# ORAL ARGUMENTS ON THE REQUEST FOR THE INDICATION OF INTERIM MEASURES OF PROTECTION

MINUTES OF THE PUBLIC SITTINGS

*held at the Peace Palace, The Hague, on 21, 22, 23 and 25 May 1973, President Lachs presiding, and on 22 June 1973, Vice-President Ammoun presiding*

## FIRST PUBLIC SITTING (21 V 73, 3 p.m.)

*Present: President* LACHS; *Vice-President* AMMOUN; Judges FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, Sir HUMPHREY WALDOCK, NAGENDRA SINGH, RUDA; *Judge* ad hoc Sir Garfield BARWICK; *Registrar* AQUARONE.

*Also present:*

*For the Government of Australia:*

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

H.E. Mr. L. D. Thomson, M.V.O., Ambassador of Australia, *as Co-Agent*;

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

Mr. R. J. Ellicott, Q.C., Solicitor-General of Australia,

Mr. M. H. Byers, Q.C., of the Australian Bar,

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*;

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. K. R. Widdows, of the Australian Bar, Second Secretary, Australian Embassy, The Hague, *as Advisers*.

## OPENING OF THE ORAL PROCEEDINGS

The PRESIDENT: The Court meets today to consider the request for the *indication of interim measures of protection, under Article 41 of the Statute* of the Court and Article 66 of the 1972 Rules of Court, filed by the Government of Australia on 9 May 1973, in the *Nuclear Tests* case brought by Australia against France.

The proceedings in this case were begun by an Application[1] by the Government of Australia, filed in the Registry of the Court on 9 May 1973. The Application founds the jurisdiction of the Court on Article 17 of the General Act for the Pacific Settlement of International Disputes of 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 and on the declarations of acceptance of the jurisdiction of the Court filed by France and Australia on the basis of Article 36. The Applicant asks 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 Government shall not carry out any further such tests.

On 9 May 1973, the same day on which the Application was filed, Australia filed a request[2] under Article 41 of the Statute and Article 66 of the 1972 Rules of Court, for the indication of interim measures of protection. I shall ask the Registrar to read from that request the details of the measures which the Government of Australia asks the Court to indicate.

The REGISTRAR: The provisional measures should be that the French Government should desist from any further atmospheric nuclear tests pending the judgment of the Court in this case.

The PRESIDENT: The French Government was informed forthwith by telegram[3] of the filing of the Application and of the request for interim measures of protection, and of the precise measures requested, and a copy of the Application and of the request were sent to it by express air mail on the same day. The Parties were then informed by communications of 14 May[4] that the President proposed to convene the Court for a public hearing on 21 May at 3 p.m. to afford the Parties the opportunity of presenting their observations on the Australian request for the indication of interim measures of protection. By communications to the Parties of 17 May[5], the date and time for the present public hearing were confirmed.

On 16 May, the Ambassador of France to the Netherlands handed to the Registrar of the Court a letter and annex[6] setting out the attitude of the French Government to the proceedings. In that letter the Court was informed that the French Government considered that the Court was manifestly not competent in this case and that France could not accept its jurisdiction. This view was based first on the fact that the French Government's declaration of acceptance

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[1] See pp. 3-39, *supra*.
[2] See pp. 43-146, *supra*.
[3] **II**, p. 338.
[4] **II**, p. 345.
[5] **II**, p. 358.
[6] **II**, p. 347.

of the jurisdiction of the Court under Article 36 of the Statute excluded "disputes concerning activities connected with the national defence", and on the contention that the French nuclear tests in the Pacific formed part of a programme of nuclear weapon development and therefore constituted one of those activities connected with national defence which the French declaration intended to exclude; and secondly on the contention that the present status of the 1928 General Act and the attitude towards it of the interested parties, and in the first place of France, rendered it out of the question to consider that there existed on that basis, on the part of France, that clearly expressed will to accept the competence of the Court which the Court itself, according to its constant jurisprudence, deems indispensable for the exercise of its jurisdiction. Further reasons were also adduced why the French Government considered that the Court has no jurisdiction in the case. Accordingly, the French Government stated that it did not intend to appoint an agent; and it requested the Court to remove the case from its List. This request by the Government of France 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.

