domestic purposes.

By way of contrast, where the needs of the land were neglected, and massive schemes launched for urban supply rather than irrigation, there was disaster. The immense works in the Euphrates Valley in the third millennium B.C. aimed not at improving the irrigation system of the local tribesmen, but at supplying the requirements of a rapidly growing urban society (e.g., a vast canal built around 2400 B.C. by King Entemenak) led to seepage, flooding and over-irrigation[64]. Traditional farming methods and later irrigation systems helped to overcome the resulting problems of waterlogging and salinization.

China was another site of great irrigation works, some of which are still in use over two millennia after their construction. For example, the ravages of the Mo river were overcome by an excavation through a mountain and the construction of two great canals. Needham describes this as "one of the greatest of Chinese engineering operations which, now 2,200 years old, is still in use today"[65] An ancient stone inscription teaching the art of river control says that its teaching "holds good for a thousand autumns"[66]. Such action was often inspired by the philosophy recorded in the *Tao Te Ching* which "with its usual gemlike brevity says 'Let there be no action [contrary to Nature] and there will be nothing that will not be well regulated'[67]. Here, from another ancient irrigation civilization, is yet another expression of the idea of the rights of future generations being served through the harmonization of human developmental work with respect for the natural environment.

Regarding the Inca civilization at its height, it has been observed that it continually brought new lands under cultivation by swamp drainage, expansion of irrigation works, terracing of hillsides and construction of irrigation works in dry zones, the goal being always the same — better utilization of all resources so as to maintain an equilibrium between production and consumption[68]. In

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[55] Goldsmith and Hildyard, *op. cit.*, pp.282-291.

[56] *Ibid*, pp.284-285.

[57] *Ibid*, p.284

[58] Sir Charles Dundas, *Kilimanjaro and Its Peoples*, 1924, p.262.

[59] Goldsmith and Hildyard, *op. cit.*, 289.

[60] See further Fidelio T. Masao, "The Irrigation System in Uchagga: An Ethno-Historical Approach", *Tanzania Notes and Records*, No. 75, 1974.

[61] *Qanats* comprise a series of vertical shafts dug down to the aquifer and joined by a horizontal canal - see Goldsmith and Hildyard, *supra*, p.277.

[62] Some idea of the immensity of this work can be gathered from the fact that it would cost around one million dollars to build an eight kilometres *qanat* with an average tunnel depth of 15 metres (*ibid.*, p. 280).

[63] *Ibid.*, p. 277.

[64] Goldsmith and Hildyard, *supra*, p.308.

[65] *Op. cit.*, Vol. 4, p.288.

[66] [*Ibid.*, p.295.

[67] Needham, *Science and Civilization in China*, Vol. 2, *History of Scientific Thought*, 1969, p.69.

[68] Jorge E. Hardoy, *Pre-Columbian Cities*, 1973, p.415.

the words of a noted writer on this civilization, "in this respect we can consider the Inca civilization triumphant, since it conquered the eternal problem of *maximum use and conservation of soil*"[69]. Here, too, we note the harmonization of developmental and environmental considerations.

Many more instances can be cited of irrigation cultures which accorded due importance to environmental considerations and reconciled the rights of present and future generations. I have referred to some of the more outstanding. Among them, I have examined one at greater length, partly because it combined vast hydraulic development projects with a meticulous regard for environmental considerations, and partly because both development and environmental protection are mentioned in its ancient records. That is sustainable development *par excellence*; and the principles on which it was based must surely have a message for modern law.

Traditional wisdom which inspired these ancient legal systems was able to handle such problems. Modern legal systems can do no less, achieving a blend of the concepts of development and of conservation of the environment, which alone does justice to humanity's obligations to itself and to the planet which is its home. Another way of viewing the problem is to look upon it as involving the imperative of balancing the needs of the present generation with those of posterity.

In relation to concern for the environment generally, examples may be cited from nearly every traditional system, ranging from Australasia and the Pacific Islands, through Amerindian and African cultures to those of ancient Europe. When Native American wisdom, with its deep love of nature, ordained that no activity affecting the land should be undertaken without giving thought to its impact on the land for seven generations to come[70]; when African tradition viewed the human community as threefold — past, present and future — and refused to adopt a one-eyed vision of concentration on the present; when Pacific tradition despised the view of land as merchandise that could be bought and sold like a common article of commerce[71], and viewed land as a living entity which lived and grew with the people and upon whose sickness and death the people likewise sickened and died; when Chinese and Japanese culture stressed the need for harmony with nature; and when Aboriginal custom, while maximizing the use of all species of plant and animal life, yet decreed that no land should be used by a man to the point where it could not replenish itself[72], these varied cultures were reflecting the ancient wisdom of the human family which the legal systems of the time and the tribe absorbed, reflected and turned into principles whose legal validity cannot be denied. Ancient Indian teaching so respected the environment that it was illegal to cause wanton damage, even to an enemy's territory in the course of military conflict[73].

Europe, likewise, had a deep-seated tradition of love for the environment, a prominent feature of European culture, until the industrial revolution pushed these concerns into the background. Wordsworth in England, Thoreau in the United States, Rousseau in France, Tolstoy and Chekhov in Russia, Goethe in Germany spoke not only for themselves, but represented a deep-seated love of nature that was instinct in the ancient traditions of Europe — traditions whose gradual disappearance these writers lamented in their various ways[74]. Indeed, European concern with the environment can be traced back

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[69] Jon Collier, *Los indios de las Americas*, 1960, cited in Hardoy, *op.cit.*, p.415. See also Donald Collier, "Development of civilization on the Coast of Peru" in *Irrigation Civilizations: A Comparative Study*, Julian H. Steward (ed.), 1955.

[70] On Native American attitudes to land, see Guruswamy, Palmer, and Weston (eds.), *International Environmental Law and World Order*, 1994, pp.298-299. On American Indian attitudes, see further J. Callicott, "The Traditional American Indian and Western European Attitudes Towards Nature: An Overview", 4 *Environmental Ethics* 293 (1982); A. Wiggins, "Indian Rights and the Environment", 1*18 Yale J. Int'l Law 345 (1993)*; J. Hughes, *American Indian Ecology (1983)*).

[71] A Pacific Islander, giving evidence before the first Land Commission in the British Solomons (1919-1924), poured scorn on the concept that land could be treated "as if it were a thing like a box" which could be bought and sold, pointing out that land was treated in his society with respect and with due regard to the rights of future generations. (Peter G. Sack, *Land Between Two Laws*, 1993, p.33.)

[72] On Aboriginal attitudes to land, see E.M. Eggleston, *Fear, Favour and Affection*, 1976. For all their concern with the environment, the Aboriginal people were not without their own development projects.

There were remarkable Aboriginal water control schemes at Lake Condah, Toolondo and Mount William in south-western Victoria. These were major engineering feats, each involving several kilometres of stone channels connecting swamp and watercourses.

At Lake Condah, thousands of years before Leonardo da Vinci studied the hydrology of the northern Italian lakes, the original inhabitants of Australia perfectly understood the hydrology of the site. A sophisticated network of traps, weirs and sluices were designed..." (Stephen Johnson *et al, Engineering and Society: An Australian Perspective*, 1995, p.35.)

[73] Nagenddra Singh, *Human Rights and the Future of Mankind*, 1981, p.93.

[74] Commenting on the rise of naturalism in all the arts in Europe in the later Middle Ages, one of this century's outstanding philosophers of science has observed:

> The whole atmosphere of every art exhibited direct joy in the apprehension of the things around us. The draftsmen who executed the later mediaeval decorative sculpture, Giotto, Chaucer, Wordsworth, Walt Whitman and at the present day the New England poet Robert Frost, are all akin to each other in this respect." (Alfred North Whitehead, *Science and the Modern World*, 1926, p.17.)

through the millennia to such writers as Virgil, whose *Georgics*, composed between 37 and 30 B.C., extols the beauty of the Italian countryside and pleads for the restoration of the traditional agricultural life of Italy, which was being damaged by the drift to the cities[75].

This survey would not be complete without a reference also to the principles of Islamic law that inasmuch as all land belongs to God, land is never the subject of human ownership, but is only held in trust, with all the connotations that follow of due care, wise management, and custody for future generations. The first principle of modern environmental law — the principle of trusteeship of earth resources — is thus categorically formulated in this system.

The ingrained values of any civilization are the source from which its legal concepts derive, and the ultimate yardstick and touchstone of their validity. This is so in international and domestic legal systems alike, save that international law would require a worldwide recognition of those values. It would not be wrong to state that the love of nature, the desire for its preservation, and the need for human activity to respect the requisites for its maintenance and continuance are among those pristine and universal values which command international recognition.

The formalism of modern legal systems may cause us to lose sight of such principles, but the time has come when they must once more be integrated into the corpus of the living law. As stated in the exhaustive study of *The Social and Environmental Effects of Large Dams*, already cited, "We should examine not only what has caused modern irrigation systems to *fail*; it is much more important to understand what has made traditional irrigation societies to *succeed*"[76]. Observing that various societies have practised sustainable irrigation agriculture over thousands of years, and that modern irrigation systems rarely last more than a few decades, the authors pose the question whether it was due to the achievement of a "congruence of fit" between their methods and "the nature of land, water and climate"[77]. Modern environmental law needs to take note of the experience of the past in pursuing this "congruence of fit" between development and environmental imperatives.

By virtue of its representation of the main forms of civilization, this Court constitutes a unique form for the reflection and the revitalization of those global legal traditions. There were principles ingrained in these civilizations as well as embodied in their *legal systems*, for legal systems include not merely written legal systems but traditional legal systems as well, which modern researchers have shown to be no less legal systems than their written cousins, and in some respects even more sophisticated and finely tuned than the latter[78].

Living law which is daily observed by members of the community, and compliance with which is so axiomatic that it is taken for granted, is not deprived of the character of law by the extraneous tests and standard of reduction to writing. Writing is of course useful for establishing certainty, but when a duty such as the duty to protect the environment is so well accepted that all citizens act upon it, that duty is part of the legal system in question[79].

Moreover, when the Statute of the Court described the sources of international law as including the "general principles of law recognized by civilized nations", it expressly opened a door to the entry of such principles into modern international law.

(f) Traditional Principles that can assist in the Development of Modern Environmental Law

As modern environmental law develops, it can, with profit to itself, take account of the perspectives and principles of traditional systems, not merely in a general way, but with reference to specific principles, concepts, and aspirational standards.

Among those which may be extracted from the systems already referred to are such far reaching principles as the principle of trusteeship of earth resources, the principle of intergenerational rights, and the principle that development and environmental conservation must go hand in hand. Land is to be respected as having a vitality of its own and being integrally linked to the welfare of the community. When it is used by humans, every opportunity should be afforded to it to replenish itself. Since flora and fauna have a niche in the ecological system, they must be expressly protected. There is a duty lying upon all members of the community to preserve the integrity and purity of the environment.

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[75] See the *Georgics*, Book II, 1.36 ff.; 1.458 ff. Also *Encyclopaedia Britannica*, 1992, Vol. 29, pp.499-500).

[76] Goldsmith and Hildyard, *op. cit.*,p.316.

[77] *Ibid.*

[78] See, for example, M. Gluckman, *African Traditional Law in Historical Perspective*, 1974, *The Ideas in Barotse Jurisprudence*, 2nd ed., 1972, and *The Judicial Process among the Barotse*, 1955; Al. L. Epstein, *Juridical Techniques and the Judicial Process: A Study in African Customary Law*, 1954.

[79] On the precision with which these systems assigned duties to their members, see Malinowski, *Crime and Custom in Savage Society*, 1926.

Natural resources are not individually, but collectively, owned, and a principle of their use is that they should be used for the maximum service of people. There should be no waste, and there should be a maximization of the use of plant and animal species, while preserving their regenerative powers. The purpose of development is the betterment of the condition of the people.

Most of them have relevance to the present case, and all of them can greatly enhance the ability of international environmental law to cope with problems such as these if and when they arise in the future. There are many routes of entry by which they can be assimilated into the international legal system, and modern international law would only diminish itself were it to lose sight of them — embodying as they do the wisdom which enabled the works of man to function for centuries and millennia in a stable relationship with the principles of the environment. This approach assumes increasing importance at a time when such a harmony between humanity and its planetary inheritance is a prerequisite for human survival.

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Sustainable development is thus not merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law.

B. The Principle of Continuing Environmental Impact Assessment

(a) The Principle of Continuing Environmental Impact Assessment

Environmental Impact Assessment (EIA) has assumed an important role in this case.

In a previous opinion[80] I have had occasion to observe that this principle was gathering strength and international acceptance, and had reached the level of general recognition at which this Court should take notice of it[81].

I wish in this opinion to clarify further the scope and extent of the environmental impact principle in the sense that environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This follows from the fact that EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences. As long as a project of some magnitude is in operation, EIA must continue, for every such project can have unexpected consequences; and considerations of prudence would point to the need for continuous monitoring[82].

The greater the size and scope of the project, the greater is the need for a continuous monitoring of its effects, for EIA before the scheme can never be expected, in a matter so complex as the environment, to anticipate every possible environmental danger.

In the present case, the incorporation of environmental considerations into the Treaty by Articles 15 and 19 meant that the principle of EIA was also built into the Treaty. These provisions were clearly not restricted to EIA before the project commenced, but also included the concept of monitoring during the continuance of the project. Article 15 speaks expressly of monitoring of the water quality during the *operation* of the System of Locks, and Article 19 speaks of compliance with obligations for the protection of nature arising in connection with the construction and *operation* of the System of Locks.

Environmental law in its current state of development would read into treaties which may reasonably be considered to have a significant impact upon the environment, a duty of environmental impact assessment and this means also, whether the treaty expressly so provides or not, a duty of monitoring the environmental impacts of any substantial project during the operation of the scheme.

Over half a century ago the *Trail Smelter Arbitration*[83] recognized the importance of continuous monitoring when, in a series of elaborate provisions, it required the parties to monitor subsequent performance under the decision[84]. It directed the Trail Smelter to install observation stations, equipment necessary to give information

[80] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in* Nuclear Tests (New Zealand v. France *Cse, I.C.J. Reports 1995,* p.344. See, also, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J. Reports 1996,* p.140.

[81] Major international documents recognizing this principle (first established in domestic law under the 1972 National Environmental Protection Act of the United States) are the 1992 Rio Declaration (Principle 17); United Nations General Assembly resolution 2995 (XXVII), 1972; the 1978 UNEP Draft Principles of Conduct (Principle 5); Agenda 21 (paras.7.41 *(b)* and 8.4); the 1974 Nordic Environmental Protection Convention (Art. 6); the 1985 EC Environmental Assessment Directive (Art. 3); and the 1991 Espoo Convention. The status of the principle in actual practice is indicated also by the fact that multilateral development banks have adopted it as an essential precaution (World Bank Operational Directive 4.00).

[82] *Trail Smelter Arbitration* (III *UNRILA* (1941), P.1907).

[83] *III UNRIIA* (1941), p. 1907

[84] See *ibid.*, pp. 1934-1937.

of gas conditions and sulphur dioxide recorders, and to render regular reports which the Tribunal would consider at a future meeting. In the present case, the Judgment of the Court imposes a requirement of joint supervision which must be similarly understood and applied.

The concept of monitoring and exchange of information has gathered much recognition in international practice. Examples are the Co-operative programme for the Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe, under the ECE Convention, the Vienna Convention for the Protection of the Ozone Layer, 1985 (Arts. 3 & 4), and the Convention on Long-Range Transboundary Air Pollution, 1979 (Art.9)[85]. There has thus been growing international recognition of the concept of continuing monitoring as part of EIA.

The Court has indicated in its Judgment (para. 155 2 C) that a joint operational régime must be established in accordance with the Treaty of 16 September 1977. A continuous monitoring of the scheme for its environmental impacts will accord with the principles outlined, and be a part of that operational régime. Indeed, the 1977 Treaty, with its contemplated régime of joint operation and joint supervision, had itself a built-in régime of continuous joint environmental monitoring. This principle of environmental law, as reinforced by the terms of the Treaty and as now incorporated into the Judgment of the Court (para.140), would require the Parties to take upon themselves an obligation to set up the machinery for continuous watchfulness, anticipation and evaluation at every stage of the project's progress, throughout its period of active operation.

Domestic legal systems have shown an intense awareness of this need and have even devised procedural structures to this end. In India, for example, the concept has evolved of the "continuous mandamus" — a court order which specifies certain environmental safeguards in relation to a given project, and does not leave the matter there, but orders a continuous monitoring of the project to ensure compliance with the standards which the court has ordained[86].

EIA, being a specific application of the larger general principle of caution, embodies the obligation of continuing watchfulness and anticipation.

(b) The Principle of Contemporaneity in the Application of Environmental Norms

This is a principle which supplements the observations just made regarding continuing assessment. It provides the standard by which the continuing assessment is to be made.

This case concerns a treaty that was entered into in 1977. Environmental standards and the relevant scientific knowledge of 1997 are far in advance of those of 1977. As the Court has observed, new scientific insights and a growing awareness of the risks for mankind have led to the development of new norms and standards.

"Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past." (Para.140.)

This assumes great practical importance in view of the continued joint monitoring that will be required in terms of the Court's Judgment.

Both Parties envisaged that the project they had agreed upon was not one which would be operative for just a few years. It was to reach far into the long-term future, and be operative for decades, improving in a permanent way the natural features that it dealt with, and forming a lasting contribution to the economic welfare of both participants.

If the Treaty was to operate for decades into the future, it could not operate on the basis of environmental norms as though they were frozen in time when the Treaty was entered into.

This inter-temporal aspect of the present case is of importance to all treaties dealing with projects impacting on the environment. Unfortunately, the Vienna Convention offers very little guidance regarding this matter which is of such importance in the environmental field. The provision in Article 31, paragraph 3 *(c)*, providing that "any relevant rules of international law applicable in the relations between the parties" shall be taken into account, scarcely covers this aspect with the degree of clarity requisite to so important a matter.

Environmental concerns are live and continuing concerns whenever the project under which they arise may have been inaugurated. It matters little that an undertaking has been commenced under a treaty of 1950, if in fact that undertaking continues in operation in the year 2000. The relevant environmental standards that will be applicable will be those of the year 2000.

As this Court observed in the *Namibia* case, "an international instrument has to be interpreted and applied within

[85] *XVIII ILM* (1979), p. 1442.

[86] For a reference to environmentally-related judicial initiatives of the cours of the SAARC Region, see the Proceedings of the Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development, held in Colombo, Sri Lanka, 4-6 July 1997, shortly to be published.

the framework of the entire legal system prevailing at the time of the interpretation"[87], and these principles are "not limited to the rules of international law applicable at the time the treaty was concluded"[88]

Environmental rights are human rights. Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of their time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights.

Support for this proposition can be sought from the opinion of Judge Tanaka in *South West Africa*, when he observed that a new customary law could be applied to the interpretation of an instrument entered into more than 40 years previously[89]. The ethical and human rights related aspects of environmental law bring it within the category of law so essential to human welfare that we cannot apply to today's problems in this field the standards of yesterday. Judge Tanaka reasoned that a party to a humanitarian instrument has no right to act in a manner which is today considered inhuman, even though the action be taken under an instrument of 40 years ago. Likewise, no action should be permissible which is today considered environmentally unsound, even though it is taken under an instrument of more than 20 years ago.

Mention may also be made in this context of the observation of the European Court of Human Rights in the *Tyrer* case that the Convention is a "living instrument" which must be interpreted "in the light of present-day conditions"[90].

It may also be observed that we are not here dealing with questions of the *validity* of the Treaty which fall to be determined by the principles applicable at the time of the Treaty, but with the *application* of the Treaty[91]. In the application of an environmental treaty, it is vitally important that the standards in force *at the time of application* would be the governing standards.

A recognition of the principle of contemporaneity in the application of environmental norms applies to the joint supervisory régime envisaged in the Court's Judgment, and will be an additional safeguard for protecting the environmental interests of Hungary.

C. The Handling of *erga omnes* Obligations in *inter partes* Judicial Procedure

(a) The Factual Background: The presence of the elements of estoppel

It is necessary to bear in mind that the Treaty of 1977 was not one that suddenly materialized and was hastily entered into, but that it was the result of years of negotiation and study following the first formulations of the idea in the 1960s. During the period of negotiation and implementation of the Treaty, numerous detailed studies were conducted by many experts and organizations, including the Hungarian Academy of Sciences.

The first observation to be made on this matter is that Hungary went into the 1977 Treaty, despite very clear warnings during the preparatory studies that the project might involve the possibility of environmental damage. Hungary, with a vast amount of material before it, both for and against, thus took a considered decision, despite warnings of possible danger to its ecology on almost all the grounds which are advanced today.

Secondly, Hungary, having entered into the Treaty, continued to treat it as valid and binding for around 12 years. As early as 1981, the government of Hungary had ordered a reconsideration of the project and researchers had then suggested a postponement of the construction, pending more detailed ecological studies. Yet Hungary went ahead with the implementation of the Treaty.

Thirdly, not only did Hungry devote its own effort and resources to the implementation of the Treaty but, by its attitude, it left Czechoslovakia with the impression that the binding force of the Treaty was not in doubt. Under this impression, and in pursuance of the Treaty which bound both Parties. Czechoslovakia committed enormous resources to the project. Hungary looked on without comment or protest and, indeed, urged Czechoslovakia to more expeditious action. It was clear to Hungary that Czechoslovakia was spending vast funds on the Project — resources clearly so large as to strain the economy of a State whose economy was not particularly

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[87] *I.C.J. Reports 1971*, p. 31, para. 53.

[88] *Oppenheim's International Law*, R.Y. Jennings and A. Watts (eds.), 1992, p. 1275, Note 21.

[89] *I.C.J. Reports 1966*, pp. 293-294.

[90] Judgment of the Court, Tyrer case, 25 April 1978, para. 31, publ. Court A, Vol. 26, at 15, 16.

[91] See further Rosalyn Higgins, "Some observations on the Inter-Temporal Rule in International Law", in *Theory of International Law at the Threshold of the 21st Century, supra*, p. 173.

[92] On the application of principles of estoppel in the jurisprudence of this Court and its predecessor, see *Legal Status of Eastern Greenland, P.C.I.J., Series A/B. No. 53, p. 22; Fisheries (United Kingdom v. Norway), I.C.J. Reports 1951*, p. 116; *Temple of Preah Vihear, I.C.J. Reports 1962*, p. 6. For an analysis of this jurisprudence, see the separate opinion of Judge Ajibola in *Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994, pp. 77-83.*

strong.

Fourthly, Hungary's action in so entering into the Treaty in 1977 was confirmed by it as late as October 1988 when the Hungarian Parliament approved of the Project, despite all the additional material available to it in the intervening space of 12 years. A further reaffirmation of this Hungarian position is to be found in the signing of a protocol by the Deputy Chairman of the Hungarian Council of Ministers on 6 February 1989, reaffirming Hungary's commitment to the 1977 Project. Hungary was in fact interested in setting back the date of completion from 1995 to 1994.

Ninety-six days after the 1989 Protocol took effect, i.e., on 13 May 1989, the Hungarian Government announced the immediate suspension for two months of work at the Nagymaros site. It abandoned performance on 20 July 1989, and thereafter suspended work on all parts of the Project. Formal termination of the 1977 Treaty by Hungary took place in May 1992.

It seems to me that all the ingredients of a legally binding estoppel are here present[92].

The other Treaty partner was left with a vast amount of useless project construction on its hands and enormous incurred expenditure which it had fruitlessly undertaken.

(b) The Context of Hungary's Actions

In making these observations, one must be deeply sensitive, one must be deeply sensitive to the fact that Hungary was passing through a very difficult phase, having regard to the epochal events that had recently taken place in Eastern Europe. Such historic events necessarily leave their aftermath of internal tension. This may well manifest itself in shifts of official policy as different emergent groups exercise power and influence in the new order that was in the course of replacing that under which the country had functioned for close on half a century. One cannot but take note of these realities in understanding the drastic official changes of policy exhibited by Hungry.

Yet the Court is placed in the position of an objective observer, seeking to determine the effects of one State's changing official attitudes upon a neighbouring State. This is particularly so where the latter was obliged, in determining its course of action, to take into account the representations emanating from the official reposition of power in the first State.

Whatever be the reason for the internal changes of policy, and whatever be the internal pressures that might have produced this, the Court can only assess the respective rights of the two States on the basis of their official attitudes and pronouncements. Viewing the matter from the standpoint of an external observer, there can be little doubt that there was indeed a marked change of official attitude towards the Treaty, involving a sharp shift from full official acceptance to full official rejection. It is on this basis that the legal consequence of estoppel would follow.

(c) Is it appropriate to use the Rules of inter partes litigation to Determine erga omnes *Obligations?*

This recapitulation of the facts brings me to the point where I believe a distinction must be made between litigation involving issues *inter partes* and litigation which involves issues with an *erga omnes* connotation.

An important conceptual problem arises when, in such a dispute *inter partes*, an issue arises regarding an alleged violation of rights or duties in relation to the rest of the world. The Court, in the discharge of its traditional duty of deciding *between the parties* makes the decision which is in accordance with justice and fairness *between the parties*. The procedure it follows is largely adversarial. Yet this scarcely does justice to rights and obligations of an *erga omnes* character — least of all in cases involving environmental damage of a far-reaching and irreversible nature. I draw attention to this problem as it will present itself sooner or later in the field of environmental law, and because (though not essential to the decision actually reached) the facts of this case draw attention to it in a particularly pointed form.

There has been conduct on the part of Hungary which, in ordinary *inter partes* litigation, would prevent it from taking up wholly contradictory positions. But can momentous environmental issues be decided on the basis of such *inter partes* conduct? In cases where the *erga omnes* issues are of sufficient importance, I would think not.

This is a suitable opportunity, both to draw attention to the problem and to indicate concern at the inadequacies of such *inter partes* rules as determining factors in major environmental disputes.

I stress this for the reason that *inter partes* adversarial procedures, eminently fair and reasonable in a purely *inter partes* issue, may need reconsideration in the future, if ever a case should arise of the imminence of serious or catastrophic environmental danger, especially to parties other than the immediate litigants.

Indeed, the inadequacies of technical judicial rules of procedure for the decision of scientific matters has for long been the subject of scholarly comment[93].

[93] See, for example, Peter Brett, "Implications of Science for the Law", 18 *McGill Law Journal* (1972), p. 170, at p. 191. For a well known comment from the perspective of sociology, see Jacques Ellul, *The Technological Society*, tr. John Wilkinson, 1964, pp. 251, 291-300.

We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation.

When we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.

The present case offers an opportunity for such reflection.

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Environmental law is one of the most rapidly developing areas of international law and I have thought it fit to make these observations on a few aspects which have presented themselves for consideration in this case. As this vital branch of law proceeds to develop, it will need all the insights available from the human experience, crossing cultural and disciplinary boundaries which have traditionally hemmed in the discipline of international law.

(Signed) Christopher Gregory WEERAMANTRY.

SEPARATE OPINION OF JUDGE ABDUL G. KOROMA

I have voted in favour of most of the operative part of the Judgment, principally because I concur with the Court's finding, in response to the questions submitted to it in the Special Agreement, that Hungary was not entitled to suspend and subsequently to abandon in 1989 the works on the Nagymaros Project and on the part of the Gabcikovo Project on the Danube river for which it was responsible under the 1977 Treaty, that the Treaty continues to be in force and consequently governs the relationship between the Parties.

In making such a finding the Court not only reached the right decision in my view, but reached a decision which is in accordance with the 1977 Treaty, and is consistent with the jurisprudence of the Court as well as the general principles of international law. Foremost among these principles is that of *pacta sunt servanda* which forms an integral part of international law. Any finding to the contrary would have been tantamount to denying respect for obligations arising from treaties, and would also have undermined one of the fundamental principles and objectives of the United Nations Charter calling upon States "to establish conditions under which justice and respect for the obligations arising from treaties ... can be maintained", and "to achieve international co-operation in solving problems of an economic, social... character".

When Czechoslovakia (later Slovakia) and Hungary agreed by means of the 1977 Treaty to construct the Gabcikovo Nagymaros barrage system of locks on the Bratislava-Budapest sector of the river for the development and broad utilization of its water resources, particularly for the production of energy, and for purposes connected with transport, agriculture and other sectors of the national economy, this could be seen as a practical realization of such objectives, since the Danube has always played a vital part in the commercial and economic life of its riparian States, underlined and reinforced by their interdependence.

Prior to the adoption of the Treaty and the commencement of the Project itself, both Czechoslovakia and Hungary had recognized that whatever measures were taken to modify the flow of the river, such as those contemplated by the Project, they would have environmental effects, some adverse. Experience had shown that activities carried on upstream tended to produce effects downstream, thus making international co-operation all the more essential. With a view to preventing, avoiding and mitigating such impacts, extensive studies on the environment were undertaken by the Parties prior to the conclusion of the Treaty. The Treaty itself, in its Articles 15, 19 and 20, imposed strict obligations regarding the protection of the environment which were to be met and complied with by the Contracting Parties in the construction and operation of the Project.

When in 1989 Hungary, concerned about the effects of the Project on its natural environment, suspended and later abandoned works for which it was responsible under the 1977 Treaty this was tantamount to a violation not only of the Treaty itself but of the principle of *pacta sunt servanda*.

Hungary invoked the principle of necessity as a legal justification for its termination of the Treaty. It stated, *inter alia*, that the construction of the Project would have significantly changed that historic part of the Danube with which the Project was concerned; that as a result of operation in peak mode and the resulting changes in water level, the flora and fauna on the banks of the river would have been damaged and water quality impaired. It was also Hungry's contention that the completion of the Project would have had a number of other adverse ef-

fects, in that the living conditions for the biota of the banks would have been drastically changed by peak-mode operation, the soil structure ruined and its yield diminished. It further stated that the construction might have resulted in the waterlogging of several thousand hectares of soil and that the groundwater in the area might have become over-salinized. As far as the drinking water of Budapest was concerned, Hungry contended that the Project would have necessitated further dredging; this would have damaged the existing filter layer allowing pollutants to enter nearby water supplies.

On the other hand, the PHARE Report on the construction of the reservoir at Cunovo and the effect this would have on the water quality offered a different view. The Report was commissioned by the European Communities with the co-operation of, first, the Government of the Czech and Slovak Federal Republic and, later, the Slovak Republic. It was described as presenting a reliable integrated modelling system for analysing the environmental impact of alternative management regimes in the Danubian lowland area and for predicting changes in water quality as well as conditions in the river, the reservoir, the soil and agriculture.

As to the effects of the construction of the dam on the ecology of the area, the Report reached the conclusion that whether the post-dam scenarios represented an improvement or otherwise would depend on the ecological objectives in the area, as most fundamental changes in ecosystems depended on the discharge system and occurred slowly over many years or decades, and, no matter what effects might have been felt in the ecosystem thus far, they could not be considered as irreversible.

With regard to water quality, the Report stated that groundwater quality in many places changed slowly over a number of years. With this in mind, comprehensive modelling, some of which entailed modelling impacts for periods of up to 100 years, was undertaken and the conclusion reached that no problems were predicted in relation to groundwater quality.

The Court in its Judgment, quite rightly in my view, acknowledges Hungary's genuine concerns about the effect of the project on its natural environment. However, after careful consideration of the conflicting evidence, it reached the conclusion that it was not necessary to determine which of these points of view was scientifically better founded in order to answer the question put to it in the Special Agreement. Hungary had not established to the satisfaction of the Court that the construction of the Project would have led to the consequences it alleged. Further, even though such damages might occur, they did not appear imminent in terms of the law, and could otherwise have been prevented or redressed. The Court, moreover, stated that such uncertainties as might have existed and had raised environmental concerns in Hungary could otherwise have been addressed without having to resort to unilateral suspension and termination of the Treaty. In effect, the evidence was not of such a nature as to entitle Hungary to unilaterally suspend and later terminate the Treaty on grounds of ecological necessity. In the Court's view, to allow that would not only destabilize the security of treaty relations but would also severely undermine the principle of *pacta sunt servanda*.

Thus it is not as if the Court did not take into consideration the scientific evidence presented by Hungary in particular regarding the effects on its environment of the Project, but the Court reached the conclusion that such evidence was not sufficient to allow Hungary unilaterally to suspend or terminate the Treaty. This finding, in my view, is not only of significance to Slovakia and Hungary — the parties to the dispute — but it also represents a significant statement by the Court rejecting the argument that obligations assumed under a validity concluded treaty can no longer be observed because they have proved inconvenient or as a result of the emergence of a new wave of legal norms, irrespective of their legal character or quality. Accordingly, not for the first time and in spite of numerous breaches over the years, the Court as in this case upheld and reaffirmed the principle that every treaty in force is binding upon the parties and must be performed in good faith (Article 26 of the Vienna Convention on the Law of Treaties).

Nor can this finding of the Court be regarded as a mechanical application of the principle of *pacta sunt servanda* or the invocation of the maxim *summun jus summa injuria* but it ought rather to be seen as a reaffirmation of the principle that a validly concluded treaty can be suspended or terminated only with the consent of all the parties concerned. Moreover, the parties to this dispute can also draw comfort from the Court's finding in upholding the continued validity of the Treaty and enjoining them to fulfil their obligations under the Treaty so as to achieve its aims and objectives.

I also concur with the Court's findings that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine its final decision. On the other hand, I cannot concur with the Court's finding that Czechoslovakia was not entitled to put Variant C into operation from October 1992. The Court reached this latter conclusion after holding that Hungary's suspension and abandonment of the works for which it was responsible under the 1977 Treaty was unlawful, and after acknowledging the serious problems with which Czechoslovakia was confronted as a result of Hungary's decision to abandon the greater part of the construction of the System of Locks for which it was responsible under the Treaty. The Court likewise recognized that huge investments had been made, that the construction at Gabcikovo was all but finished, the bypass canal com-

pleted, and that Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect by completing work on the tailrace canal. The Court also recognized that not using the system would not only have led to considerable financial losses of some $2.5 billion but would have resulted in serious consequences for the natural environment.

It is against this background that the Court also reaffirmed the principle of international law that, subject to the appropriate limitations, a State party to a treaty, when confronted with a refusal by the other party to perform its part of an agreed project, is free to act on its own territory and within its own jurisdiction so as to realize the original object and purpose of the treaty, thereby limiting for itself the damage sustained and, ultimately, the compensatory damages to be paid by the other party.

As the Judgment recalled, Article 1 of the 1977 Treaty stipulated that the Gabcikovo-Nagymaros Project was to comprise a "joint investment" and to constitute a "single and operational system of locks", consisting of two sections, Gabcikovo and Nagymaros. According to Article 5, paragraph 5, of the Treaty, each of the Contracting Parties had specific responsibilities regarding the construction and operation of the System of Locks. Czechoslovakia was to be responsible for, *inter alia*:

"(1)The Dunakiliti-Hrusov head-water installations on the left bank, in Czechoslovak territory;

(2) The head-water canal of the by-pass canal, in Czechoslovak territory;

(3) The Gabcikovo series of locks, in Czechoslovak territory;

(4) The flood-control works of the Nagymaros head-water installations, in Czechoslovak territory, with the exception of the lower Ipel district;

(5) Restoration of vegetation in Czechoslovak territory."

Hungary was to be responsible for, *inter alia*:

"(1) The Dunakiliti-Hrusov head-water installations on the right bank, in Czechoslovak territory, including the connecting weir and the diversionary weir,

(2) The Dunakiliti-Hrusov head-water installations on the right bank, in Hungarian territory;

(3) The Dunakiliti dam, in Hungarian territory;

(4) The tail-water canal of the by-pass canal, in Czechoslovak territory;

(5) Deepening of the bed of the Danube below Palkovicovo, in Hungarian and Czechoslovak territory;

(6) Improvement of the old bed of the Danube, in Hungarian and Czechoslovak territory;

(7) Operational equipment of the Gabcikovo system of locks (transport equipment, maintenance machinery), in Czechoslovak territory;

(8) The flood- control works of the Nagymaros head-water installations in the lower Ipel district, in Czechoslovak territory;

(9) The flood-control works of the Nagymaros head-water installations, in Hungarian territory;

(10) The Nagymaros series of locks, in Hungarian territory;

(11) Deepening of the tail-water bed below the Nagymaros system of locks, in Hungarian territory;

(12) Operational equipment of the Nagymaros system of locks (transport equipment, maintenance machinery), in Hungarian territory."

(13) Restoration of vegetation in Hungarian territory."

In accordance with the Treaty and the concept of joint investment, some of those structures, such as the Dunakiliti weir, the bypass canal, the Gabcikovo dam and the Nagymaros dam were to become joint property, irrespective of the territory on which they were located.

As noted in the Judgment, by the spring of 1989 the work on Gabcikovo was well advanced; the Dunakiliti dam was 90 per cent complete, the Gabcikovo dam was 85 per cent complete, the bypass canal was between 60 per cent complete (downstream of Gabcikovo) and 95 per cent complete (upstream of Gabcikovo), and the dykes of the Dunakiliti-Hrusov reservoir were between 70 and 98 per cent complete. This was not the case in the Nagymaros sector where, although the dykes had been built, the only structure relating to the dam itself was the coffer-dam which was to facilitate its construction.

When Hungary, on 13 May 1989, decided to suspend works on the Nagymaros part of the Project because of alleged ecological hazards and later extended this to the Gabcikovo section, thereby preventing the scheduled damming of the Danube in 1989, this had a considerable, negative impact on the Project — which was envisaged as an integrated project and depended on the actual construction of the planned installations at Nagymaros and Gabcikovo. Hungary's contribution was therefore considered indispensable, as some of the key structures were under its control and situated on its territory.

Following prolonged and fruitless negotiations with Hungary regarding the performance of their obligations under the Treaty, Czechoslovakia proceeded, in November 1991, to what came to be known as the "provisional solution", or Variant C. This was put into operation from October 1992 with the damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory with resulting consequences on water and the navigation channel. It entailed the diversion of the Danube some 10 kilometres upstream of Dunakiliti on Czechoslovak territory. In its final stage it included the construction at Cunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. The corresponding reservoir was designed to have a small surface area and provided approximately 30 per cent less than the storage initially contemplated. Provision was made for ancillary works, namely; an intake structure to supply the Mosoni Danube; a weir to enable, *inter alia*, flood water to be directed along the old bed of the Danube; an auxiliary shiplock; and two hydroelectric plants (one capable of an annual production of 4 GWh on the Mosoni Danube, and the other with a production of 174 GWh on the old course of the Danube). The supply of the water to the side-arms of the Danube on the Czechoslovak bank was to be secured by means of two intake structures on the bypass canal at Dobrohost and Gabcikovo. Not all problems were solved: a solution was to be found for the Hungarian bank, and the question of lowering the bed of the Danube at the confluence of the bypass canal and the old bed of the river remained.

In justification of the actions, Slovakia contended that this solution was as close to the original project as possible and that Czechoslovakia's decision to proceed with it was justified by Hungary's decision to suspend and subsequently abandon the construction works at Dunakiliti, which had made it impossible for Czechoslovakia to attain the object and purpose contemplated by the 1977 Treaty. Slovakia further explained that Variant C represented the only possibility remaining to it of fulfilling the purposes of the 1977 Treaty, including the continuing obligation to implement the Treaty in good faith. It further submitted that Variant C for the greater part was no more than what had already been agreed to by Hungary, and that only those modifications were made which had become necessary by virtue of Hungary's decision not to implement its obligations under the Treaty.

In spite of what appeared to me not only a cogent and reasonable explanation for its action but also an eminently legal justification for Variant C, the Court found that, though there was a strong factual similarity between Variant C and the original Project in its upstream component (the Gabcikovo System of Locks), the difference from a legal point of view was striking. It observed that the basic characteristics of the 1977 Treaty provided for a "joint investment", "joint ownership" of the most important construction of the Gabcikovo-Nagymaros Project and for the operation of this "joint property" as a "co-ordinated single unit". The Court reasoned that all this could not be carried out by unilateral action such as that involving Variant C and that, despite its physical similarity with the original Project, it differed sharply in its legal characteristics. The Court also found that, in operating Variant C, Slovakia essentially appropriated for its own use and benefit between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river downstream of Gabcikovo. This act, in the Court's view, deprived Hungary of its right to an equitable share of the natural resources of the river, this being not only a shared international watercourse but an international boundary river.

In the light of these findings, the Court concluded that Czechoslovakia, by putting into operation Variant C, did not apply the Treaty, but, on the contrary, violated certain of its express provisions and in so doing committed an internationally wrongful act. In its reasoning, the Court stated that it had placed emphasis on the "putting into operation" of Variant C, the unlawfulness residing in the damming of the Danube.

This finding by the Court calls for comment. In the first place, it is to be recalled that the Court found that Hungry's suspension and unilateral termination of the Treaty was unlawful. Secondly, the Court held that a State party confronted, as Czechoslovakia was, with a refusal by the other party to perform its part of an agreed project is entitled to act on its own territory and within its own jurisdiction so as to realize the object and purpose of the treaty. This notwithstanding, the Court took exception to the fact that Variant C did not meet the requirements of Articles 1, 8, 9 and 10 of the 1977 Treaty regarding a "single and operational system of locks", "joint ownership" and "use and benefits of the system of locks in equal measure". In its view, "by definition all this could not be carried out by unilateral measure". This stricture of Variant C is not, in my respectful opinion, warranted. The unilateral suspension and termination of the Treaty and the works for which Hungry was responsible under it had amounted not only to a repudiation of the Treaty. It frustrated the realization of the Project as a *single* and operational system of works, *jointly* owned and used for the benefit of the Contracting Parties in equal measure. As a result of Hungary's acts, the objective of the original Project could only have been achieved by Slovakia alone operating it; according to the material before the Court, Variant C constituted the minimum modification of the original Project necessary to enable the aim and objective of the original Project to be realized. It should be recalled that but for the suspension and abandonment of the works, there would have been no Variant C, and without Variant C, the objective of the act of Hungary which the Court has qualified as unlawful would have been realized thus defeating the object and purpose of the Treaty. In my view Variant C was therefore a genu-

ine application of the Treaty and it was indispensable for the realization of its object and purpose. If it had not proceed to its construction, according to the material before the Court, Czechoslovakia would have been stranded with a largely finished but inoperative system, which had been very expensive both in terms of cost of construction and in terms of acquiring the necessary land. The environmental benefits in terms of flood control, which was a primary object and purpose of the Treaty, would not have been attained. Additionally, the unfinished state of the constructions would have exposed them to further deterioration through continued inoperation.

Variant C was also held to be unlawful by the Court because, in its opinion, Czechoslovakia, by diverting the waters of the Danube to operate Variant C, unilaterally assumed control of a shared resource and thereby deprived Hungary of its right to an equitable share of the natural resources of the river — with the continuing effects of the diversion of these waters upon the ecology of the riparian area of the Szigetköz — and failed to respect the degree of proportionality required by international law.

The implication of the Court's finding that the principle of equitable utilization was violated by the diversion of the river is not free from doubt. That principle, which is now set out in the Convention on the Non-Navigational Uses of International Watercourses, is not new.