On 16 May 1973, the Government of Fiji filed in the Registry of the Court, an Application[1], under the terms of Article 62 of the Statute of the Court, for permission to intervene in the present case. In accordance with Article 69, paragraph 3, of the 1972 Rules of Court, 29 May has been fixed as the time-limit for the written observations of the Parties on this Application.

Since the Court in the present case includes upon the Bench no judges of Australian nationality, the Government of Australia notified the Court on 9 May 1973[2] of its choice of the Right Honourable Sir Garfield Barwick, Chief Justice of the High Court of Australia, to sit as judge *ad hoc* in the case pursuant to Article 31, paragraph 2, of the Statute. Within the time-limit fixed by the President under Article 3 of the Rules of Court for the views of the French Government on this appointment to be submitted to the Court, the French Ambassador, in the letter of 16 May already referred to, stated that in view of the considerations set out in the letter, the question of the appointment by the Australian Government of a judge *ad hoc* did not, in the opinion of the French Government, arise, any more than the question of the indication of interim measures of protection. Thus the objection on the part of France was not one within the meaning of Article 3, paragraph 1, of the Rules of Court.

I shall therefore call upon Sir Garfield Barwick to make the solemn declaration required by Article 20 of the Statute of the Court.

Sir Garfield BARWICK: I solemnly declare that I will perform my duties and exercise my powers as judge, honourably, faithfully, impartially and conscientiously.

The PRESIDENT: I place on record the declaration made by Sir Garfield Barwick and declare him duly installed as Judge *ad hoc* in the present case.

I note the presence in Court of the Agent and counsel of Australia and declare the oral proceedings open on the request of Australia for the indication of interim measures of protection.

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[1] See pp. 149-159, *supra*.
[2] II, p. 338.

## ARGUMENT OF SENATOR MURPHY

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Senator MURPHY: Mr. President and Members of the Court. On behalf of Australia, I ask the Court to indicate provisional measures: an Order of the Court that France desist from conducting further atmospheric nuclear tests in the South Pacific Ocean pending the final judgment of the Court upon this dispute.

This being Australia's first case in the contentious jurisdiction of this Court, I wish to express on behalf of Australia, our Government and our people, Australia's respect for this great judicial tribunal and the work it has done, and Australia's support of the role of the law in regulating international relations.

I also wish to express to the Court the appreciation of Australia for the expeditious manner in which the Court is dealing with the present request.

This dispute between Australia and France is about the illegality, under international law and the Charter of the United Nations, of atmospheric nuclear weapon testing conducted by the French Government in the Pacific Ocean.

The basis of jurisdiction is twofold: first, 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 France both acceded to the General Act on 21 May 1931. Neither country has denounced its accession. Second, Article 36 (2) of the Statute of the Court. Australia and France have both made declarations thereunder.

Forty-three years ago Australia accepted the compulsory jurisdiction of the Permanent Court of International Justice. It accepted that Court's jurisdiction under the General Act for the Pacific Settlement of International Disputes 42 years ago. It subsequently accepted the compulsory jurisdiction of this Court. Throughout these years, there has never been occasion for Australia to become involved in contentious judicial proceedings. Until now, questions dividing Australia from other States have been resolved by negotiations. Today, to the disappointment of the Australian Government, it finds itself faced with a problem which has not been solved in that way. Australia has thus been obliged to turn to the principal judicial organ of the United Nations to seek recognition and protection of her rights. These rights include particular rights of Australia and others shared with the world community.