While it is acknowledged that the waters of rivers must not be used in such a way as to cause injury to other States and in the absence of any settled rules an equitable solution must be sought (case of the *Diversion of Water from the Meuse, Judgment, 1937, P.C.I.J., Series A/B, No. 70*), this rule applies where a treaty is absent. In the case under consideration Article 14, paragraph 2, of the 1977 Treaty provides that the Contracting Parties may, without giving prior notice, both withdraw from the Hungarian-Czechoslovak section of the Danube, and subsequently make use of the quantities of water specified in the water balance of the approved Joint Contractual Plan. Thus, the withdrawal of excess quantities of water from the Hungarian-Czechoslovak section of the Danube to operate the Gabcikovo section of the system was contemplated with compensation to the other Party in the form of an increased share of electric power. In other words, Hungary had agreed within the context of the Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube). Accordingly, it would appear that the normal entitlement of the Parties to an equitable and reasonable share of the water of the Danube under general international law was duly modified by the 1977 Treaty which considered the Project as a *lex specialis*. Slovakia was thus entitled to divert enough water to operate Variant C, and more especially so if, without such diversion, Variant C could not have been put into productive use. It is difficult to appreciate the Court's finding that this action was unlawful in the absence of an explanation as to how Variant C should have been put into operation. On the contrary, the Court would appear to be saying by implication that, if Variant C had been operated on the basis of a 50-50 sharing of the waters of the Danube, it would have been lawful. However, the Court has not established that a 50-50 ratio of use would have been sufficient to operate Variant C optimally. Nor could the Court say that the obligations of the Parties under the Treaty had been infringed or that the achievement of the objectives of the Treaty had been defeated by the diversion. In the case concerning the *Diversion of Water from the Meuse*, the Court found that, in the absence of a provision requiring the consent of Belgium, "the Netherlands are entitled, ..., to dispose of waters of the Meuse at Maastricht" provided that the treaty obligations incumbent on it were not ignored" (*Judgment, 1937, P.C.I.J., Series A/B, No. 70. p. 30*). Applying this test in the circumstances which arose, Variant C can be said to have been permitted by the 1977 Treaty as a reasonable method of implementing it. Consequently Variant C did not violate the rights of Hungary and was consonant with the objectives of the Treaty régime.

Moreover the principle of equitable and reasonable utilization has to be applied with all the relevant factors and circumstances pertaining to the international watercourse in question as well as to the needs and uses of the watercourse States concerned. Whether the use of the waters of a watercourse by a watercourse State is reasonable or equitable and therefore lawful must be determined in the light of all the circumstances. To the extent that the 1977 Treaty was designed to provide for the operation of the Project, Variant C is to be regarded as a genuine attempt to achieve that objective.

One consequence of this finding by the Court is its prescription that unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the wrongful suspension and abandonment by Hungary of the works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia.

While this finding would appear to aim at encouraging the Parties to negotiate an agreement so as realize the aims and objectives of the Treaty, albeit in a modified form, it appears to suggest that the Court considered the wrongful conduct of the Parties to be equivalent. This somehow emasculates the fact that the operation of Variant C would not have been necessary if the works had not been suspended and terminated in the first place. It was this original breach which triggered the whole chain

of events. At least a distinction should have been drawn between the consequences of the "wrongful conduct" of each party, hence my unwillingness to concur with the finding. While Article 38, paragraph 2, of its Statute allows the Court to decide a case *ex aequo et bono* but this can only be done with the agreement of the parties to a dispute.

The Judgment also alluded to "the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz". It is not clear whether by this the Court had reached the conclusion that significant harm had been caused to the ecology of the area by the operation of Variant C.

In the light of the foregoing considerations, I take the view that the operation of Variant C should have been considered as a genuine attempt by an injured party to secure the achievement of the agreed objectives of the 1977 Treaty, in ways not only consistent with that Treaty but with international law and equity.

In his separate opinion in the case concerning the *Diversion of Water from the Meuse*, Judge Hudson stated that "[W]hat are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals, ..." (*Judgment, 1937, P.C.I.J., Series A/B, No. 70,* p. 76). He went on to point out that.

"It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law. Some of these maxims are ...; 'He who seeks equity must do equity'. It is in line with such maxims that 'a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper' (13 Halsbury's *Laws of England* (2nd ed., 1934), p. 87). A very similar principle was received into Roman Law. The obligations of a vendor and a vendee being concurrent, 'neither could compel the other to perform unless he had done, or tendered, his own part' (Buckland, *Text Book of Roman Law* (2nd ed., 1932), p. 493)." (*Ibid.*, p. 77.)

Judge Hudson took the view that:

"The general principle is one of which an international tribunal should make a very sparing application. It is certainly not to be thought that a complete fulfilment of all its obligations under a treaty must be proved as condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness." (*Ibid.* p. 77.)

Judge Hudson continued, "Yet, in a particular case in which it is asked to enforce the obligation to make reparation, a court of international law cannot ignore special circumstances which may call for the consideration of equitable principles." (*Ibid.* p. 78.) It is my view that this case, because of the circumstances surrounding it, is one which calls for the application of the principles of equity.

The importance of the River Danube for both Hungary and Slovakia cannot be overstated. Both countries, by means of the 1977 Treaty, had agreed to co-operate in the exploitation of its resources for their mutual benefit. That Treaty, in spite of the period in which it was concluded, would seem to have incorporated most of the environmental imperatives of today, including the precautionary principle, the principle of equitable and reasonable utilization and the no-harm rule. None of these principles was proved to have been violated to an extent sufficient to have warranted the unilateral termination of the Treaty. The Court has gone a long way, rightly in my view, in upholding the principle of the sanctity of treaties. Justice would have been enhanced had the Court taken account of special circumstances as mentioned above.

DISSENTING OPINION OF JUDGE ODA

INTRODUCTION

1. I have voted against operative paragraph 1 C of the Judgment (para. 155) as I am totally unable to endorse the conclusions that, on the one hand, "Czechoslovakia was entitled to proceed, in November 1991, to the 'provisional solution'" and, on the other hand, that "Czechoslovakia was not entitled to put into operation, from October 1992, this 'provisional solution'" and I cannot subscribe to the reasons given in the Judgment in support of those conclusions.

I have also voted against operative paragraph 2 D (para. 155). I have done so because the request made by myself and other Judges to separate this paragraph into two so that it could be voted on as two separate issues was simply rejected for a reason which I do not understand. I have therefore had to vote against this paragraph as a whole, although I had wanted to support the first part of it.

I am in agreement with the conclusions that the Court has reached on the other points of the operative para-

graph of the Judgment. However, even with regard to some of the points which I support, my reasoning differs from that given in the Judgment. I would like to indicate several points on which I differ from the Judgment through a brief presentation of my overall views concerning the present case.

I
The 1977 Treaty and the Joint Contractual Plan (JCP) for the Gabcikovo-Nagymaros System of Locks

2. (The Project) The dispute referred to the Court relates to a Project concerning the management of the river Danube between Bratislava and Budapest, which a number of specialists serving the Governments of Czechoslovakia and Hungary, as well as those employed in corporations of those two States (which were governed in accordance with the East European socialist régime), had been planning since the end of the Second World War under the guidance of the Soviet Union.

It is said that Hungary had, even before the rise of the communist régime, proposed the building of a power plant at Nagymaros on Hungarian territory. However, with the co-operation of the socialist countries and under the leadership of the Soviet Union, the initiative for the management of the river Danube between Bratislava and Budapest was taken over by Czechoslovakia, and the operational planning was undertaken by technical staff working for COMECON.

The Project would have entailed the construction of (i) a bypass canal to receive water diverted at the Dunakiliti dam (to be constructed on Hungarian territory) and (ii) two power plants (one at Gabcikovo on the bypass canal on Czechoslovak territory and one at Nagymaros on Hungarian territory). It may well have been the case that the bypass canal was also required for the future management of the river Danube with respect to flood prevention and the improvement of international navigation facilities between Bratislava and Budapest. However, the bypass canal was aimed principally at the operation of the Gabcikovo power plant on Czechoslovak territory and the Dunakiliti dam, mostly on Hungarian territory, was seen as essential for the filling and operation of that canal, while the Nagymaros System of Locks on Hungarian territory was to have been built for the express purpose of generating electric power at Nagymaros and partially for the purpose of supporting the peak-mode operation of the Gabcikovo power plant.

The whole Project would have been implemented by means of "joint investment" aimed at the achievement of "a single and indivisible operational system of works" (1977 Treaty, Art. I, para. 1).

3. (The 1977 Treaty) The Project design for the Gabcikovo-Nagymaros System of Locks had been developed by administrative and technical personnel in both countries and its realization led to the conclusion, on 16 September 1977, of the *Treaty Concerning the Construction and Operation of the Gabcikovo-Nagymaros System of Locks*. I shall refer to this Treaty as the 1977 Treaty.

The 1977 Treaty was signed by the Heads of each Government (for Czechoslovakia, the Prime Minister; for Hungary, the Chairman of the Council of Ministers), and registered with the United Nations Secretariat (UNTS. Vol. 236, p. 241). It gave, on the one hand, an overall and general picture (as well as some details of the construction plan) of the Project for the Gabcikovo-Nagymaros system of Locks (which would, however, have in essence constituted a "partnership" according to the concept of municipal law) (see 1977 Treaty, Chaps. I-IV), while, on the other hand, it aimed, as an ordinary international treaty, to serve as an instrument providing for the rights and duties of both Parties in relation to the future management of the river Danube (see 1977 Treaty, Chaps. V-XI).

Under the plan described in the 1977 Treaty, the cost of the "joint investment" in the system of locks was to have been borne by the respective Parties and the execution of the plan, including labour and supply, was to have been apportioned between them (1977 Treaty, Art. 5). The Dunakiliti dam, the bypass canal, the Gabcikovo series of locks and the Nagymaros series of locks were to have been owned jointly (1977 Treaty, Art. 8) and the Parties assumed joint responsibility for the construction of those structures. More concretely, the project for the diversion of the waters of the river Danube at Dunakiliti (on Hungarian territory) into the bypass canal (on the territory of Czechoslovakia), and the construction of the dams together with the power stations at Gabcikovo and Nagymaros were to have been funded jointly by the Parties. The electric power generated by those two power stations was to have been available to them in an equal measure (1977 Treaty, Art. 9).

It must be noted, however, that the 1977 Treaty does not seem to have been intended to prescribe in detail the content of the construction plan, that being left to the Joint Construction Plan to be drafted by the Parties – which, for the sake of convenience, I shall refer to as the JCP. While some detailed provisions in Chapters I-IV of the 1977 Treaty concerning the completion of the Project did in fact, as stated above, correspond to provisions subsequently incorporated into the JCP, the Preamble to the 1977 Treaty confines itself to stating that "[Hungary and Czechoslovakia] decided to conclude an Agreement concerning the construction and operation

of the Gabcikovo-Nagymaros System of Locks". The 1977 Treaty lacks the form of words usually present in any international treaty which generally indicates that the parties have *thus agreed the following text* (which text usually constitutes the main body of the treaty). This fact further reinforces the view that the 1977 Treaty is intended only to indicate the basic construction plan of the Project and to leave the details of planning to a separate instrument in the form of the JCP.

4. (The Joint Contractual Plan) The drafting of the JCP was already anticipated in the *Agreement regarding the Drafting of the Joint Contractual Plan concerning the Gabcikovo-Nagymaros Barrage System* of 6 May 1976 (hereinafter referred to as the 1976 Agreement[1]), signed by plenipotentiaries at the level of Deputy Minister. The Hungarian translation states in its Preamble that

"[the Parties] have decided on the basis of a mutual understanding with regard to the joint implementation of the Hungary-Czechoslovakia Gabcikovo-Nagymaros Barrage System ... to conclude an Agreement for the purpose of drafting a Joint Contractual Plan for the barrage system".

As stated above, the 1976 Agreement was concluded in order to facilitate the future planning of the Project and the 1977 Treaty provided some guidelines for the detailed provisions to be included in the JCP, which was to be developed jointly by the representatives of both States as well as by the enterprises involved in the Project. The time-schedule for the implementation of the construction plan was subsequently set out in the *Agreement on Mutual Assistance in the Course of Building the Gabcikovo-Nagymaros Dam* of 16 September 1977 (hereinafter referred to as the 1977 Agreement[2]), the same date on which the 1977 Treaty was signed[3]. It was not made clear whether those two Agreements of 1976 and 1977 themselves constituted the JCP or whether the JCP would be further elaborated on the basis of these Agreements.

In fact, the text of the JCP seems to have existed as a separate instrument but neither Party has submitted it to the Court in its concrete and complete form. A "summary description" of the JCP, dated 1977, was presented by Hungary (Memorial of Hungary, Vol. 3, p. 298) while Slovakia presented a "summary report" as a part of the "JCP Summary Documentation" (SM. Vol. 2, p. 33). Neither of those documents gave a complete text but they were merely compilations of excerpts. Neither document gave a precise indication of the date of drafting. What is more, one cannot be certain that those two documents as presented by the two Parties are in fact identical. The Judgment apparently relies on the document presented by Hungary and received in the Registry on 28 April 1997 in reply to a question posed by a Judge on 15 April 1997 during the course of the oral arguments. This document, the *Joint Contractual Plan's Preliminary Operating Rules and Maintenance Mode*, contains only extremely fragmentary provisions. I submit that the Court did not, at any stage, have sufficient knowledge of the JCP in its complete form.

5. (Amendment of the Joint Contractual Plan) I would like to repeat that the JCP is a large-scale plan involving a number of corporations of one or the other party, as well as foreign enterprises, and that the JCP, as a detailed construction plan for the whole Project, should not be considered as being on the same level as the 1977 Treaty itself which, however, also laid down certain guidelines for the detailed planning of the project. As in the case of any construction plan of a "partnership" extending over a long period of time, the JCP would in general have been, and has been in fact, subject to amendments and modifications discussed between the Parties at working level and those negotiations would have been undertaken in a relatively flexible manner where necessary, in the course of the construction, without resort to the procedures relating to amendment of the 1977 Treaty. In other words, the detailed provisions of the construction plan of the JCP to implement the Project concerning the Gabcikovo-Nagymaros System of Locks as defined in the 1977 Treaty should be considered as separate from the 1977 Treaty itself.

6. (The lack of provision in the JCP for dispute settlement) One may well ask how the parties should have settled any differences of views which might have occurred between the two States with regard to the design and planning of the construction or the amendment of that design. The designing or the amendment of the design should have been effected with complete agreement between the two Parties but the 1976 Agreement, which was the first document providing for the future design of the JCP, scarcely contemplated the possibility of the two sides being unable to reach an agreement in this respect. The 1976 Agreement states that, if the investment and planning organs cannot reach a mutual understanding on the issues which are disputed within the co-operation

[1] This Agreement is not to be found, even in the *World Treaty Index* (1983). The English text is to be found in the documents presented by both Parties but they are not identical (SM, Vol. 2, p. 25; HM, Vol. 3, p. 219).

[2] This Agreement is not to be found, even in the *World Treaty Index* (1983). The English text is to be found in the documents presented by both Parties but they are not identical (SM, Vol. 2, p. 71; HM, Vol. 3, p. 293).

[3] The time-limit for the construction plan was revised in the *Protocol concerning the Amendment of the [1866] Treaty* signed on 10 October 1983; see also the *Protocol concerning the Amendment of the 1977 Agreement signed on 10 October 1983 and the Protocol concerning the amendment of the 1977 Agreement signed on 6 February 1989.*

team, the investors shall report to the Joint Committee for a solution. There was no provision for a situation in which the Joint Committee might prove unable to settle such differences between the parties. It was assumed that there was no authority above the Joint Committee which would be competent to determine the various merits of the plan or of proposed amendments to it.

In view of the fact that this Project was to be developed by COMECON under Soviet leadership, it may have been tacitly considered that no dispute would ever get to that stage. In the event that no settlement could be reached by the Joint Committee, one or the other party would inevitably have had to proceed to a unilateral amendment. However, such an amendment could not have been approved unconditionally but would have been followed by a statement of the legitimate reasons underlying its proposal.

7. (The 1977 Treaty and the Joint Contractual Plan) It is therefore my conclusion that, on the one hand, the 1977 *Treaty* between Czechoslovakia and Hungary not only provided for a generalized régime of rights and duties accepted by each of them in their mutual relations with regard to the management of the river Danube (1977 Treaty, Chaps. V-XI), but also bound the Parties to proceed jointly with the construction of the Gabcikovo-Nagymaros System of Locks (the construction of (i) the Dunakiliti dam which would permit the operation of the bypass canal, (ii) the Gabcikovo dam with its power plant and (iii) the Nagymaros dam with its power plant). The construction of the Gabcikovo-Nagymaros System of Locks might have constituted a type of "partnership" which would have been implemented through the JCP (1977 Treaty, Chaps, I-IV).

On the other hand, the *JCP* was designed to incorporate detailed items of technical planning as well as provisions for the amendment or revision and did not necessarily have the same legal effect as the 1977 Treaty, an international treaty.

Those two instruments, that is, the *1977 Treaty* and the *JCP* (which was designed and modified after 1977), should be considered as separate instruments of differing natures from a legal point of view.

II
The Suspension and Subsequent Abandonment of the Works by Hungary in 1989

(Special Agreement, article 2, paragraph 1 (a)

8. Under the terms of the Special Agreement, the Court is requested to answer the question

"whether [Hungary] was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the Treaty attributed responsibility to [Hungary]" (Art. 2, para. 1 *(a)*).

9. (Actual situation in the late 1980s) This question put in the Special Agreement should, my view, have been more precisely worded to reflect the actual situation in 1989. The work on the Gabcikovo Project had by that time already been completed; the work at Nagymaros was still at a preliminary stage, that is, the work on that particular barrage system had, to all intents and purpose, not even started.

Hungary's actions in 1989 may be summed up as follows: firstly, on 13 May 1989, Hungary decided to suspend work at Nagymaros pending the completion of various environmental studies. Secondly, Hungary decided, on the one hand, on 27 October 1989, to abandon the Nagymaros Project and, on the other, to maintain the status quo at Dunakiliti, thus rendering impossible the diversion of waters to the bypass canal at that location. Hungary had, however, made it clear at a meeting of the plenipotentiaries in June 1989 that it would continue the work related to the Gabcikovo sector itself, so the matter of the construction of the Gabcikovo Barrage System itself was not an issue for Hungary in 1989. The chronology of Hungary's actions is traced in detail in the Judgment.

10. (Violation of the 1977 Treaty) Whatever the situation was in 1989 regarding the works to be carried out by Hungary, and in the light of the fact that the failure to complete the Dunakiliti dam and the auxiliary structures (the sole purpose of which was to divert water into the bypass canal) would have made it impossible to operate the whole Gabcikovo-Nagymaros System of Locks as "a single and indivisible operational system of works" (1977 Treaty, Art. 1, para. 1), Hungary should have been seen to have incurred international responsibility for its failure to carry out the relevant works, thus being in breach of the 1977 Treaty. It is to be noted that, at that stage, Hungary did not raise the matter of the termination of the 1977 Treaty but simply suspended or abandoned the works for which it was responsible.

In the light of the actions taken by Hungary with regard to the Gabcikovo-Nagymaros System of Locks, there can be no doubt that in 1989 Hungary violated the 1977 Treaty. The question remains, however, whether Hungary was justified in violating its treaty obligations. I fully share the view of the Court when it concludes that "Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the

[1977] Treaty ... attributed responsibility to it" (Judgment, operative para. 155, point I A) and that Hungary's wrongful act could not have been justified in any way.

Let me examine the situation in more detail. Hungary relies, in connection with the Dunakiliti dam and the diversion of waters into the bypass canal at Dunakiliti, upon the deterioration of the environment in the Szigetköz region owing to the reduced quantity of available water in the old Danube river bed. In my view, however, the decrease in the amount of water flowing into the old bed of the Danube as a result of the operation of the bypass canal would have been an inevitable outcome of the whole Project as provided for in the 1977 Treaty.

11. (Hungary's ill-founded claim of ecological necessity) Certain effects upon the environment of the Szigetkoz region were clearly anticipated by and known to Hungary at the initial stage of the planning of the whole Project. Furthermore, there was no reason for Hungary to believe that an environmental assessment made in the 1980s would give quite different results from those obtained in 1977, and require the total abandonment of the whole Project.

I have no doubt that the Gabcikovo-Nagymaros System of Locks was, in the 1970s, prepared and designed with full consideration of its potential impact on the environment of the region, as clearly indicated by the fact that the 1977 Treaty itself incorporated this concept as its Article 19 (entitled Protection of Nature), and I cannot believe that this assessment made in the 1970s would have been significantly different from an ecological assessment 10 years later, in other words, in the late 1980s. It is a fact that the ecological assessment made in the 1980s did not convince scientists in Czechoslovakia.

I particularly endorse the view taken by the Court when rejecting the argument of Hungary, that ecological necessity cannot be deemed to justify its failure to complete the construction of the Nagymaros dam, and that Hungary cannot show adequate grounds for that failure by claiming that the Nagymaros dam would have adversely affected the downstream water which is drawn to the bank-filtered wells constructed on Szentendre Island and used as drinking water for Budapest (Judgment, para. 40)

12. (Environment of the river Danube) The 1977 Treaty itself spoke of the importance of the protection of water quality, maintenance of the bed of the Danube and the protection of nature (Arts. 15, 16, 19), and the whole structure of the Gabcikovo-Nagymaros System of Locks was certainly founded on an awareness of the importance of environmental protection. It cannot be said that the drafters of either the Treaty itself or of the JCP failed to take due account of the environment. There were, in addition, no particular circumstances in 1989 that required any of the research or studies which Hungary claimed to be necessary, and which would have required several years to be implemented. If no campaign had been launched by environmentalist groups, then it is my firm conviction that the Project would have gone ahead as planned.

What is more, Hungary had, at least in the 1980s no intention of withdrawing from the work on the Gabcikovo power plant. One is at a loss to understand how Hungary could have thought that the operation of the bypass canal and of the Gabcikovo power plant, to which Hungary had not objected at the time, would have been possible without the completion of the works at Dunakiliti dam.

13. (Ecological necessity and State responsibility) I would like to make one more point relating to the matter of environmental protection under the 1977 Treaty. The performance of the obligations under that Treaty was certainly the joint responsibility of both Hungary and Czechoslovakia. If the principles which were taken as the basis of the 1977 Treaty or of the JCP had been contrary to the general rules of international law - environmental law in particular - the two States, which had reached agreement on their joint investment in the whole Project, would have been held jointly responsible for that state of affairs and *jointly* responsible to the international community. This fact does not imply that the *one Party* (Czechoslovakia, and later Slovakia) bears responsibility, *towards the other* (Hungary).

What is more, if a somewhat more rigorous consideration of environmental protection had been needed, this could certainly have been given by means of remedies of a technical nature to those parts of the JCP — not the 1977 Treaty itself — that concern the concrete planning or operation of the whole System of locks. In this respect, I do not see how any of the grounds advanced by Hungary for its failure to perform its Treaty obligations (and hence for its violation of the Treaty by abandoning the construction of the Dunakiliti dam) could have been upheld as relating to a state of "ecological necessity".

14. (General comments on the preservation of the environment) If I may give my views on the environment, I am fully aware that concern for the preservation of the environment has rapidly entered the realm of international law and that a number of treaties and conventions have been concluded on either a multilateral or bilateral basis, particularly since the Declaration on the Human Environment was adopted in 1972 at Stockholm and reinforced by the Rio de Janeiro Declaration in 1992, drafted 20 years after the Stockholm Declaration.

It is a great problem for the whole of mankind to strike a satisfactory balance between more or less contradictory issues of economic development on the one hand and preservation of the environment on the other, with a view

to maintaining sustainable development. Any construction work relating to economic development would be bound to affect the existing environment to some extent but modern technology would, I am sure, be able to provide some acceptable ways of balancing the two conflicting interests.

2. Special Agreement, Article 2, paragraph 2

15. The Court is asked, under Article 2, paragraph 2, of the Special Agreement, to

"determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this Article".

16. (Responsibility of Hungary) In principle, Hungary must compensate Slovakia for "the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible". I was, however, in favour of the first part of operative paragraph 155, point 2 D of the Judgment. As I stated at the outset, I had to vote against the whole of paragraph 155, point 2 D, as that first part of the paragraph was not put to the vote as a separate issue.

17. (Difference between the Gabcikovo Project and the Nagymaros Project) when one is considering the legal consequences of the responsibility incurred by Hungary on account of its violation of its obligations to Czechoslovakia under the 1977 Treaty and the JCP, it seems to me that there is a need to draw a further distinction between (i) Hungary's suspension of the work on the Dunakiliti dam for the diversion of water into the bypass canal, which rendered impossible the operation of the Gabcikovo power plant, and (ii) its complete abandonment of the work on the Nagymaros System of Locks, each of which can be seen as having a completely different character.

18. (The Dunakiliti dam and the Gabcikovo plant) The construction of the Dunakiliti dam and of the bypass canal, which could have been filled only by the diversion of the Danube waters at that point, form the cornerstone of the whole Project. Without the Dunakiliti dam the whole Project could not have existed in its original form. The abandonment of work on the Dunakiliti dam meant that the bypass canal would be unusable and the operation of the Gabcikovo power plant impossible. Hungary must assume full responsibility for its suspension of the works at Dunakiliti in violation of the 1977 Treaty.

The reparation to be paid by Hungary to Slovakia for its failure in this respect, as prescribed in the 1977 Treaty, will be considered in the following part of this opinion, together with the matter of the construction of the Cunovo dam by Czechoslovakia, which took over the function of the Dunakiliti dam for the diversion of water into the bypass canal (see para. 34 below).

19. (The Nagymaros dam - 1) with regard to the Nagymaros dam, Hungary cannot escape from its responsibility for having abandoned an integral part of the whole Project. However, this matter is very different from the situation concerning the Gabcikovo project. In fact, the site where the Nagymaros power plant was to have been built is located completely on Hungarian territory. Although the plant would also have supplied electric power to Czechoslovakia just as the Gabcikovo power plant would likewise have provided a part of its electric power to Hungary, the amount of power to be produced by the Gabcikovo power plant was far greater than that predicted for the Nagymaros power plant.

In 1989, Hungary seems to have found that the Nagymaros power plant was no longer necessary to its own interests. If the Nagymaros dam was initially considered to be a part of the whole Project, it was because an equal share of the power output of the Nagymaros power plant was to have been guaranteed to Czechoslovakia in exchange for an equal share for Hungary of the electric power from the Gabcikovo plant. The anticipated supply of electric power from the Nagymaros plant could have been negotiated taking into account the agreed supply to Hungary of electric power from the Gabcikovo plant. The Nagymaros dam would also have been required essentially in order to enable the operation of the Gabcikovo power plant in peak mode and it might therefore have been seen as not really essential to the project as a whole.

20. (The Nagymaros dam - II) The matter of the equal shares of the electric power from the Nagymaros power plant to be guaranteed to Czechoslovakia and the feasibility of the operation of the Gabcikovo power plant in peak mode could have been settled as modalities for the execution of the JCP, even in the event of the abandonment of the Nagymaros power plant, as technical questions could be dealt with in the framework of the JCP without any need to raise the issue of reparations to be paid by Hungary to Czechoslovakia in connection with the abandonment of the Nagymaros dam.

There can be no doubt that the construction of the Nagymaros System of Locks was seen as a major link in the chain of the whole Project in connection with the construction of the Gabcikovo System of Locks on Czechoslovak territory. The construction of the Nagymaros System of Locks was, however, essentially a matter that fell within Hungary's exclusive competence on its own territory. In the late 1980s, Hungary found it no longer necessary to produce electricity from the Nagymaros power plant on its own territory, and the abandonment of the Nagymaros dam did not, in fact, cause

any significant damage to Czechoslovakia and did not have any adverse affect on interests that Czechoslovakia would otherwise have secured.

In this connection, I must add that Czechoslovakia would have been permitted under international law as prescribed in the Vienna Convention on the Law of Treaties to terminate the 1977 Treaty on the ground of Hungary's failure to perform the obligations of that Treaty. In fact, however, Czechoslovakia did not do so but chose to implement the 1977 Treaty without Hungary's co-operation because the completion of the Project, as envisaged in the 1977 Treaty, would be greatly to its benefit.

Thus, although Hungary has to bear the responsibility for its abandonment of the Nagymaros dam as a part of the joint project of the Gabcikovo-Nagymaros System of Locks, the reparations that Hungary should pay to the present-day Slovakia as a result are minimal (see para. 34 below).

III
The Implementation of variant C. (Damming of the Waters at Cunovo) By Czechoslovakia

(Special Agreement, Article 2, paragraph 1 *(b)*; Article 2, paragraph 2)

1. Special Agreement, Article 2, paragraph 1 *(b)*

21. The Court is requested under the terms of the Special Agreement to decide

"whether [Czechoslovakia] was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system" (Art. 2, para. 1 *(b)*).

22. (Provisional solution = Variant C) As Hungary had suspended work on part of the Gabcikovo Project, more particularly the work at Dunakiliti, thus preventing the diversion of the water into the bypass canal, the finalization of the whole Project, which was already nearly 70 per cent complete, was rendered impossible.

In order to accomplish the purpose of the 1977 Treaty, Czechoslovakia, one of the parties to that Treaty, was forced to start work on the diversion of the waters into a bypass canal that lay within its own territory. That was the commencement of the so-called "provisional solution" — in other words, Variant C — in November 1991. Czechoslovakia had previously made it clear to Hungary that, if Hungary were to abandon unilaterally the works at Dunakiliti (which constituted the basis of the whole Project between the two States), it would have to consider an alternative plan to accomplish the agreed original Project. Variant C was designed by Czechoslovakia because it had no other option in order to give life to the whole Project.

Since the agreed basic concept of the whole Project under the 1977 Treaty had been jeopardized by Hungary, and since the benefit which Czechoslovakia would have enjoyed as a result of the power plant at Gabcikovo and all the benefits which would have been available to both States with regard to international navigation as well as water management (including flood prevention) of the river Danube had thereby been threatened, it was permissible and not unlawful for Czechoslovakia to start work on Variant C (the construction of the Cunovo dam). This would have an effect similar to the original plan contemplated in the 1977 Treaty, that is, the diversion of water into the bypass canal. Hungary, for its part, had from the outset given its full agreement to the diversion of the Danube waters into a bypass canal at Dunakiliti on its own territory.

23. (The lawfulness of the construction and operation of Variant C) The Court has found that "Czechoslovakia was entitled to proceed, in November 1991, to the 'provisional solution'" (Judgment, para. 155, point 1 B) under the 1977 Treaty, which provided for a "partnership" for the construction of a magnificent Project, but "was not entitled to put into operation, from October 1992, this provisional solution" (Judgment, para. 155, point 1 C), that is, diverting the waters at Cunovo. The "provisional solution" was effected in order that Czechoslovakia might secure its rights and fulfil its obligations under the 1977 Treaty. Its action implied nothing other than the accomplishment of the original Project. Czechoslovakia claimed that the construction of the Cunovo dam could have been justified as a countermeasure taken in response to the wrongful act of Hungary (that is, the abandonment of the works at Dunakiliti) but I believe that the construction of the Cunovo dam was no more than the implementation of an alternative means for Czechoslovakia to carry out the Project in the context of the JCP.

I would like to repeat that I cannot agree with the Judgment when it states, as I pointed out in paragraph 1 above, that "Czechoslovakia was entitled to proceed... to the 'provisional solution" but it "was not entitled to put into operation ... this 'provisional solution'" (see also Judgment, para. 79). I wonder if the Court is really of the view that construction work on a project is permissible if the project ultimately, however, may never be used" The plan to divert the waters of the Danube river into the bypass canal where the Gabcikovo power plant was to be constructed was the essence of the whole Project with which Hungary was in full agreement.

The Judgment states that the diverting of the Danube waters into the bypass canal was not proportionate to the injury suffered by Czechoslovakia as a result of Hungary's wrongful act (Judgment, para. 85). However, I hold the firm view that since Hungary did nothing to divert the waters at Dunakiliti, thus failing to execute its Treaty obligations, Czechoslovakia inevitably had to proceed with Variant C, that is, the construction of the Cunovo dam and the diversion of the waters of the Danube at that point, in execution of the JCP, although this was not explicitly authorized in the 1977 Treaty. This would have been a good reason to revise the JCP in order to implement the 1977 Treaty, although the consent of Hungary to that solution was not obtained. Czechoslovakia had the right to take that action.

24. (Volume of diverted waters) In this respect it should be added that the construction and operation of the Cunovo dam was simply undertaken in order to replace the Dunakiliti dam — while control of the Danube waters, as covered by Chapters V-XI of the 1977 Treaty, is another matter entirely as I have already stated (see para. 3 above). The Judgment seems to indicate that Czechoslovakia acted wrongfully by unilaterally diverting an undue proportion of the Danube waters into the bypass canal, but the distribution of sharing of those waters does not fall squarely within the framework of the construction and operation of Variant C. (I wonder whether control over the sharing of the water would have fallen under the exclusive competence of Hungary if the Dunakiliti dam had been built.)

The Cunovo dam, which replaced the Dunakiliti dam, is said to have diverted 90 per cent of the available water into the bypass canal on Czechoslovak territory. This figure for the division of the water might not reflect the original intention of the Parties, each of which wanted to have an equitable share of the waters, with a reasonable amount of the water going into the old Danube river bed and a similar reasonable amount going into the bypass canal. However, the way in which the waters are actually divided does not result simply from the *construction* of a dam at either Dunakiliti or at Cunovo but, the diversion of waters at Cunovo has, in fact, been operated by Czechoslovakia itself under its own responsibility.

The matter of the sharing of the waters between the bypass canal and the old Danube river bed is but one aspect of the *operation* of the system and could have been negotiated between the two States in an effort to carry on applying the JCP. A minimal share of the river waters currently discharged into the old Danube river bed might have been contradictory to the original Project, and for this, Czechoslovakia is fully responsible.

This matter, however, might well have been rectified by some mutually acceptable arrangement. It may well be possible to control the distribution of the water at Cunovo by the use of sluicegates or by a modification to the design of the dyke separating the waters in the Cunovo reservoir. The Control of the water was *not* the essence of the Variant C project and could still be dealt with in a more flexible manner through a revision or redrafting of the relevant texts of the JCP.

2. Special Agreement, Article 2, paragraph 2

25. The Court is requested under Article 2, paragraph 2, of the Special Agreement

"to determine the legal consequences, including the rights and obligations of the Parties, arising from its Judgment on the questions in paragraph 1 of this Article".

26. (The lawfulness of Variant C) The *construction* of Variant C was not unlawful and Slovakia did not incur any responsibility to Hungary, except that the way in which the Cunovo dam was controlled by Czechoslovakia seems to have led to an unfair division of the waters between the old Danube river bed and the bypass canal. Slovakia is entitled to reparation in the form of monetary compensation from Hungary for some portion of the cost of the construction work on the Cunovo dam met by Czechoslovakia alone as a result of Hungary's failure to execute its Treaty obligations concerning the completion of the Gabcikovo-Nagymaros System of Locks. The cost of the construction of the Cunovo dam and the related works should in part be borne by Hungary but, in exchange, it should be offered co=ownership of it. On the other hand, if the operation of the Cunovo dam diverting waters into the old Danube river bed has caused any tangible damage to Hungary, Slovakia should bear the responsibility for this mishandling of the division of waters. It must be noted, however, that, as a result of the planning of this whole Project (especially the bypass canal), the volume of water flowing into the old river bed could not be as great as before the Project was put into operation.

IV
Termination of the 1977 Treaty by Hungary

(Special Agreement, Article 2, paragraph 1 *(c)*; Article 2, paragraph 2)

1. Special Agreement, Article 2, paragraph 1 *(c)*

27. The Court is requested under the terms of the Special Agreement to decide

"what are the legal effects of the notification, on 19 May

1992, of the termination of the Treaty by [Hungary]" (Art. 2, para. 1 *(c)*).

28. (Hungary's notification of termination of the 1977 Treaty) This question concerns nothing other than the interpretation of the law of treaties, as the Judgment properly suggests. The termination of the 1977 Treaty is essentially different from an amendment of the JCP. Hungary claims that, as Variant C was in contradiction of the plan and thus constituted a wrongful act, the 1977 Treaty could be terminated because of that alleged violation of the Treaty by Czechoslovakia.

I am in agreement with the Judgment when it states that the termination of the 1977 Treaty by Hungary does not meet any of the criteria for the termination of a treaty as set out in the Vienna Convention on the Law of Treaties, which is considered as having the status of customary international law. I share the view of the Court that the 1977 Treaty has remained in force, as the notification of termination made by Hungary in 1992 could not have any legal effect (Judgment, para. 155, point 1 D).

2. Special Agreement, Article 2, paragraph 2

29. No legal consequences will result from the Court's Judgment in this respect, since the notification of termination of the 1977 Treaty by Hungary must be seen as having had no legal effect.

V
The Final Settlement

(Special Agreement, Article 5)

30. Hungary and Slovakia have agreed under Article 5 of the Special Agreement, that

"immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution".

31. (Negotiations under Article 5 of the Special Agreement) As I have already said, my views differ from those set out in the Judgment in that I believe that Czechoslovakia was entitled to proceed to the provisional solution, namely, not only the construction of the Cunovo dam but also the operation of that dam at Cunovo in November 1992 for diversion of water into the bypass canal. As I see it, Czechoslovakia did not violate the 1977 Treaty. It is my opinion that the "negotiations" between Hungary and Slovakia under Article 5 of the Special Agreement should be based on this understanding and not on the finding stated in the Judgment in its operative paragraph 155, points 1 C and 2 D.

32. (The amendment of the Joint Contractual Plan) The implementation by Czechoslovakia of Variant C — the construction of the Cunovo dam and the damming of the waters for diversion into the bypass canal — was a means of executing the plan for the Gabcikovo-Nagymaros System of Locks which had originally been agreed by the Parties. The implementation of Variant C will *not* remain a "provisional" solution but will, in future, form a part of the JCP.

The mode of operation at the Gabcikovo power plant should be expressly defined in the amendment JCP so as to avoid the need for operation in peak mode, as this has already been voluntarily abandoned by the Parties and does not need to be considered here.

The way in which the waters are divided at Cunovo should be negotiated in order to maintain the original plan, that is, an equitable share of the waters — and this should be spelt out in any revision or amendment of the JCP. The equitable sharing of the water must both meet Hungary's concern for the environment in the Szigetköz region and allow satisfactory operation of the Gabcikovo power plant by Slovakia, as well as the maintenance of the bypass canal for flood prevention and the improvement of navigation facilities. I would suggest that the JCP should be revised or some new version drafted during the negotiations under Article 5 of the Special Agreement in order to comply with the modalities which I have set out above.

33. (Reassessment of the environmental effect) Whilst the whole Project of the Gabcikovo-Nagymaros System of Locks is now in operation, in its modified form (that is, with the Cunovo dam instead of the Dunakiliti dam diverting the water to the bypass canal and with the abandonment of the work on the Nagymaros dam/power plant), the Parties are under an obligation in their mutual relations, under Articles 15, 16 and 19 of the 1977 Treaty, and, perhaps in relations with third parties, under an obligation in general law concerning environmental protection, to preserve the environment in the region of the river Danube.

The Parties should continue the environmental assessment of the whole region and search out remedies of a technical nature that could prevent the environmental damage which might be caused by the new project.

34. (Reparation) The issues on which the Parties should negotiate in accordance with Article 5 of the Special Agreement are only related to the details of the reparation to be made by Hungary to Slovakia on account of its having breached the 1977 Treaty and its failure to execute the Gabcikovo Project and the Nagymaros Project. The legal consequences of these treaty violations are different in nature, depending on whether they relate to one or other separate part of the original Project.

Hungary incurred responsibility to Czechoslovakia (later, Slovakia) on account of its suspension of the Gabcikovo Project and for the work carried out solely by Czechoslovakia to construct the Cunovo dam. In addition, Czechoslovakia is entitled to claim from Hungary the costs which it incurred during the construction of the Dunakiliti dam, which subsequently became redundant (see paras. 17 and 18 above).

With regard to the abandonment by Hungary of the Nagymaros dam, Hungary is not, in principle, required to pay any reparation to Slovakia as its action did not affect any essential interest of Slovakia (see para. 19 above). There is one point which should not be overlooked, that is, as the Nagymaros dam and power plant are, as Slovakia admits, no longer a part of the whole Project, the construction of the bypass canal from Cunovo would be mostly for the benefit of Slovakia and would provide no benefit to Hungary.

The main benefits of the whole Project now accrue to Slovakia, with the exception of the flood prevention measures and the improved facilities for international navigation, which are enjoyed by both States. This should be taken into account when assessing the reparation to be paid as a whole by Hungary to Slovakia.

In view of the statements I have made above, it is my firm belief that the modalities of the reparation to be paid by Hungary to Slovakia should be determined during the course of the negotiations to be held between the two States.

(Signed) Shigeru ODA.

DISSENTING OPINION OF JUDGE FLEISCHHUER

I have voted in favour of paragraph 1 A of the *dispositif* of the Court's Judgment as I am in agreement with the Court's finding therein.

"that Hungary was not entitled to suspend" and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the Treaty of 16 September 1977 and related instruments attributed responsibility to it." (para. 155).

I am also in agreement with the reasons that led the Court to this finding (paras. 27-59).

I have, moreover, voted in favour of paragraph 1 C of the *dispositif*, according to which

"Czechoslovakia was not entitled to put into operation, from October 1992, this "provisional solution;" (para. 155)

I share the view of the majority that

"Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act" (para. 78).

As to the reasoning which led the Court to its findings in this respect (paras. 72-88), I note, in particular, that the Court has not endorsed justification of Czechoslovakia's recourse to Variant C by an alleged principle of "approximate application: (para. 76) and that

"[t]he Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate" (para. 87).

I am in agreement with these positions of the Court.

I cannot agree, however, with most of the rest of the Judgment, and in particular not with its central finding that

"the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them" (conclusion 1 D, para. 155).

I am of the view that Hungary has validly terminated that Treaty by its notification of termination of 19 May 1992, with effect from 25 May 1992, or — alternatively — as from 23 October 1992, i.e., the date of the actual damming. Accordingly, I regard the consequences, which the majority of the Court draws in the five conclusions in part 2 of paragraph 155 as legally flawed, inasmuch as they are based on the concept of the continuing validity of the 1977 Treaty. I have therefore voted against four of them (i.e., conclusions 2 A, 2 B, 2 C and 2 E); my vote in favour of conclusion 2 D has to be seen in the light of my considerations on the legal consequences of the Judgment set forth in Part II below.

My reasoning is as follows:

I
WITH REGARD TO THE LEGAL FATE OF THE 1977 TREATY

1. *As to the date of the unlawfulness of the recourse by Czechoslovakia to Variant C*, the Judgment points only to the date when the actual damming of the Danube at Cunovo occurred, i.e., to 23 October 1992.

"Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully." (Para. 108.)

"The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied." (Para. 79.)

Based on these findings the majority of the Court has concluded that

"the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did." (Para. 108.)

These considerations are erroneous for two reasons:

Firstly, Czechoslovakia, when it "proceeded" to Variant C, as the expression used in Article 2, paragraph 1 *(b)* of the Special Agreement reads, was not free to engage in this way of proceeding. It follows from the Special Agreement that the time in question is November 1991. What happened in November 1991 is that work on Variant C began that month (para.23). It is uncontested between the Parties that at that time, in spite of Hungary's violation of the 1977 Treaty, the Treaty was in force between Czechoslovakia and Hungary.

The 1977 Treaty being in force in November 1991, both Czechoslovakia and Hungary were under the obligation to perform it in good faith. That is the basic rule underlying the whole fabric of the international law of treaties. It is reflected in Article 26 of the Vienna Convention on the Law of Treaties ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith"). Good faith in performing a treaty does not only concern the manner in which the treaty is applied and implemented by the parties to it; good faith performance means also that the parties must not defeat the object and purpose of the treaty. Under the Vienna Convention, the obligation not to defeat the object and purpose of a treaty exists already before its entry into force. According to Article 18 of the Convention,

"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed".

I do not want to go into the question as to whether the whole of Article 18 corresponds actually to general international law. However, as the International Law Commission remarked in its Commentary on Article 15 (which became Article 18 in the text of the Convention as adopted) - with a reference to the Permanent Court's decision in the case concerning *Certain German Interests in Polish Upper Silesia (1926, P.C.I.J, Series A, No. 7, p. 30)*:

"That an obligation of good faith to refrain from acts calculated to frustrate the object of the treaty attaches to a State which has signed a treaty subject to ratification appears to be generally accepted." *Yearbook of the International Law Commission,* 1966, Vol. II, p. 202.)

A *fortiori* does that obligation apply to a treaty after its entry into force. It follows from there that a State party to a treaty in force is not free to engage in — even on its own territory as Czechoslovakia did as from November 1991 — construction works which are designed to frustrate the treaty's very object, i.e., in the present case the creation and the operation of the Joint Project. The question of a justification of Czechoslovakia's construction work as countermeasure does not arise, as the Court has — rightly — found that the diversion of the Danube carried out by Czechoslovakia — which is the central part of Variant C — was not a lawful countermeasure because it was not proportionate (para. 87).

Secondly, I do not regard — as the majority of the Court does — the putting into operation of Variant C as a wrongful act which consisted only in the actual damming of the Danube in October 1992. In my view, the putting into operation of Variant C constituted a continuing wrongful act in the meaning of Article 25 of the ILC Draft on State Responsibility (Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, *General Assembly, Official Records, Fifty-first Session, Supplement No. 10* (A/51/10), p. 133), which extended from the passing from mere studies and planning to construction in November 1991 and lasted to the actual damming of the Danube in October of the following year. This is so because Czechoslovakia, in November 1991, entered into the construction phase in the certainty that Hungary would not, and could not, in view of the position taken not only by its Government but also by its Parliament, return to the implementation of the 1977 Treaty. At the same time, Czechoslo-

vakia was firmly determined to start production at the Gabcikovo hydroelectric power plant as soon as it was technically possible and to that end to dam the Danube at Cunovo at the next occasion when that would be feasible, i.e., during the low-water season in October 1992. How firmly both sides were locked in their respective positions is illustrated by their diplomatic exchanges. In April 1991, the Hungarian Parliament had recommitted the Government to negotiate with the Czechoslovak Government "regarding the dissolution by joint agreement of the Treaty concluded on 16 September 1977" (Parliamentary resolution 26/1991 (IV. 23) Regarding the government's Responsibility In Connection With the Gabcikovo-Nagymaros Barrage System, SM, Vol. IV, Ann. 88, p. 215) and instructed the Government to:

"concurrently initiate the conclusion of a new international treaty to settle the issue of the consequences of the non-construction (abandonment) of the barrage system and associated main projects: (*ibid.*).

Consequently, Hungary not only constantly protested the unilateral measures initiated by Czechoslovakia in order to put Variant C into operation, but it continued to ask for the abrogation of the 1977 Treaty and its replacement by a new agreement:

"the mandate of the Hungarian Governmental Delegation was determined by the Resolution of Parliament, ... Freed from the politics of the past, we can re-evaluate the disputed problem from a professional/scientific viewpoint, namely, the ecological effects, flood protection, navigation, energy, economic, technical/security and other questions of the Barrage System related to the 1977 Interstate Treaty or any other solution." (Hungarian Minister Without Portfolio to Slovak Prime Minister, 7 November 1991, HM, Vol. 4, Ann. 67, p. 122.)

"the Hungarian Party has repeatedly (beginning in Summer of 1989) offered the Czech and Slovak Party the chance to cooperate and to amend the 1977 Interstate Treaty, and to conclude a new treaty, ... the Czech and Slovak Party should not undertake any work which would be aimed at unilateral solutions (which may, perhaps, mean the diversion of the Danube in contravention of international law)" (Letter from the Hungarian Minister for Environmental Protection & Territorial Development and the Minister Without Portfolio to the Czechoslovak Minister of Environmental Protection of 6 December 1991, HM, Vol. 4, Ann. 68, p. 124).

"In light of this the Hungarian Government deems the decision brought about on 12 December 1991 by the Czech and Slovak Federal Republic unlawful and unacceptable and calls upon the Czech and Slovak Federal Republic to discontinue work on the diversion of the Danube." (Note Verbale from the Ministry of Foreign Affairs of the Republic of Hungary to the Embassy of the Czech and Slovak Federal Republic, 14 February 1992, HM, Vol. 4, Ann. 74, p. 135.)

Czechoslovakia on the other hand, in the critical period between the fall of 1991 and May 1992, when Hungary came through with its notification of termination of the 1977 Treaty, consistently gave this message to Hungary:

"I would once again emphasise, however, that Czechoslovakia will only find acceptable a variant which would make the operation of the Gabcikovo Barrage possible." (Slovak Prime Minister to Hungarian Minister Without Portfolio, 19 September 1991, HM, *ibid.*, Ann. 62, p. 113.)

"Work on the temporary measures will also cease if the Hungarian Party discontinues its unilateral breach of the 1977 Treaty and recommences the obligations provided for it therein or if an agreement is concluded between the Republic of Hungary and the Czech and Slovak Federal Republic as to some other solution regarding the fate of the Project.

The Government of the Czech and Slovak Federal Republic is prepared to continue negotiations with the Hungarian Government on all levels regarding the situation which has developed. At the same time, it cannot agree to the cessation of work on the provisional solution." (Note Verbale from the Ministry of Foreign Affairs of the Czech and Slovak Federal Republic to the Ministry of Foreign Affairs of the Republic of Hungary, 17 march 1992, HM, *ibid.*, ann. 76, p. 139.)

"Czechoslovak[ia] has shown enough good intentions and a readiness to negotiate, but it can no longer give consideration to the time-wasting and delays which are being used by Hungary, and thus, it cannot suspend work related to the provisional solution. In my view, until the Danube is closed (31 October 1992) there is still an opportunity to resolve the debated question by way of an agreement between the two States." (Czechoslovak Prime Minister to Hungarian Prime Minister, 23 April 1992, HM, *ibid.*, Ann 79, p. 147.)

Czechoslovakia did not reject the formation of a joint committee of experts, including "foreign experts nominated by the European Community based on the needs of both Parties" (Slovak Prime Minister to Hungarian Minister without Portfolio, 18 December 1991, HM. *ibid.*, Ann. 69, p. 126). But the Slovak Prime Minister added:

"I am repeatedly stressing that, because of the high state of readiness of the Gabcikovo plant, the only solution that is acceptable for us is one which takes into account the putting into operation of the Gabcikovo plant." (*ibid.*)

And on 8 January 1992 the Slovak Prime Minister re-

peated this position:

"We repeatedly emphasized at joint negotiations undertaken by the Government Delegations of the CSFR and the Republic of Hungary that we can only accept a solution which is aimed at the commencement of operations of the Gabcikovo Barrage. This demand is justified by the advanced stage of the construction at Gabcikovo and the amount of material resources invested.

The Czechoslovak party is willing to take into consideration the conclusions of the work done by such a committee of experts in any further procedures regarding the Gabcikovo-Nagymaros Barrage System. It is also known that the Government of the CSFR is willing to suspend the provisional solution on its own sovereign territory insofar as the Government of the Republic of Hungary is able to find an opportunity to enter into a joint solution." (HM. Vol. 4, Ann. 72, p. 132.)

In the light of these circumstances, when the construction work for Variant C got under way, on both sides the point of no return was passed. There was a *continuum* and the Czechoslovak action of November 1991 and its action undertaken in October 1992 share the same legal deficiency. The putting into operation of Variant C was an internationally wrongful act extended over time between November 1991 and October 1992.

Since I am thus — contrary to the opinion expressed in the Court's Judgment — of the view that Czechoslovakia was not entitled to proceed, in November 1991, to Variant C, I am also in disagreement with the conclusion in paragraph 1 B of the *dispositif* of the Judgment:

"that Czechoslovakia was entitled to proceed, in November 1991, to the 'provisional solution'" (para. 155).

Nor can I agree with paragraph 1 D of the *dispositif*.

"that the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them" (*ibid.*)

in so far as it is based on the allegedly premature giving of the notification of termination by Hungary (para. 108).

2. *I would disagree with the conclusion drawn by the majority based on the point in time at which Hungary made its notification of termination even if I shared* — quod non — *the view that Czechoslovakia violated the 1977 Treaty only in October 1992.* What that view means is that the notification of termination was not warranted in May, as no breach of the Treaty had yet occurred (para. 108), but that when the damming of the Danube happened, in October, the event occurred too late as far as the Hungarian notification is concerned. This view amounts, in its practical consequence, to an extraordinary formalism: a unilateral legal act, the notification, is discounted because a certain event, although expected and foreseen, had not yet happened. The event happens, nothing else changes, but still legal effects of the earlier act are said not to arise as it had been premature. This approach to a matter of international law does not correspond to the requirements of good faith. As the Court has said:

"One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential." (*Nuclear Tests (Australia v. France). Judgment of 20 December 1974, I.C.J. Reports 1974,* p. 253 at p. 268.)

If one regards — as the majority of the Court does — Hungary's notification of termination as premature, then one must also admit that it would have been possible for Hungary to withdraw this act and to substitute it later by a new notification of termination based on the events of October 1992. The principle of good faith requires that under such circumstances the defect of Hungary's original act, the, in the view of the Court, premature giving of its notification of termination of the 1977 Treaty, has to be regarded as remedied once the missing factual event has occurred. That the occurrence of a subsequent even can be an adequate ground for remedying a defective unilateral act has been confirmed by the Permanent Court when it stated in the case concerning the *Mavrommatis Palestine Concessions*:

"Even if the grounds on which the institution of proceedings was based were defective for the reason stated, this would not be an adequate reason for the dismissal of the Applicant's suit. ... Even, therefore, if the application were premature because the Treaty of Lausanne had not yet been ratified, this circumstance would now be covered by the subsequent deposit of the necessary ratifications." (*1924, P.C.I.J., Series A. No. 2,* p. 34.)

And in the case concerning *Certain German Interests in Polish Upper Silesia* the Permanent Court said:

"Even if, under Article 23, the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned." (*1925, P.C.I.J., Series A. No. 6,* p. 14.)

Even if, therefore, the date of 19 May 1992 is not regarded as a suitable date for Hungary's notification of termination, this defect is to be regarded as being rem-

edied as from 23 October 1992, date of the actual damming of the Danube.

3. In its finding that

"the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them" (para. 155 1 D, see also para. 108),

the majority of the Court did not base itself alone on the ground that Hungary's notification had been premature. *Two more grounds are given, neither of which I can agree with.*

The first of these additional reason is

"*that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior, wrongful conduct.* As was stated by the Permanent Court of International Justice, 'it is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal cours, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, (*1927, P.C.I.J., Series A. No. 9,* p. 31). Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty." (Para. 110; emphasis added.)

I do not want to put into doubt this general rule; however, I do not think that the principle applies in the circumstances of the present case.

My objection to the Judgment in this respect is twofold: firstly, the Court overlooks that recourse to Variant C was neither automatic nor the only possible reaction of Czechoslovakia to Hungary's violations of the 1977 Treaty. Czechoslovakia would have been entitled to terminate the Treaty. If it did not want to do this, it could, for example, have provided unilaterally for participation of Hungary in the realization of Variant C, possibly in combination with a third party dispute settlement clause. Secondly, the Court, in basing its negation of a right of Hungary to terminate the 1977 Treaty in response to the realization by Czechoslovakia of Variant C, on the fact that Hungary itself had violated the Treaty first, does not take account of its own conclusion that:

"Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz — failed to respect the proportionality which is required by international law" (para. 85),

and that the derivation of the Danube "was not a lawful countermeasure because it was not proportionate" (para. 87).

What applies in the present case is this: Hungary, by its prior violation of the 1977 Treaty, had not become a legal outlaw which must endure every measure with which Czechoslovakia could come up in response. The principle that no State may profit from its own violation of a legal obligation does not condone excessive retaliation. The principle, as stated by the Permanent Court and applied to the present case, means that one Party, Hungary, would not be entitled to avail itself of the fact that the other Party, Czechoslovakia, has not fulfilled an obligation if the first Party, Hungary, has by an illegal act prevented the other, Czechoslovakia, from fulfilling the obligation in question. This, however, is not the case here. The obligation not fulfilled by Czechoslovakia is the duty to respect Hungary's entitlement to an equitable and reasonable share in the waters of the Danube. Hungary has not made it impossible for Czechoslovakia to respect that right; as I have pointed out above, the unilateral realization of Variant C by Czechoslovakia was neither automatic nor the only possible reaction to Hungary's breaches of the Treaty. A broader interpretation of the principle in question which would disregard the requirement of proportionality, would mean that the right to countermeasures would go further, in respect to disproportionate intersecting violations of a treaty, as it goes under general international law. It is therefore wrong to apply the principle quite schematically to cases where there are intersecting ("reciprocal") violations of a treaty as the Court does where it states

> "that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination" (para. 114).

Rather, the recourse by Czechoslovakia to Variant C constituted a new breach of the 1977 Treaty, this time by Czechoslovakia. This new breach of the Treaty, by exceeding in proportionality Hungary's earlier breaches, set in motion a new chain of causality and entitled Hungary to defend itself by taking recourse to its right under Article 60 of the Vienna Convention on the Law of Treaties, i.e., to terminate the Treaty. The requirements of Article 60, paragraph 3 *(b)*, are met as

> "the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube be-

> fore returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river" (para. 78)

and thus Variant C infringed upon basic rights of Hungary, essential in the accomplishment of the 1977 Treaty. In a situation of disproportionate intersecting violations of an international treaty, such as the one in which Hungary and Czechoslovakia found themselves after the latter's recourse to Variant C, the corrective element does not lie in the loss by the first offending State of the right to defend itself against the second offence by way of termination, but in a limitation of the first offender's — here Hungary's — right to claim redress for the second offence.

I therefore come to the conclusion that — contrary to the view of the majority of the Court — the fact that Hungary violated the 1977 Treaty first did not deprive it of its right to terminate the same Treaty in reaction to its later violation by Czechoslovakia.

4. The other of the additional reasons invoked by the Court's majority in support of the alleged invalidity of Hungary's notification of termination is

> "that, according to Hungary's Declaration of 19 May 1992, *the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later.* Both Parties agree that Article 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith." (Para. 109; emphasis added.)

I do not contest that Articles 65 to 67 may reflect certain procedural principles pertaining to customary law, but I do not think that Hungary's notification of termination contradicts these principles. In this respect, the delay of only six days provided for by Hungry for its notification to become effective should not be seen in isolation. In fact, Hungary transmitted its notification of termination full six months after Czechoslovakia had proceeded to Variant C in November 1991. During that period Hungary — as shown above in the quotations from the diplomatic exchanges between the two Parties — did not cease to protest against the unilateral measures taken by Czechoslovakia and to ask that they be stopped. Hungary also pointed out that a continuation of these measures might put the fate of the 1977 Treaty into question.

> "I am hopeful that the representatives of the Government and the Parliament of the Czech and Slovak Republic having regard to their historic responsibility will find an opportunity to take the above reasonable points of view into consideration. If this expectation proves to be futile, the Government of the Republic of Hungary would be compelled to review the consequences of the discontinuation of the negotiations, the fate of the 1977 interstate Treaty and the necessary counter-measures." (Hungarian Prime Minister to the Czechoslovak Prime Minister, 19 December 1991, HM. Vol. 4, Ann. 70, p 129.)
>
> If the Government of the Czech and Slovak Federal Republic were to reject our proposals anyway and continue the work aimed at the diversion of the Danube, which is a serious breach of international law, then it will create a very difficult situation.
>
> The Government of the Czech and Slovak Republic would thus be placing the Hungarian Government into a state of necessity forcing it to terminate the Treaty." (Hungarian Prime Minister to Czechoslovak Prime Minister, 26 February 1992, HM, Vol. 4, Ann. 75, p. 138.)
>
> In these circumstances the fact that Hungary, in May 1992, gave only six days' notice cannot be regarded as contravening the requirements of good faith in the application of international law.
>
> These are the reasons which lead me to the conclusion that Hungary has validly terminated the 1977 Treaty as from 25 May 1992 or — alternatively — as from 23 October 1992.

II
WITH REGARD TO THE LEGAL CONSEQUENCES OF THE JUDGMENT

From my considerations set forth above follows that the determination of the legal consequences arising from the answers to the first three questions asked of the Court by the Special Agreement has to start from the finding that Hungary has validly terminated the 1977 Treaty as from 25 May — or alternatively 23 October — 1992. From there follows that up to that date the legal situation concerning the G/N Project was primarily governed by the 1977 Treaty and related instruments; after that date the situation is governed by general international law and by those treaties which remain in force independently of Hungary's termination of the 1977 Treaty, such as, *inter alia*, the 1948 Danube Convention, the 1976 Boundary Water Convention, the agreements relating to Danube fishery, as well as by conventions of a general character such as the Vienna Convention on the Law of Treaties.

This means that as from 25 May to 23 October 1992 Hungary is no longer obliged to construct at Nagymaros. The constructions at Dunakiliti do not have to be revived and completed. For Slovakia, the termination of the 1977 Treaty means that it is no longer under an obligation to arrange for the joint operation, together with Hungary, of the Gabcikovo hydroelectric power plant or to share with Hungary the electricity generated there.

A second starting point is that the termination of the 1977 Treaty — whether one accepts 25 May 1992 or 23 October of the same year as the decisive date — means that Slovakia, which came into existence as an independent State only as from 1 January 1993, has never become a party to the 1977 Treaty. The fact that Slovakia has never succeeded to Czechoslovakia as a party to the 1977 Treaty does not mean, however, that Slovakia has become separated from this case. Slovakia has inherited the works produced under the G/N Project on its territory, in particular the Cunovo reservoir, the bypass canal, the Gabcikovo lock and the Gabcikovo power station. It is operating these installations. It has thus endorsed and continued the Czechoslovak action regarding Variant C. Slovakia therefore must be held accountable for Czechoslovakia's acts regarding the G/N Project.

A third starting point for the determination of the legal consequences should be the *ex nunc* effect of the termination of international treaties. As laid down in Article 70 of the Vienna Convention on the Law of Treaties, which is another provision reflecting a customary rule, the termination of a treaty releases the parties from any obligation to further perform the treaty but does not affect any right of the parties created through the execution of the treaty prior to its termination" (Art. 70, para. 1 *(b)*).

This means, *inter alia*, that the ownership of constructions which existed on 25 May to 23 October 1992 remains as provided for in Article 8 of the 1977 Treaty. If that creates problems, it is for the Parties to sort them out by agreement between themselves.

A fourth starting point for the determination of the legal consequences of the Judgment is the conclusion that Czechoslovakia was not entitled to put Variant C into operation from October 1992 (paragraph 1 C of the *dispositif*) as

> "Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act" (para. 78).

As I have pointed out above, I agree with the Judgment in these findings. However, it does not follow from them that with the falling away of the 1977 Treaty all legal obstacles against the continued operation of Variant C by Slovakia, as the successor to Czechoslovakia, were removed. This is so because the appropriation by Czechoslovakia/Slovakia of the major part of Hungary's share in the waters of the Danube for the full length of the bypass canal violated not only the 1977 Treaty but, as the Judgment recognizes, the basic right of Hungary to an equitable and reasonable sharing of the resources of an international watercourse (para. 78). This is a right that existed not only under the Treaty but which exists under general international law.

This means that there is no obligation for Slovakia to dismantle the constructions which Czechoslovakia had built in order to make Variant C operational. These constructions are all situated in what is now Slovak territory and their mere presence there does not contravene any international legal obligation of Slovakia. After the 1977 Treaty had fallen away, there was, and still is, no legal obligation for Slovakia any more to provide for a joint running of the Gabcikovo hydroelectric power plant or for a sharing of profits. There continues to be, however, a legal obstacle against the unilateral running of Variant C by Slovakia, and that is the unilateral appropriation of, as the Judgment confirms (para. 78) between 80 and 90 per cent of Hungary's share in the waters of the Danube without Hungary's consent on a stretch of about 30 km in length. Hungary has requested the Court

> "*to adjudge and declare further*
>
> (5) that the Slovak Republic is under the following obligations:
>
> (a) to return the waters of the Danube to their course along the international frontier between the Republic of Hungary and the Slovak Republic, that is to say the main navigable channel as defined by applicable treaties;
>
> (b) to restore the Danube to the situation it was in prior to the putting into effect of the provisional solution;" (para. 13).

The Court cannot uphold these requests. While the 1977 Treaty was in force, it had been breached by both Parties, albeit in different ways and at different times. As has been explained above, Hungary as the first offender did not lose its right to defend itself against Czechoslovakia's later violation of the Treaty. However, as regards the kind of restitution Hungary can claim for the diversion of the waters of the Danube, the fact that Hungary first adhered to the 1977 Treaty and endorsed it, in 1983 asked for a slowing down, but by no means the abandonment of its execution. In 1989 again pressed for an acceleration and then, still in the same year, suspended and subsequently abandoned its share in the works at Nagymaros and Dunakiliti, cannot be overlooked. By reason of its own previous behaviour Hungary cannot in good faith be considered to be entitled to full restitution by return of the full flow of water to the old Danube and the full restoration of the situation in which the Danube was prior to the operation of Variant C. A water management regime must be established that takes into account Hungary's ecological needs, as well as the fact that the quantity of water going to the Slovak side and the rentability of the Gabcikovo hydroelectric power plant are interrelated. It would certainly be desirable that such a régime, which would be restricted to water management, but — as the Treaty does not exist any more — must not make provision for the joint running of the Gabcikovo hydroelectric power plant, should be agreed

between the Parties themselves. Should the Parties fail, they would have to return to the Court under Article 5, paragraph 3, of the Special Agreement.

The fifth starting point for the determination of the legal consequences of the Court's Judgment must be the fact that as a consequence of the Judgment the flow of water in the old bed of the Danube will be increased again. Irrespective of whether and to what extent navigation will use the old Danube again, there will be a discernable principal channel. There will therefore be no necessity for new or additional boundary arrangements. However, Slovakia, as a riparian State of the Danube and a party to the 1948 Danube Convention, will be under the legal obligation to make binding arrangements with the other States parties to the Danube Convention in order to secure for their navigation through the bypass canal, the Gabcikovo locks and the Cunovo reservoir, conditions corresponding to those provided for in the Danube Convention. On the same line, Slovakia will also be under a legal obligation to provide for the application, in the bypass canal and in the reservoir, of the provisions concerning fisheries of the 1956 Treaty Concerning the Régime of State Boundaries as well as of the 1958 Convention concerning Fishing in the Waters of the Danube.

The sixth point to be taken into consideration in this context is that, as both Parties have committed internationally illegal acts against each other, each Party owes the other compensation. Hungary owes compensation to Slovakia for the damages arising out of the delays in construction caused by its suspension and subsequent abandonment of its share in the works at Nagymaros and Gabcikovo between 13 May 1989 and 25 May to 23 October 1992. Slovakia in turn owes compensation to Hungary for losses and damages sustained by Hungary and its nationals out of the unilateral derivation by Czechoslovakia and Slovakia of waters of the Danube between the actual damming of the river in October 1992 and the entry into force of the water management agreement, to be brought about in pursuance of the Judgment of the Court. The amounts of compensation have to be fixed in accordance with Article 5 of the Special Agreement.

(Signed) Carl-August FLEISCHHAUER.

DISSENTING OPINION OF JUDGE VERESHCHETIN

I regret that I cannot associate myself with those parts of the Judgment according to which Czechoslovakia was not entitled to put the so-called Variant C ("provisional solution") into operation from October 1992 (Judgment, para. 155, point 1 C) and:

> "Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the 'provisional solution' by Czechoslovakia and its maintenance in service by Slovakia" (*ibid.*, para. 155, point 2 D).

I firmly believe that Czechoslovakia was fully entitled in international law to put into operation Variant C as a countermeasure so far as its partner in the Treaty persisted in violating its obligations. Admittedly, Slovakia itself advanced this defence as "an alternative legal argument" and did not believe Variant C to be a wrongful act, even prima facie, while any countermeasure, viewed in isolation from the circumstances precluding its wrongfulness, is a wrongful act in itself.

Slovakia takes the view that Variant C was a lawful, temporary and reversible solution necessitated by the action of its partner and prefers to defend its decision on the basis of the doctrine of "approximate application". However, a subjective view or belief of Slovakia cannot preclude the Court from taking a different view on the matter. The Court is bound by the questions put to it by the Parties in the Special Agreement, but not by the arguments they advanced in their pleadings.

In this regard a very pertinent comment can be found in the International Law Commission's Commentary to the Draft Articles on State Responsibility:

> "Whether a particular measure constitutes a countermeasure is an objective question ... It is not sufficient that the allegedly injured State has a subjective belief that it is (or for that matter is not) taking countermeasures. Accordingly whether a particular measure in truth was a countermeasure would be a matter for the tribunal itself to determine." (*General Assembly Official Records, Fifty-first Session, Supplement No. 10* (A/51/10), pp. 162-163.)

> The Parties requested the Court to decide:

> "whether the Czech and Slovak Federal Republic was *entitled* to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system..." (Special Agreement, Art. 2, para. 1*(b)*; emphasis added).

Since the Court has decided that "Czechoslovakia was entitled to proceed, in November 1991, to the 'provisional solution'" (Judgment, para. 155, point 1 B), I shall further focus my observations on the entitlement of Czechoslovakia to put this system into operation from October 1992.

Entitlement to respond by way of proportionate countermeasures stems from a prior wrongful act of the State which is the target of the countermeasures in question. According to the Court's jurisprudence, established wrongful acts justify "proportionate countermeasures on the part of the State which ha[s] been the victim of these

acts ..." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 127, para. 249). Entitlement to take countermeasures is circumscribed by a number of conditions and restrictions.

The most recent and authoritative attempt to codify the rules relating to countermeasures was made by the International Law Commission within the framework of its topic on State Responsibility (*General Assembly Official Records, Fifty-first Session, Suppl. No. 10* (A/51/10)). Some of the provisions formulated by the ILC in this regard may be viewed as not merely codifying, but also developing customary rules relating to countermeasures (formerly known as reprisals). Therefore, I do not think that the Court in its assessment of the putting into operation of Variant C as a countermeasure may be overreaching and requirements established by the ILC draft for a countermeasure to be lawful.

Thus, to require that Variant C should have been the only means available in the circumstances to Czechoslovakia would amount to applying to countermeasures the criterion which the ILC considers to be indispensable for the invocation of "the state of necessity", but does not specifically mention in the text of the Articles dealing with countermeasures.

But even assuming this criterion should be applied to countermeasures as well, what other possible legal means allegedly open to Czechoslovakia could there be apart from countermeasures? Since the Court has found that Czechoslovakia was not entitled to put Variant C into operation, it should in all fairness have clearly indicated some other legal option or options whereby Czechoslovakia could effectively have asserted its rights under the Treaty and induced its partner to return to the performance of its obligations. In my analysis of the case, I have been unable to find any such effective alternative option available for Czechoslovakia in 1991 or 1992.

Certainly one of the legal means according to Article 60 of the Vienna Convention on the Law of Treaties could be the termination of the 1977 Treaty, in response to the material breach committed by the other party. But for Czechoslovakia would this not have amounted to bringing about by its own hand the result which Hungary had sought to achieve by its unlawful actions?

Another conceivable legal means might have been the formal initiation of a dispute settlement procedure under Article 27 of the 1977 Treaty. This Article stipulates that:

> "1. The settlement of disputes in matters relating to the realization and operation of the System of Locks shall be a function of the government delegates.
>
> 2. If the government delegates are unable to reach agreement on the matters in dispute, they shall refer them to the governments of the Contracting Parties for decision."

At the time of the proceeding to Variant C (November 1991), "the matters in dispute" had long been in the hands of the governments of the Contracting Parties. Therefore, no settlement could realistically be expected through a procedure at a much lower level when all the attempts to reach a settlement at the highest possible intergovernmental level had failed.

Would it be any more legally correct or, for that matter, realistic to insist that Czechoslovakia should have come to the Court before putting Variant C into operation in October 1992? Apart from the fact that Czechoslovakia was not legally bound to do so, it should be recalled that more than four years elapsed between the filing of the Application in the present case and the commencement of the hearings. One can easily imagine the amount of economic and environmental damage as well as the damage relating to international navigation that could have been caused by such a delay.

What should be borne in mind, however, is the fact that Czechoslovakia respected the obligation to negotiate prior to taking countermeasures. The time between the first suspension of works by Hungary in May 1989 and the proceeding to Variant C in November 1991 and subsequently putting this system into operation in October 1992 was replete with fruitless negotiations at different levels aimed at finding a resolution of the dispute (see paragraphs 61-64 of the Judgment). The history of these negotiations clearly shows that, at least from the end of 1990, the sole purpose of these negotiations for Hungary was the termination of the Treaty and the conclusion of a new agreement dealing only with the consequences of this termination, while for Czechoslovakia the purpose of negotiations was the continuation and completion of the Joint Project in some agreed form within the Treaty framework. Hungary's gradual withdrawal from the Joint Project in defiance of the 1977 Treaty led to the putting into operation of Variant C.

The basic conditions for the lawfulness of a countermeasure are (1) the presence of a prior illicit act, committed by the State at which the countermeasure is targeted; (2) the necessity of the countermeasure; and (3) its proportionality in the circumstances of the case. Certain kinds of acts are entirely prohibited as countermeasures, but they are not relevant to the present case (these acts being the threat or use of force, extreme economic or political coercion, infringement of the inviolability of diplomatic agents, derogations from basic human rights or norms of *jus cogens*).

I believe all the above-mentioned conditions were met when Czechoslovakia put Variant C into operation in October 1992. As to the first condition, it has been sat-

isfied by the Court's findings that Hungary was not entitled to suspend and subsequently abandon the works relating to the Project or to terminate the Treaty (Judgment, para. 155, points 1 A and D). The unilateral suspension of the works by Hungary at Nagymaros and at Dunakiliti (initial breaches of the 1977 Treaty by way of non-performance) and later the abandonment of the work on the Project occurred before November 1991 — the date when, according to the Special Agreement, Czechoslovakia proceeded to the "provisional solution". The illicit termination of the Treaty by Hungary (19 May 1992) preceded the date when Czechoslovakia put Variant C into operation (October 1992 according to the Special Agreement).

Countermeasures may be seen as "necessary" only if they are aimed at bringing about the compliance of the wrongdoing State with its obligations and must be suspended once the illicit act has ceased. This requirement therefore presupposes that countermeasures are reversible by nature.

In the course of the pleadings Slovakia stated and repeated over and over again that Variant C was conceived as a provisional and reversible solution, as an attempt to induce Hungary to re-establish the situation which existed before her wrongful act. Significantly, the Working Group of Independent Experts of the Commission of the European Communities, in its report of 23 November 1992, did not deny the technical feasibility of the return to the Treaty Project:

"In principle, the ongoing activities with Variant C could be reversed. The structures, excluding some of the underground parts like sheet piling and injections, could in theory be removed. The cost of removing the structures are roughly estimated to at least 30% of the construction costs." (HM, Vol. 5, Part. II, Ann. 14, p. 434.)

This statement confirms that, at least at the time of the damming of the Danube, Variant C was a reversible measure and a return to some agreed joint scheme of the Treaty Project was possible.

The contention of Hungary regarding Czechoslovakia's hidden intentions to act unilaterally — intentions which allegedly already existed in the past and still do — may be of scant relevance to the issue of the reversibility of Variant C.

The existence of such intentions at the governmental level and the readiness to realize them would hardly be compatible with Czechoslovakia's conduct after the suspension of works under the Treaty by Hungary. The Government of Czechoslovakia did not seize upon the opportunity which had emerged to terminate the 1977 Treaty and to complete the Project unilaterally, but instead tried to persuade its Hungarian counterpart to return to the performance of its treaty obligations. At the same time, the Government of Czechoslovakia expressed its willingness to meet many of Hungary's environmental concerns, proposing in October 1989 negotiations on agreements relating to technological, operational and ecological guarantees as well as to the limitation or exclusion of the peak mode operation of the Gabcikovo-Nagymaros Barrage System. In any event, the veracity and fairness of the public commitments of Czechoslovakia and Slovakia to return to the Joint Project may not be refuted on the basis of mere conjectures, but could be tested only by the response of Czechoslovakia and Slovakia to the positive actions by Hungary.

It remains for us to examine one more basic condition for the lawfulness of a countermeasure, namely its proportionality in the circumstances of the case. It is widely recognized, in both doctrine and jurisprudence that the test of proportionality is very important in the regime of countermeasures and at the same time it is very uncertain and therefore complex.

To begin with, according to the ILC:

> "there is no uniformity ... in the practice or the doctrine as to the formulation of the principle, the strictness or flexibility of the principle and the criteria on the basis of which proportionality should be assessed" (*General Assembly Official Records, Forty-seventh Session. Supplement No. 10* (A/50/10), p. 146).

The ILC also observes that "reference to equivalence or proportionality in the narrow sense ... is unusual in State practice" (*ibid.*, p. 147). That is why in the literature and arbitral awards it is suggested that the lawfulness of countermeasures must be assessed by the application of such negative criteria as "not out of proportion", etc. The latter expression ("not out of proportion") was employed by the ILC in its most recent draft on State Responsibility. The text of the corresponding Article reads:

> "any countermeasure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State: (Art. 49).

In its Commentary the Commission says that "proportionality" should be assessed taking into account not only the purely "quantitative" element of damage caused, but also "qualitative" factors such as the importance of the interest protected by the rule infringed and the "seriousness of the breach" (*ibid,* pp. 147-148).

If we take this approach which, in my view, adequately expresses State practice and jurisprudence, we should weigh the importance of the principle *pacta sunt servanda* breached by Hungary and the concrete effects of this breach on Czechoslovakia against the imp[ortance of the rules not complied with by Czechoslovakia and the concrete effects of this non-compliance on Hungary. The

"degree(s) of gravity" in both cases need not necessarily be equivalent but, to use the words of the Air Services Agreement Award, must have "some degree of equivalence" *(International Law Reports,* Vol. 54, p. 338), or in the words of the ILC must "not be out of proportion".

The task is not an easy one and may be achieved only by way of approximation, which means with a certain degree of subjectivity. Weighing the gravity of the prior breach and its effects on the one hand, and the gravity of the countermeasure and its effects on the other, the Court should, wherever possible, have attempted in the first place to compare like with like and should have done so with due regard to all the attendant circumstances against the background of the relevant causes and consequences. Following this approach, the Court should have assessed by approximation and compared separately:

1. the economic and financial effects of the breach as against the economic and financial effects of the countermeasure;

2. the environmental effects of the breach as against the environmental effects of the countermeasure; and

3. the effects of the breach on the exercise of the right to use commonly shared water resources as against the effects of the countermeasure on the exercise of this right.

All these assessments and comparisons should have specifically been confined to the span of time defined by the question put to the Court by the Parties, namely November 1991 to October 1992. It should not be forgotten that the very idea and purpose of a countermeasure is to induce the wrongdoing State to resume performance of its obligations. The sooner it does so the less damage it will sustain as a result of the countermeasure.

On the first point of comparison, according to Slovakia "by May 1989, a total of US$ 2.3 billion (CSK 13.8 billion) had been spent by Czechoslovakia on the G/N Project" (SM, p. 187, para. 5.01). These figures, which naturally do not include the loss of energy production and the cost of the protection, maintenance and eventual removal of the existing structures, give the idea of the economic and financial losses which would inevitably have been sustained by Czechoslovakia in the event of a complete abandonment of the Project.

For its part, Hungary did not, either in its written pleadings or in its oral arguments, give any concrete figures evincing in monetary terms the amount of actual material damage sustained as a result of Czechoslovakia's resort to Variant C. Hungary claimed its entitlement to the payment by Slovakia of unspecified sums in compensation for possible future damage, or potential risk of damage, which might be occasioned by Variant C. Although it is true that "[n]atural resources have value that is not readily measured by traditional means" (HR, Vol. 1, p. 178, para. 3.170), uncertain long-term economic losses, let alone the mere potential risk of such losses, may not be seen as commensurable with the real and imminent threat of having to write off an investment of such magnitude.

In terms of comparative environmental effects, Variant C could be seen as advantageous against the originally agreed project, due to a smaller reservoir and the exclusion of peak mode operation. On the other hand, in the event of the total abandonment of the project, the waterless bypass canal and other completed but idle structures would have presented a great and long-lasting danger for the environment of the whole region. As stated in the Judgment "It emerges from the report, dated 31 October 1992, of the tripartite fact-finding mission ..., that not using the system ... could have given rise to serious problems for the environment." (Judgment, para. 72.)

Also, it is necessary to compare the gravity and the effects of the breach of the 1977 Treaty by Hungary with the gravity and the effects of the response by Czechoslovakia in terms of their respective rights to the commonly shared water resources. Hungary and Czechoslovakia had agreed by treaty on a scheme for common use of their shared water resources, which use they evidently considered equitable and reasonable, at least at the time when this agreement was reached. Both States had made important investments for the realization of the scheme agreed upon. At the time when one of the States (Czechoslovakia) had completed 90 per cent of its part of the agreed work, the other State (Hungary) abruptly refused to continue discharging its treaty obligations. Due to the technical characteristics of the project, Hungary thereby deprived Czechoslovakia of the practical possibility of benefiting from the use of its part of the shared water resources for the purposes essential for Czechoslovakia, clearly defined in the Treaty and expressly consented to by Hungary.

In response to this illicit act, Czechoslovakia likewise failed to act in accordance with its obligations under the 1977 Treaty. By putting into operation Variant C, it temporarily appropriated, on a unilateral basis and essentially for its own benefit, the amount of water from which originally, according to the Treaty and the Joint Contractual Plan, both States were entitled to benefit on equal terms. At the same time, Czechoslovakia reiterated its willingness to return to the previously agreed scheme of common use and control provided that Hungary ceased violating its obligations. The possibility of a revision by agreement of the original joint scheme was not excluded either.

In those circumstances and as long as Hungary failed to perform its obligations under the 1977 Treaty and thus,

of its own choosing, did not make use of its rights under the same Treaty, Czechoslovakia, in principle, *by way of a countermeasure* and hence on a provisional basis, could channel into the Gabcikovo structure as much water as had been agreed in the Joint Contractual Plan. Moreover, Article 14 of the 1977 Treaty provided for the possibility, under a certain condition, that each of the Parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan (see Judgment, para. 56).

Let it be assumed, however, that in view of all the attendant circumstances and the growing environmental concerns Czechoslovakia, as a matter of equity, should have discharged more water than it actually did into the old river bed and the Hungarian side-arms of the Danube. This assumption would have related to only one of the many aspects of the proportionality of the measure in question, which could not in itself warrant the general conclusion of the Court that Czechoslovakia was not entitled to put Variant C into operation from October 1992.

For the reasons stated above, I could not vote for paragraph 155, point 1 C, of the Judgment. Nor could I support paragraph 155, point 2 D, in so far as it does not, regrettably, differentiate between the obligation of the State which had committed a prior illicit act and that of the State which responded by way of a countermeasure. It goes without saying that my negative vote on paragraph 155, point 2 D, as a whole must not be understood as a vote against the first part of this paragraph.

(Signed) Vladlen S. VERESHCHETIN.

DISSENTING OPINION OF JUDGE PARRA-ARANGUREN

1. Although I have voted for the operative part of the Judgment, with the exception of paragraph 1, point C, my favourable vote does not mean that I share each and every part of the reasoning followed by the majority of the Court in reaching its conclusions.

I

2. I have voted against paragraph 1, point C, of the operative part of the Judgment for the following reasons:

3. At the time of Hungary's suspension and later abandonment of works, some of those works were largely completed, especially at the Gabcikovo section of the barrage system. As a result of Hungary's violations of its obligations under the 1977 Treaty, Czechoslovakia was entitled to terminate it, according to general international law, as codified in Article 60 of the 1969 Vienna Convention on the Law of Treaties. However, Czechoslovakia did not exercise that right and decided to maintain the 1977 Treaty in force.

4. Nonetheless, Hungary was not willing to continue to comply with its treaty obligations, and the Hungarian Government decided on 20 December 1990, that

> "The responsible ministers and the Governmental Plenipotentiary should start negotiations with the Government of the Czechoslovak Federal Republic on the termination of the 1977 Treaty by mutual consent and on the conclusion of a treaty addressing the consequences of the termination." (The Hungarian Parliament ratified this decision on 16 April 1991, HM, Vol. 4, Ann. 153, p. 366; Ann. 154, p. 368.)

5. As is acknowledged in the Judgment (see para. 72), the position adopted by Hungary made the situation very difficult for Czechoslovakia, not only because of the huge sums invested so far, but also because of the environmental consequences of leaving unfinished and useless the constructions already in place and, in some sections of the barrage system, almost complete.

6. Besides, it is easy to understand the impossibility for the Czechoslovak Government to justify the petition of substantial amounts of money necessary to minimize the environmental damage and degradation of the region, in the event that the existing constructions were left in their unfinished state, as described by the Czechoslovak Federal Committee for Environment in its "Technical-Economic Study on Removal of the Water Work Gabcikovo with the Technique of Reclaiming the Terrain", dated July 1992 (SR, Vol. II, Ann. 3).

7. For these reasons, Czechoslovakia decided to finish the works that Hungary had yet to complete in Czechoslovak territory, according to the 1977 Treaty, i.e., the construction of the tailrace canal of the bypass canal and of a connecting dyke from this canal to the site of the Danube's damming close to the Dunakiliti weir (Art. 5, para. 5 *(b)*, of the 1977 Treaty). Considering Hungary's refusal to finish the constructions it had begun, in my opinion, the decision taken by Czechoslovakia was lawful, because the 1977 Treaty was in force between the parties, and Czechoslovakia took over Hungary's role in order to guarantee the achievement of its object and purpose.

8. There were some other works under Hungarian responsibility to be finished in Hungarian territory, and Czechoslovakia could not finish them without violating the territorial sovereignty of Hungary, unless Hungary gave its consent for the completion. Since Hungary had decided to negotiation only the termination of the 1977 Treaty, there was no possibility of obtaining its authorization in order to finish those constructions already started.

9. Faced with this situation, which came into existence because of the internationally wrongful acts committed by Hungary by violating its obligations under the 1977 Treaty, in my opinion Czechoslovakia was entitled to take the necessary action, not only to realize its object and purpose, but also to solve, in the best possible way, the ecological and economic problems caused by the unfinished constructions. Therefore, Czechoslovakia was legally justified in adopting the "provisional solution" referred to in Article 2, paragraph 1 *(b)*, of the Special Agreement (hereinafter "Variant C"), i.e., a temporary solution that could be reversed as soon as Hungary resumed compliance with its obligations under the 1977 Treaty.

10. This temporary character was established by the European Communities-Czechoslovakia - Hungary Report of the Working Group of Independent Experts on Variant C of the Gabcikovo-Nagymaros Project, dated 23 November 1992, where it is stated that:

> "In principle, the ongoing activities with Variant C could be reversed. The structures, excluding some of the underground parts like sheet piling and injections, could in theory be removed. The cost of removing the structures are roughly estimated to at least 30% of the construction costs." (HM, Vol. 5, Part II, Ann 14, p. 434.)

11. Variant C provided for the construction of a weir complex at Cunovo, ten kilometres up from Dunakiliti (as originally planned), with a reservoir of reduced proportions behind, and for a new section of dykes connecting the weir with the bypass canal and the right-side dyke on Czechoslovak territory. Furthermore, the Danube had to be dammed; the Project had to be put into operation, and some other ancillary structures at Cunovo were to be completed, such as navigation locks and a hydroelectric power plant.

12. Hungary has pointed out that those are not the only differences between Variant C and the 1977 Treaty Project, because Variant C is not operated jointly and because Hungary was never informed, even less consulted, by Czechoslovakia as to its specifications and all other technical details, before and during its construction and putting into operation.

13. The Judgment follows those arguments. It remarks that "the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabcikovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works", and that this "element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabcikovo-Nagymaros project and for the operation of this joint project as a co-ordinated single unit". Then it concludes: "By definition, all this could not be carried out by unilateral action. In spite of having a certain external, physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics." (See para. 77).

14. The aforementioned conclusion overlooks the fact that Czechoslovakia did not exclude Hungary from the Project; on the contrary, Hungary excluded itself of its own volition and violated the obligations imposed upon it by the 1977 Treaty. Information, consultation, joint operation and joint control only make sense if Hungary were willing to co-operate but, at that time, Hungary would only consider the termination of the 1977 Treaty. Therefore, the existing differences were the direct consequence of the attitude assumed by Hungary in respect of the 1977 Treaty, and should be considered consistent with the requirement set up by the Judgment, because they are "within the limits of the treaty" (see para. 76).

15. In my opinion, as stated before, Czechoslovakia was entitled to proceed as it did. The conduct of Czechoslovakia may not be characterized as an internationally wrongful act, notwithstanding the differences between Variant C and the 1977 Treaty; Variant C can be justified because of the right of Czechoslovakia to put into effect the 1977 Treaty as best it could, when Hungary violated its treaty obligations.

16. Even though Variant C could be characterized as an internationally wrongful act, Czechoslovakia was entitled to take countermeasures as a reaction to Hungary's violation of its obligations under the 1977 Treaty in suspending and later abandoning the works at Nagymaros and Gabcikovo. Article 30 of the International Law Commission's Draft on State Responsibility, which codifies general international law, provides:

> "The wrongfulness of an act of a State not in conformity with an obligation of that State toward another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State."

17. All the conditions required by Article 30 of the International Law Commission's Draft on State Responsibility are met in the present case. Variant C was conceived as a provisional and reversible solution (see para. 10 above), which may be explained as an attempt to induce Hungary to comply with its 1977 Treaty obligations and it cannot be considered a disproportionate reaction. Therefore, even assuming that the construction and the putting into operation of Variant C could be characterized as an internationally wrongful act committed by Czechoslovakia, its wrongfulness would be precluded because is was a legitimate countermeasure.

18. The Judgment takes a different view and

> "considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetkoz — failed to respect the proportionality which is required by international law" (see para. 85).

19. However, "the withdrawal of water from the Danube" is regulated by Article 14 of the 1977 Treaty. Not only Article 14 but also all the Treaty provisions that may support the conduct of Czechoslovakia, continued by Slovakia, have to be applied to determine whether or not it was lawful, since the Judgment acknowledges that the 1977 Treaty and related instruments are in force between the parties.

20. In my opinion, it is not necessary to choose between the aforementioned grounds to justify the action undertaken by Czechoslovakia, continued by Slovakia, because the juridical consequences are the same, i.e., the building and putting into operation of Variant C was not an internationally wrongful act committed by Czechoslovakia; and Slovakia, as its sole successor State, has not committed any internationally wrongful act in operating Variant C to date.

II

21. A substantial number of Judges, myself among them, asked for a separate vote on each of the two issues included in paragraph 2, point D, of the operative part of the Judgment. However, the majority decided, severely curtailing freedom of expression, to force a single vote on both questions, based upon obscure reasons which are supposed to be covered by the confidentiality of the deliberations of the Court.

22. Since there was no other choice left, I reluctantly decided to vote in favour of paragraph 2, point D, notwithstanding my opinion that the building and putting into operation of Variant C was not an internationally wrongful act committed by Czechoslovakia; and that Slovakia, as its sole successor State, has not committed any internationally wrongful act in maintaining its operation to date. My decision can only be explained as a way out of the dilemma confronted by me because of the determination adopted by the majority of the Court, in a very peculiar way, and shall be understood within the context of the 1977 Treaty, and related instruments, i.e. by applying Article 14, paragraph 3, of the 1977 Treaty, in the event "that the withdrawal of water exceeds the quantities of water specified in the water balance of the approved joint contractual plan". However, in principle, Slovakia shall not compensate Hungary on account of the putting into operation of Variant C by Czechoslovakia and by its maintenance in service by Slovakia, unless a manifest abuse of rights on its part is clearly evidenced.

23. In my opinion, paragraph 2, point A, of the operative part of the Judgment should not have been included, because the succession of Slovakia to the 1977 Treaty was neither a question submitted to the Court in the Special Agreement nor is it a legal consequence arising out of the decision of the questions submitted by the Parties in its Article 2, paragraph 1. Furthermore, the answer of the Court is incomplete since nothing is said with respect to the "related instruments" to the 1977 Treaty, and it does not take into consideration the position adopted by the dissenting judges who maintained that the 1977 Treaty was no longer in force.

(Signed) Gonzalo PARRA-ARANGUREN.

DISSENTING OPINION OF JUDGE *AD HOC* SKUBISZEWSKI

1. While agreeing with the Court in all its other holdings, I am unable to concur in the broad finding that Czechoslovakia was not entitled to put Variant C into operation from October 1992 Judgment, para. 155, point 1 C). The finding is too general. In my view the Court should have distinguished between, on the one hand, Czechoslovakia's right to take steps to execute and operate certain works on her territory and, on the other, her responsibility towards Hungary resulting from the diversion of most of the waters of the Danube into Czechoslovak territory, especially in the period preceding the conclusion of the 1995 Agreement (Judgment, para. 25).

I

2. In proposing to Czechoslovakia the revision of the Treaty, Hungary, for some time, did not exclude the possibility of an arrangement that would maintain, in one form or another, the System of Locks (Art. 1 of the Treaty). But the subsequent abandonment of the works was a clear indication of where Hungary was heading. Even when she first proposed a postponement of the works she was aiming at abolishing the Project. That was the heart of the matter. On 22 May 1990, the Prime Minister of the newly democratic Hungary put it in a nutshell by describing the whole Project as "a mistake" (HM, Vol. 1, p. 64, para. 3.110), Hungary wanted to extricate herself from that "mistake". This is the basic fact

of the case. The mass of scientific and technological information that has been submitted to the Court and the maze of legal argumentation should not cause that basic fact to be lost: it was Hungary, and Hungary alone, which, from a certain moment on, followed a policy of freeing herself from the bonds of the Treaty. Czechoslovakia, on her part, insisted on the implementation of the Treaty, though she was ready to adopt a flexible attitude with regard to some aspects of the operation of the System of Locks, e.g., with regard to the limitation or exclusion of the peak power operation mode or the objectively verified environmental needs.

3. This difference in the stance and the actions of the two parties with regard to the Treaty should not be blurred. To simply say that, in fact, the two contracting States (and not only one of them, i.e., Hungary) conformed to rules other than those laid down by the Treaty does not correspond to legal reality. In particular, chronology cannot be dismissed as irrelevant. Hungarian doubts and reservations about and, finally, Hungary's withdrawal from the Project have not only preceded Variant C, but constituted its cause. Without an earlier suspension and abandonment of the works by Hungary there would have been no Variant C. Nor can it be said that Variant C excluded Hungary from the Project. The fact is that Hungary excluded herself, having lost all interest in the maintenance of the Project. Also, Czechoslovakia did not express any such intention. Variant C maintained some important aims of the joint investment: production of energy, flood prevention, and improvement of navigation. Where it deviated from the Project, it did not put any definitive bar to a return to the original concept of the Treaty. There was no tacit consent to the extinction of the Treaty on the part of Czechoslovakia. That country no longer exists, but Slovakia (as its successor) still postulates the implementation of the Treaty (Judgment, para. 14).

5. When Czechoslovakia and Hungary were negotiating and concluding their Treaty, they knew very well what they were doing. They made a conscious choice. A joint investment of such proportions inevitably entails some changes in the territories of the countries involved, including an impact on the environment. In particular, the two States were facing the dichotomy of socio-economic development and preservation of nature. Articles 15, 19 and 20 show that the two States paid attention to environmental risks and were willing to meet them. In the 1970s, when the Treaty was being negotiated, the state of knowledge was sufficient to permit the two partners to assess the impact their Project would have on the various areas of life, one of them being the environment. The number of studies was impressive indeed. The progress of science and knowledge is constant; thus, with regard to such a project, that progress becomes a reason for adaptation and, consequently, for entering into negotiations, no matter how long and difficult.

6. By her unilateral rejection of the Project, Hungary has precluded herself from asserting that the utilization of the hydraulic force of the Danube was dependent on the condition of a prior agreement between her and Czechoslovakia (and subsequently Slovakia). For this is what the Treaty was and is about: mutual regulation of the national competence of each riparian State, in particular, to use the hydraulic force of the river. Mutual rights and obligations have been created under the Treaty, but during the period 1989 to 1992 Hungary progressively repudiated them. She thus created an estoppel situation for herself.

II

7. The withdrawal of Hungary from the Project left Czechoslovakia with the possibility of doing on her territory what she was allowed to do by general law. In the circumstances of the dispute submitted to the court action based on general law does not derogate from the binding force of the Treaty. The shift onto the plane of general law results from the Hungarian rejection of the Project. There was, actually, no "single and indivisible operational system of works" (Art. 1, para. 1, of the 1977 Treaty) in which first Czechoslovakia and subsequently Slovakia could participate. The conduct of Hungary led to a factual situation which, as long as it lasted, prevented the implementation of binding agreements. A full application of the Treaty required bilateral action. Thus, for the time being, the treaty relationship of the two States found itself in a state of abeyance or inactivity. As the objectives of the Treaty did not disappear, a temporary solution would be based on general law and equity, until there was a return to the bilateral enforcement of the Treaty. That is the essence of the concept of the Czechoslovak "provisional solution", maintained by Slovakia.

8. In the present case one should draw a distinction between, on the one hand, the "provisional solution" which, as a whole, is lawful, especially under the existing circumstances (i.e., the advanced stage of completion of the works on Czechoslovak territory at the beginning of the 1990s), and, on the other, one element of the implementation of that solution that calls for redress and remedy; that element is the sharing of the waters of the Danube. It is not enough to dismiss the Slovak arguments (that is, the principle of approximate application; the duty to mitigate damages; and , as a possibility, the plea of countermeasures, Judgment, paras. 75-87). The situation is more complex. A legal evaluation of Variant C cannot be limited to the Treaty alone. As a result of Hungarian action, the implementation of the Treaty became paralysed. Czechoslovakia responded by putting into effect her "provisional solution". In the proceedings before the Court Slovakia's emphasis was on what I

would term as the Treaty approach. But Slovakia has also referred, though in a somewhat subsidiary manner, to general law. Under that law, as applied by the Court, Slovakia bears responsibility for withholding from Hungary that part of the Danube's waters to which the latter was entitled. By saying that Hungary did not forfeit "its basic right to an equitable and reasonable sharing of the resources of an international watercourse" the Court applies general law (Judgment, para. 78). The Court likewise applies general law (cf. para. 85) when, in particular, it refers to the concept of the "community of interest in a navigable river", as explained by the Permanent Court in the case relating to the *Territorial Jurisdiction of the International Commission of the River Oder, (1929. P.C.I.J., Series A. No. 23*, p. 27). The canon of an equitable and reasonable utilization figures prominently in the recent United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, especially its general principles (Arts. 5-10).

9. The Award in the case of *Lake Lanoux* between Spain and France states the law which is relevant to the evaluation of Variant C, though for various reasons that case must be distinguished from the case before the Court . In the *Lake Lanoux* case, the Arbitral Tribunal considered the question whether the French development scheme would not have freedom of action to undertake the works (*Reports of Internatiional Arbitral Awards,* Vol. 12, p. 281, at p. 306, para. 10; *International Law Reports*, Vol. 24, 1957, p. 101, at p. 127, para. 10).

10. The Tribunal said (*UNRIAA, ibid.*, para. 11; *ILR, ibid.*, p. 128, para. 11):

> "In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisaged the hypothesis in which the interested States cannot reach agreement. In such case, it must be admitted that the State which is normally competent has lost its right to act alone as a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a 'right of assent', a 'right of veto', which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another.
>
> That is why international practice prefers to resort to less extreme solutions by confining itself to obliging the States to seek, by preliminary negotiations, terms for an agreement, without subordinating the exercise of their competence to the conclusion of such an agreement. Thus, one speaks, although often inaccurately, of the obligation of 'negotiating an agreement'. In reality, the engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith (*Tacna-Arica Arbitration: Reports of International Arbitral Awards*, Vol. II, pp. 921 *et seq.; Case of Railway Traffic between Lithuania and Poland: Advisory Opinion, 1931, P.C.I.J., Series A/B No. 42*, pp. 108 *et seq.*)."

Czechoslovakia has fulfilled her obligation to negotiate a revision of the Treaty. But a revision is something different from the refusal to implement that Treaty. Faced with such a refusal on the part of Hungary Czechoslovakia could act alone, without any prior consent by Hungary, while respecting the latter's right to an equitable and reasonable share of the Danube's waters. But in evaluating whether Czechoslovakia has respected that right one must not forget that the said share has increased in 1995, and that the water appropriated by Czechoslovakia and subsequently used by Slovakia does not serve Slovakia's interests alone, but also Hungary's. The operation of Variant C improved navigation on the Danube and enhanced flood protection.

11. In the *Lake Lanoux* case the Tribunal expressed its position on the right of each riparian State to act unilaterally in the following terms (UNRIAA, ibid., p. 308. para. 13; *ILR, ibid.*, p. 129, para. 13).

> "In fact, States are today perfectly conscious of the importance of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements on an increasingly comprehensive basis. International practice reflects the conviction that States ought to strive to conclude such agreements: there would thus appear to be an obligation to accept in good faith all communications and contracts which could, by a broad comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements.
>
> But international practice does not so far permit more than the following conclusion: the rule that States may utilize the hydraulic power of international watercourses only on condition of a *prior* agreement between the interested States cannot be established as a custom, even less as a general principle of law. The history of the formulation of the multilateral Convention signed at Geneva on December 9, 1923, relative to the Development of Hydraulic Power Affecting More than One State, is very characteristic in this connection. The initial project was based on the obligatory and paramount character of agreements whose purpose was to harness the hydraulic forces of international watercourses. But this formulation was rejected, and the Convention, in its final form, provides (Article 1) that
>
> [it] in no way alters the freedom of each State, within the framework of international law, to carry out on its territory all operations for the development of hydraulic power which it desires;

there is provided only an obligation upon the interested signatory States to join in a common study of a development programme; the execution of this programme is obligatory only for hose States which have formally subscribed to it."

I think that the Court would agree that this is an exact statement of general law. That law is applicable in the present case. Czechoslovakia had the right to put the Gabcikovo complex into operation. She also had the duty to respect Hungary's right to an equitable and reasonable share of the waters of the Danube.

12. In rejecting, in the *Lake Lanoux* case, the necessity of a prior agreement between the interested States on the utilization of the hydraulic power of international watercourses the Tribunal referred to the "most general principles of international law" according to which (*UNRIAA, ibid.*, p. 310, para. 16; *ILR, ibid.*, p. 132, para. 16)

"It is for each State to evaluate in a reasonable manner and in good faith the situations and the rules which will involve it in controversies; its evaluation may be in contradiction with that of another State; in that case, should a dispute arise the Parties normally seek to resolve it by negotiation or, alternatively, by submitting to the authority of a third party; but one of them is never obliged to suspend the exercise of its jurisdiction because of the dispute except when it assumes an obligation to do so; by exercising its jurisdiction it takes the risk of seeing its international responsibility called into question, if it is established that it did not act within the limits of its rights."

13. This seemed to be, *mutatis mutandis*, the position of Czechoslovakia. She could act, but she had to respect certain rights of Hungary. In the *Lake Lanoux* case, the Tribunal said (*loc. cit.*) that, carrying matters to extremes, the requirement of prior agreement

"would imply either the general paralysis of the exercise of State jurisdiction whenever there is a dispute, or the submission of all disputes, of whatever nature, to the authority of a third party; international practice does not support either the one or the other of these consequences"

14. Concerning the said possibility of a unilateral suspension of works the Tribunal added (*UNRIAA, ibid.*, p. 311, para. 18; *ILR, ibid.*, p. 134, para. 18):

"Further, in order for negotiations to proceed in a favourable climate, the Parties must consent to suspend the full exercise of their rights during the negotiations. It is normal that they should enter into engagements to this effect. If these engagements were to bind them unconditionally until the conclusion of an agreement, they would, by signing them, lose the very right to negotiate; this cannot be presumed. It is important to keep these considerations in mind when drawing legal conclusions from diplomatic correspondence."

15. Finally, it is worthwhile to note the following statement of the Tribunal (*UNRIAA, ibid.*, p. 316, para. 23; *ILR, ibid.*, p. 140, para. 23):

"France is entitled to exercise her rights; she cannot ignore Spanish interests.

Spain is entitled to demand that her rights be respected and that her interests be taken into consideration.

As a matter of form, the upstream State has, procedurally, a right of initiative; it is not obliged to associate the downstream State in the elaboration of its schemes. If, in the course of discussions, the downstream State submits schemes to it, the upstream State must examine them, but it has the right to give preference to the solution contained in its own scheme provided that it takes into consideration in a reasonable manner the interests of the downstream State."

III

16. In paragraph 72 of its Judgment the Court makes clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary's action. That is another reason for distinguishing between various elements of Variant C. Having said what it did the Court should have made a step further and applied equity as part of international law. It would then have arrived at a holding that would have given more nuance to its decision.

17. In the case relating to the *Diversion of Water from the Meuse,* Judge Hudson observed *(1937, P.C.I.J., Series A/B. No.* 70, p. 77):

"It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.

The general principle is one of which an international tribunal should make a very sparing application. It is certainly not to be thought that a complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the

limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness."

18. The foregoing quotation does not mean that one may close one's eyes to the differences between the *Diversion of Water from the Meuse* case and the present case. According to Judge Hudson the two locks (i.e., the one operated by The Netherlands and the one operated by Belgium) were in law and in fact in the same position. "This seems to call for an application of the principle of equity stated above" (*ibid.*, p. 78). But the more complex facts in the present case do not by themselves eliminate the relevance of the learned Judge's opinion.

19. The impossible situation in which Hungarian action put Czechoslovakia speaks strongly in favour of the application of equitable principles by the Court in evaluating Variant C. For "[e]quity as a legal concept is a direct emanation of the idea of justice. ... [T]he legal concept of equity is a general principle directly applicable as law" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982*, p. 60, para. 71). The Court's "decisions must by definition be just, and therefore in that sense equitable" (*North Sea Continental Shelf, I.C.J. Reports 1969*, pp. 48-49, para. 88). "[A]n equitable solution derive[s] from the applicable law" (*Fisheries Jurisdiction, I.C.J. Reports 1974*, p. 33, para. 78; p. 202, para. 69). Both "the result to be achieved and the means to be applied to reach the result" must be equitable. "It is, however, the result which is predominant; the principles are subordinate to the goal" (*Continental Shelf, ibid.* pp. 59-60, para. 70).

20. In its resolution of 1961 on the utilization of non-maritime international waters the Institute of International Law has stated (Art. 3):

"If the States are in disagreement over the scope of their rights of utilization [of the said waters], settlement will take place on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances."

21. The degree to which Czechoslovakia has implemented the Treaty has reached such proportions that it would be both unreasonable and harmful to stop the completion of certain works and to postpone indefinitely the operation of the bypass canal, the Gabcikovo hydroelectric power plant, navigation locks and appurtenances thereto, in so far as that operation was possible without Hungarian co-operation of participation. To find, as the Court does, that such operation is unlawful overlooks the considerations of equity. At the same time Hungary's right under general international law to an equitable and reasonable sharing of the waters of the Danube had to be preserved notwithstanding her repudiation of the Project and the Treaty.

IV

22. A State that concluded a treaty with another State providing for the execution of a project like Gabcikovo-Nagymaros cannot, when that project is near completion, simply say that all should be cancelled and the only remaining problem is compensation. This is a situation where, especially under equitable principles, the solution must go beyond mere pecuniary compensation. The Court has found that the refusal by Hungary to implement the Treaty was unlawful. By breaching the Treaty, Hungary could not deprive Czechoslovakia and subsequently Slovakia of all the benefits of the Treaty and reduce their rights to that of compensation. The advanced stage of the work on the Project made some performance imperative in order to avoid harm: Czechoslovakia and Slovakia had the right to expect that certain parts of the Project would become operational.

23. Thus, pecuniary compensation could not, in the present case, wipe out even some, not to speak of all, the consequences of the abandonment of the Project by Hungary. How could an indemnity compensate for the absence of flood protection, improvement of navigation and production of electricity? The attainment of these objectives of the 1977 Treaty was legitimate not only under the Treaty but also under general law and equity. The benefits could in no way be replaced and compensated by the payment of a sum of money. Certain works had to be established and it was vital that they be made operational. For the question here is not one of damages for loss sustained, but the creation of a new system of use and utilization of the water.

24. Once a court, whether international or municipal, has found that a duty established by a rule of international law has been breached, the subject to which the act is imputable must make adequate reparation. The finding in point 2 D of the operative paragraph is the consequence of the holdings in point 1. Absence of congruence between the vote on one or more of the findings in point 1 and the vote on point 2 D should be explained in order that any implication of an uncertainty regarding the foregoing principle on reparation may be eliminated.

25. The formulation of the finding in point 1 C of the operative paragraph does not correspond to the possibility of different evaluations concerning the various elements of the "provisional solution". There is equally no reflection of that possibility in the formulation of the finding in point 2 D. Indeed, the terms of that point made the position of those Judges who voted against point 1 C quite difficult. The same applies to point 2 D when a Judge does not agree with *all* the findings in point 1, though I think that there is a way out of this difficulty.

26. It is on the basis of the position taken in this dissent-

ing opinion that I have voted in favour of the finding in point 2 D. However, there is a further reason which made it possible for me to accept that finding. That reason is linked to the task of the Court under Article 2, paragraph 2, of the Special Agreement and the ensuing negotiations of the Parties on the modalities of the execution of the Judgment (Art. 5, para. 2). My understanding of point 2 D of the operative paragraph is that the enforcement of responsibility and the obligation to compensate, though elaborated upon by the Court in the part of the Judgment devoted to Article 2, paragraph 2, of the Special Agreement (paras. 148-151) need not be a primary factor in the negotiations on the future of the Gabcikovo-Nagymaros Project. It should be noted that the said finding refers to the issue of compensation in rather general terms. At the same time the Court gives its support to what I would describe as the "zero option" (para. 153 of the Judgment). In my view the underlying message of point 2 D to the negotiating Governments is that, notwithstanding their legal claims and counterclaims for compensation, they should seek — and find — a common solution.

(Signed) Krzysztof SKUBISZEWSKI.

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

JUDGMENT OF THE COURT

(Appeal - Natural or Legal Persons — Measures of Direct and Individual Concern to Them)

In Case C-321/95 P,

STICHTING GREENPEACE COUNCIL (GREENPEACE INTERNATIONAL) AND OTHERS,

represented by Philippe Sands and Mark Hoskins, Barristers, instructed by Leigh, Day & o., Solicitors, with an address for service in Luxembourg at the Chambers of Jean-Paul Noesen, 18 Rue des Glacis,

appellants,

APPEAL against the order of the Court of First Instance of the European communities (First Chamber) of 9 August 1995 in Case T-585/93 *Greenpeace and Others v Commission* [1995] ECR II.2205, seeking to have that order set aside,

The other party to the proceedings being:

COMMISSION OF THE EUROPEAN COMMUNITIES

represented by Peter Oliver, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

supported by

Kingdom of Spain, represented by Alberto José Navarro González, Director-General for Legal and Institutional Coordination in Community Matters, and Gloria Calvo Díaz, Abogado del Estado, of the State Legal Service for matters before the Court of Justice of the European Communities, acting as Agents, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard Emmanuel Servais,

intervener,

THE COURT

composed of: G.C. Rodriguez Iglesias, President, C. Gulmann, H. Ragnemalm, M. Wathelet (President of Chambers), G.F. Macini, J.C. Motinho de Almeida (Rapporteur), P.J.G. Kapteyn, J.L. Murray, D.A.O. Edward, J.P. Puissochet, G. Hirsch, P. Jann and L, Sevón Judges,

Advocate General: G. Cosmas
Registrar: R. Grass,

having regard to the Report for the Hearing,

After hearing oral argument from the parties at the hearing on 17 June 1997, at which Stichting Greenpeace Council (Greenpeace International) and Others were represented by Philippe Sands and Mark Hoskins, the Commission by Peter Oliver and the Kingdom of Spain by Luis Pérez de Ayala Becerril, Abogado de Estado, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 23 September 1997,

gives the following

JUDGEMENT

1. By application lodged at the Court Registry on 16 October 1995, Stitching Greenpeace Council (Greenpeace International) and Others brought an ap-

peal under Article 49 of the EC Statute of the Court of Justice against the order of the Court of First Instance of 9 August 1995 in Case T-585/93 *Greenpeace and Others v Commission* [1995 ECR II 2205 ('the contested order') in so far as it declared inadmissible their action for annulment of the Commission's decision allegedly taken between 7 March 1991 and 29 October 1993 to disburse to the Kingdom of Spain ECU 12 000 000, or other amounts of that order, pursuant to Decision C (91) 440 concerning financial assistance provided by the European Regional Development Fund for the construction of two power stations in the Canary Islands (Gran Canaris and Tenerife).

2. According to the contested order, the factual background to the dispute is as follows:

1 On 7 March 1991, on the basis of Council Regulation (EEC) No 1787/84 of 19 June 1984 on the European Regional Development Fund (OJ 1984 L 169, p. 1, "the basic regulation"), as amended by Council Regulation (EEC) No 3641/85 of 20 December 1985 (OJ 1985 L 350, p.40), the Commission adopted Decision C(91) 440 granting the Kingdom of Spain financial assistance from the European Regional Development Fund ("the ERDF") up to a maximum of ECU 108 578 419, for infrastructure investment. The project concerned was for the building of two power stations in the Canary Islands, on Gran Canaria and on Tenerife, by Unión Eléctrica de Canarias SA ("Unelco").

2 The Community finance for the construction of the two power stations was to be spread over four years, from 1991 to 1994, and to be paid in yearly tranches (Articles 1 and 9 of, and Annexes II and III to, the decision). The financial commitment for the first year (1991), for ECU 28 953 000 (Article 1 of the decision), was payable on the defendant's adoption of the decision (Annex III, paragraph A6, of the decision). Subsequent disbursements, based on the financial plan for the operation and on the progress of its implementation, were to cover expenditure relating to the operations in question, legally approved in the Member State concerned (Articles 1 and 3 of the decision). Under Article 5 of the decision, the Commission could reduce or suspend the aid granted to the operation in issue if an examination were to reveal an irregularity and in particular a significant change affecting the way in which it was carried out for which the Commission's approval has not been requested (see also paragraphs A20, A21 and C2 of Annex III to the decision).

3 By letter dated 23 December 1991, Aurora González and Pedro Melán Castro the fifth and sixth applicants informed the Commission that the works carried out on Gran Canaria were unlawful because Unelco had failed to undertake an environmental impact assessment study in accordance with Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) and asked it to intervene to stop the works. Their letter was registered as No 4084/92.

4 By letter dated 23 November, 1992, Domingo Viera Gonzalez, the second applicant, sought the Commission's assistance on the ground the Unelco had already started work on Gran Canaria and Tenerife without the Comisión de Urbanismo y Medio Ambiente de Canarias (Canary Islands Commission for Planning and the Environment, "Cumac") having issued its declaration of environmental impact in accordance with the applicable national legislation. That letter was registered as No 5151/92.

5 On 3 December 1992, Cumac issued two declarations of environmental impact relating to the construction of the power stations on Gran Canaria and Tenerife, published in the *Boletin Oficiel de Canarias* on 26 February and 3 March 1993 respectively.

6 On 26 March 1993, Tagoror Ecologista Alternativo ("TEA"), the 18th applicant, a local environmental protection association based on Tenerife, lodged an administrative appeal against Cumac's declaration of environmental impact relating to the project for the construction of a power station on Tenerife. On 2 April 1993, the Comisión Canaria contra la Contaminación (Canary Islands Commission against Pollution, hereinafter "CIC"), the 19th applicant, a local environmental protection association based on Gran Canaria, also brought administrative proceedings against Cumac's declaration of environmental impact relating to the two construction projects on Gran Canaria and Tenerife.

7 On 18 December 1993, Greenpeace Spain, an environmental protection association responsible at the national level for the achievement at local level of the objectives of Stichting Greenpeace Council ("Greenpeace"), the first applicant, a nature conservancy foundation having its head office in the Netherlands, brought legal proceedings challenging the validity of the administrative authorisations issued to Unelco by the Canary Island Regional Ministry of Industry, Commerce and Consumption.

8 By letter of 17 March 1993 addressed to the Director-General of the Commission's Directorate General for Regional Policies ("DG XVI"), Greenpeace asked the Commission to confirm whether Community structural funds had been paid to the Regional Government of the Canary Islands for the construction of two power stations and to inform of the time-

table for the release of those funds.

9 By letter of 13 April 1993, the Director-General of DG XVI recommended that Greenpeace "read the Decision C (91) 440" which, he said, contained "details of the specific conditions to be respected by Unelco in order to obtain Community support and the financing plan".

10 By the letter of 17 May 1993, Greenpeace asked the Commission for full disclosure of all information relating to measures it had taken with regard to the construction of the two power stations in the Canary Islands, in accordance with Article 7 of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of those activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p.9), which provides: "Measures financed by the Funds or receiving assistance from the EIB or from another existing financial instrument shall be in keeping with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning environmental protection."

11 By letter dated 23 June 1993, the Director General of DG XVI wrote as follows to Greenpeace "I regret to say that I am unable to supply this information since it concerns the internal decision making procedures of the Commission ... but I can assure you that the Commission's decision was taken only after full consultation between the various services concerned".

12 On 29 October 1993 a meeting took place at the Commission's premises in Brussels between Greenpeace and DG XVI, concerning the financing by the ERDF of the construction of the power stations on Gran Canaria and Tenerife."

3 It was against that background that, by application lodged at the Registry of the Court of First Instance on 21 December, 1993, the applicants brought an action seeking annulment of the decisions allegedly taken by the Commission to disburse to the Spanish Government, in addition to the first tranche of ECU 28 953 000, a further ECU 12 000 000 in reimbursement of expenses incurred in the construction of two power stations in the Canary Islands (Gran Canaria and Tenerife). That decision was allegedly taken between 7 March 1991, when Decision C (91) 440 was adopted, and 29 October, 1995, when the Commission, at the above mentioned meeting with Greenpeace, whilst refusing to provide Greenpeace with detailed information regarding the financing of the construction of the two power stations in the Canary Islands, confirmed that a total of ECU 40 000 000 had already been disbursed to the Spanish government pursuant to Decision C (91) 440.

4 By separate document lodged at the Registry of the Court of First Instance on 22 February 1994, the Commission raised an objection of inadmissibility in support of which it raised two pleas, one concerning the nature of the contested decision and the other the applicants' lack of *locus standi,*

5 By the contested order, the Court of First Instance upheld the objection and declared the action inadmissible.

6 As to the pleas raised by the Commission in support of its objection of inadmissibility, the Court of First Instance stated, at paragraph 46, that it was first necessary to examine whether the applicants had *locus standi* to bring an action, before considering whether the act which they were challenging constituted a decision within the meaning of Article 173 of the EC Treaty.

7 As regards, first, the *locus standi* of the applicants who are private individuals, the Court of First Instance, in paragraph 48, referred first to the settled case-law of the Court of Justice according to which persons other than the addressees may claim that a decision is of direct concern to them only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed (Case 25/62 *Plaumann v Commission* [1963 ECR 95, Case 231/82 *Spilker v Commission* [1983] ECR 2559, Case 97/85 *Deutshe Lebengnttelweke and Others v. Commission* [1987] ECR 2265, Case C. 198/91 *Cook v. Commission [1993] ECR 1-2487, Case C.225/91 Matra v. Commission* [1993] ECR 1-3203, Case T-2/93 *Air France v. Commission* [1994] ECR II-323 and Case T-465/93 *Consorzio Gruppo di Arione Locale 'Murgia Messapica' v. Commission* [1994] ECR II-361).

8 The Court of First Instance then decided to examine, at paragraph 49, the applicants' argument that the Court should not be constrained by the limits imposed by that case-law and should concentrate on the sole fact that third-party applicants had suffered or would potentially suffer loss or detriment from the harmful environmental effects arising out of unlawful conduct on the part of the Community institutions.

9 In that regard, the Court of First Instance held, at paragraph 50, that whilst the settled case-law of the Court of Justice concerned essentially cases involving economic interests, the essential criterion which it applied (namely, a combination of circumstances sufficient for the third-party applicant to be able to claim to be affected by the contested decision in a manner which differentiated him

from all other persons) remained applicable whatever the nature, economic or otherwise, of the applicants' interests which were affected.

10 The Court of First Instance accordingly held, at paragraph 51, that the criterion proposed by the applicants for appraising their *locus standi,* namely the existence of harm suffered or to be suffered was not in itself sufficient to confer *locus standi* on an applicant; this was because such harm might affect, in a general abstract way, a large number of persons who could not be determined in advance in such a way as to distinguish them individually just like the addressee of a decision, as required under the case-law cited above. The Court of First Instance added that, in view of the conditions laid down in the fourth paragraph of Article 173 of the Treaty, that conclusion could not be affected by the practice of national courts whereby *locus standi* might depend merely on applicants having a "sufficient" interest.

11 The Court of First Instance therefore concluded, at paragraph 52, that the applicants' argument that the question of their *locus standi* in this case should be determined in the light of criteria other than those already laid down in the case-law could not be accepted, and went on to hold, at paragraph 53, that their *locus standi* had to be assessed in the light of the criteria laid down in that case-law.

12 In this regard, the Court of First Instance stated first of all, at paragraph 54 and 55, that the objective status of local resident 'fisherman' or 'farmer' or on their position as persons concerned by the consequence which the building of two power stations might have on local tourism, on the health of Canary Island residents and on the environment, relied on by the applicants, did not differ from that of all the people living or pursuing an activity in the areas concerned and that the applicants thus could not be affected by the contested decision otherwise than in the same manner as any other local residents, fisherman, farmer or tourist who was or might be in the future, in the same situation.

13 Finally, at paragraph 56, the Court of First Instance held that the fact that certain of the applicants had submitted a complaint to the Commission could not confer *locus standi* under Article 173 of the Treaty, since no specific procedures were provided for whereby individuals might be associated with the adoption, implementation and monitoring of decisions taken in the field of financial assistance granted by the ERDF. The Court of Justice had held that, although a person who asked an institution not to take a decision in respect of him, but to open an inquiry with regard to third parties, might be considered to have an indirect interest, such a person was nevertheless not in the precise legal position of the actual or potential addressee of a measure which might be annulled under Article 173 of the Treaty (Case 246/81 *Lord Bethell v Commission* [1982] ECR 2277).

14 Second, as regards the *locus standi* of the applicant associations, the Court of First Instance recalled, at paragraph 99, that it had consistently been held that an association formed for the protection of the collective interests of a category of persons could not be considered to be directly and individually concerned, for the purposes of the fourth paragraph of Article 173 of the Treaty, by a measure affecting the general interests of that category, and was therefore not entitled to bring an action for annulment where its members could not do so individually (Joined Cases 19/62 to 22/62 *Féderation Nationale de la Boucherie en Gros et du Commerce en Gros des Viandes and Others v Council* [1962] ECR 491; Case 72/74 *Union Syndicate - Service Public Europen and Others v Council* [1975] ECR 401; Case 60/79 *Féderation Nationale de Produceurs de Vins de Table et Vins de Pays v Commission* [1979] ECR 2429 Case 262/85 *DEFI v Commission* [1986] ECR 2469; Case 117/86 *UFADE v Council and Commission* [1986] ECR 3255, paragraph 12; and Joined Cases T-447/93, T-448/93 and T-449/93 *AITECH and Others v Commission* [1995] ECR II-1971, paragraphs 58 and 59). Since the Court of First Instance had held that the applicants who were private individuals could not be considered to be individually concerned by the contested decision, it therefore concluded, at paragraph 60, that the members of the applicant associations, as local residents of Gran Canaria and Tenerife, likewise could not be considered to be individually concerned.

15 The Court of First Instance went on to observe, at paragraph 59, that special circumstances, such as the role played by an association in a procedure which led to the adoption of an act within the meaning of Article 173 of the Treaty, might justify treating as admissible an action brought by an association whose members were not directly and individually concerned by the contested measure (Joined Cases 67/85, 38/85 and 70/85 *Van der Kouy and Others v Commission* [1988] ECR 219 and Case C-313/90 *CIRFS and Others v Commission* [1993] ECR I-125).

16 However, at paragraph 62 of its judgement, the Court of First Instance came to the conclusion that the exchange of correspondence and the discussions which Greenpeace had with the Commission concerning the financing of the project for the construction of two power stations in the Canary Islands did not constitute special circumstances of that kind since the Commission did not, prior to the adoption of the contested decision, initiate any procedure in which Greenpeace participated. Nor was Greenpeace in any way the Interlocutor of the Commission with regard to the adoption of the basic Decision C (91)440 and/or of the contested decision.

17 In their appeal the appellant submit that, in deter-

mining whether they were individually concerned by the contested decision within the meaning of Article 173 of the Treaty, the Court of First Instance erred in its interpretation and application of that provision and that, by applying the case-law developed by the Court of Justice in relation to economic issues and economic rights, according to which an individual must belong to a 'closed class' in order to be individually concerned by a Community act, the Court of First Instance failed to take account of the nature and specific character of the environmental interests undermining their action.

18 In particular, the appellants argue first, that the approach adopted by the Court of First Instance creates a legal vacuum in ensuring compliance with Community environmental legislation, since in this area the interests are, by their very nature, common and shared, and the rights relating to those interests are liable to be held by a potentially large number of individuals so that there could never be a closed class of applicants satisfying the criteria adopted by the Court of First Instance.

19 Nor can that legal vacuum be filled by the possibility of bringing proceedings before the national courts. According to the appellants, such proceedings have in fact been brought in the present case, but they concern the Spanish authorities' failure to comply with their obligations under Council directive 85/337/EEC, and not the legality of the Commission measure, that is to say the lawfulness under Community law of the Commission's disbursement of structural funds on the ground that disbursement is in violation of an obligation for protecting the environment.

20 Second, the appellants submit that the Court of First Instance was wrong to take the view, at paragraph 51 of the contested order, that reference to national laws on *locus standi* was irrelevant for the purposes of Article 173. The solution adopted by the Court of First Instance appears to conflict with that required by national judicial decisions and legislations as well as by developments in international law. According to the appellants, it is clear from the 'Final Report on Access to Justice (1992)', prepared by the OKO Institut for the Commission, which describes the position concerning locus standi on environmental issues, that, if they had been required to [words unclear] by some or all of the applicants would have been declared admissible. The appellants add that the above mentioned developments have been influenced by American law, the Supreme Court holding in 1972 in *Sierra Club v Morton* 405 U.S. 727, 31 Led 2d 636 (1972), at p.643 that 'aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process'.

21 Third, the appellants submit that the approach adopted by the Court of First Instance in the contested order is at odds with both the case-law of the Court of Justice and declarations of the Community institutions and governments of the Member States on environmental matters. As regards case-law, they rely on the holding that environmental protection is 'one of the Community's objectives' (judgements in case 240/83 *Procureur de la République v Association de Défense des Bruleurs d'Huiles Usegés* [1985] ECR 531, paragraph 13, *and Case 302/86 Commission v Denmark* [1988] ECR 4607, paragraph 8) and submit that Community environmental legislation can create rights and obligations for individuals (judgements in Case C-231/88 *Commission v Germany* [1991] ECR 1-825, paragraph 7, and Case C-361/88 *Commission v Germany* [1991] ECR 1-2567, paragraphs 15 and 16). Furthermore, in the present case, the appellants submit that their arguments relating to individual concern are based essentially on their individual rights conferred by Directive 85/337, Articles 6(2) and 8 of which provide for participation in the environmental impact assessment procedure in relation to certain projects (judgement in Case C-431/92 *Commission v Germany* [1995] ECR 1-2189, paragraphs 37 to 40), and that they are singled out by virtue of those rights which are recognised and protected in Commission Decision C (91) 440.

22 The appellants go on to refer to the Fifth Environmental Action Programme (OJ 1993 C 138, p.1), to principle 10 of the Rio Declaration, ratified by the Community at the United Nations Conference of 1992 on Environment and Development, to Agenda 21, adopted at the same conference, to the Council of Europe Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, and to the system of administrative review introduced by the World Bank to allow review of its acts where they have negative effects on the environment (World Bank, Resolution No 93-10, Resolution No IDA93-6, 22 September 1993, paragraph 12).

23 Fourth, the appellants propose a different interpretation of the fourth paragraph of Article 173 of the Treaty. In order to determine whether a particular applicant is individually concerned by a Community act involving violations of Community environmental obligations, that applicant should be required to demonstrate that:

(a) he has personally suffered or is likely personally to suffer) some actual or threatened detriment as a result of the allegedly illegal conduct of the Community institution concerned, such a violation of his environmental rights or interference with his environmental interests;

(b) the detriment can be traced to the act challenged; and

(c) the detriment is capable of being redressed by a favourable judgement.

24 The appellants contend that they satisfy those three conditions. As regards the first condition, they state that they submitted statements describing the detriment which they have suffered as a result of the Commission's acts. As regards the second condition, they point out that, by disbursing to the Kingdom of Spain the funds granted under Decision C (91) 440 for the construction of projects carried out in breach of Community environmental law, the Commission directly contributed to the detriment caused to their interests since the Spanish authorities had no discretion as to the use to which those funds were to be put. As regards the third condition, the appellants consider that, if the Court of First Instance had annulled the contested decision, the Commission would not have continued to finance work on construction of the power stations which would then have probably been suspended until completion of the environmental impact procedure.

25 The appellants submit further that environmental associations should be recognised as having *locus standi* where their objectives concern chiefly environmental protection and one or more of their members are individually concerned by the contested Community decision, but also where, independently, their primary objective is environmental protection and they can demonstrate a specific interest in the question at issue.

26 Referring to the judgement in *Plaunann v Commission,* cited above, the appellants conclude that Article 173 must not be interpreted restrictively; its wording does not expressly require an approach based on the idea of a 'closed class'; as affirmed in the case-law of the Court of Justice and the Court of First Instance (judgement in Case 11/*Piraiki-Patraiki and Others v Commission* [1985] ECR 207; Case C-358/89 Extramet Industrie v Council [1991] ECR 1-2501; Case C-309/89 *Codorniu v Council* [1994] ECR I-1853; and Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others v. Commission* [1995] ECR II-2305). Rather, it must be interpreted in such a way as to safeguard fundamental environmental interests and protect individual environmental rights effectively (judgement in *Procureur de la République v Association de Défense des Bruletas d'Huiles Usagées,* cited above, paragraph 13; Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraphs 13 to 21; and Case 222/86 *UNECTEF V Heylens And Others* [1987] ECR 4097, Paragraph 14).

FINDINGS OF THE COURT

27 The interpretation of the fourth paragraph of Article 173 of the Treaty that the Court of First Instance ...(illegible)

28 As far as natural persons are concerned, it follows from the case-law, cited at both paragraph 18 of the contested order and at paragraph 7 of this judgement, that where, as in the present case, the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act.

29 The same applies to associations which claim to have *locus standi* on the basis of the fact that the persons whom they represent are individually concerned by the contested decision. For the reasons given in the preceding paragraph, that is not the case.

30 In appraising the appellants' argument purporting to demonstrate that the case-law of the Court of Justice, as applied by the Court of First Instance, takes no account of the nature and specific characteristics of the environmental interests underpinning their action, it should be emphasised that it is the decision to build the two power stations in questions which is liable to affect the environmental rights arising under Directive 85/337 that the appellants seek to invoke.

31 In those circumstances, the contested decision, which concerns the Community financing of those power stations, can affect those rights only indirectly.

32 As regards the appellants' argument that application of the Court's case-law would mean that, in the present case, the rights which they derive from Directive 85/337 would have no effective judicial protection at all, it must be noted that, as is clear from the file, Greenpeace brought proceedings before the national courts challenging the administrative authorisations issued to Unelco concerning the construction of those power stations. TBA and CFC also lodged appeals against CUMAC's declaration of environmental impact relating to the two construction projects (see paragraphs 6 and 7 of the contested order, reproduced at paragraph 2 of this judgment).

33 Although the subject-matter of those proceedings and of the action brought before the Court of First Instance is different, both actions are based on the same rights afforded to individuals by Directive 85/337, so that in the circumstances of the present case those rights are fully protected by the national courts which may, if need be, refer a question to the Court for a preliminary ruling under Article 177 of the Treaty.

1. Dismisses the appeal;
2. Orders the appellants to pay the costs;
3. Orders the Kingdom of Spain to bear its own costs.

Delivered in open court in Luxembourg on 2 April 1998.

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