I note the absence before this Court of any representative of the French Government. It would appear that the French Government takes the view that the Court is without jurisdiction in this case and that, because this is its view, France is entitled to ignore the present hearings. How does the rejection by France of its commitment to the Court affect the present case? There is no principle of international judicial procedure more fundamentally and universally accepted than the one which attributes to an international tribunal the competence to determine its own jurisdiction. The principle is specifically incorporated into the Statute of this Court, as it was into the Statute of its predecessor. Article 36 (6) provides that: "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Nothing could be clearer or more explicit. The Court itself added the seal of its confirmation of this point in the *Nottebohm (Preliminary Objection)* case, when it said:

"... the Court has not hesitated to adjudicate on the question of its own jurisdiction in cases in which the dispute which had arisen in this respect went beyond the interpretation and application of paragraph 2 of Article 36". (*I.C.J. Reports 1953*, p. 119.)

The Court has dealt with a similar situation on a previous occasion in the *Fisheries Jurisdiction* case. On the view that there was no manifest absence of jurisdiction, the Court continued with the hearing of the case regardless of the absence of the respondent State. The Court indicated interim measures of protection; and the Court then decided in separate, subsequent proceedings the question of jurisdiction. The Court held that it had jurisdiction.

Mr. President, these proceedings are brought to protect the territory of Australia and its population from continued atmospheric nuclear testing in the South Pacific, pending the Court's decision in this case. Australia's concern in this regard extends to the interests and welfare of the peoples of the external territories for which Australia is at present responsible, including the United Nations Trust Territory of New Guinea. But Australia is also asserting a more far-reaching principle beyond its own specific and individual right and interest, namely the right of each and every State and its people to be free from atmospheric nuclear weapon tests by any country. In other words, Australia's arguments on the illegality of nuclear testing extend to all States and in advancing them we will be asserting a right which we share with all States, a right which merits this Court's protection in the interim.

The rights of Australia that are entitled to protection in this regard are set forth in paragraph 3 of the Australian request. They are 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."

Mr. President, I turn now to the circumstances that have brought about the present urgent situation. The protests within the United Nations that attended upon the conduct of French testing in Africa are referred to in paragraph 4 of the Australian Application. Ever since the French Government announced in 1963 its decision to move its test centre from Africa to the South Pacific, the Australian Government has expressed, in repeated protests, its apprehension and concern at the conduct of tests in the South Pacific. The Court's attention is directed in this respect to Annexes 2 to 13 of the Application. What is revealed is the Australian Government's earnest and repeated endeavours to dissuade France from her pursuit of atmospheric nuclear testing.

By a Note of 3 January 1973, the Australian Government indicated to the French Government, in the clearest terms, its view that the continuance of such tests is illegal and asked for an assurance that no further tests would take place. No such assurance was given in the French reply of 7 February. The Court is invited to look closely at these Notes, set forth in Annexes 9 and 10 to the Australian Application, for in them appears the shape and dimensions of the dispute that clearly divides the Parties.

The French reply disputed both the Australian view of the facts and the Australian understanding of the law. It was subsequently agreed between the two countries that discussions should take place. France agreed that pending the conclusion of such discussions it would not carry out any further tests. The history of the subsequent exchange between the two countries is set out in some detail in paragraph 18 of the Application.

As indicated in the Application, discussions between the two Governments took place in Paris on 18, 19 and 20 April this year. These discussions did not produce a resolution of the dispute.

The Court will note that the French Government was firm in its refusal to abandon atmospheric nuclear testing. The Australian Government invited the French Government to join it in an agreed reference of the dispute to this Court. This invitation was tendered exclusively in an attempt to maintain between the two countries as cordial a relationship as is possible having regard to the degree of feeling which the issue engenders. The invitation did not reflect any doubt on the part of Australia regarding the validity and effectiveness of the jurisdictional links operative between the two countries. The invitation was not accepted by the French Government. Further scientific talks were subsequently held between Australian and French scientists on 7 to 9 May this year. It was clear at the end of those talks that it remained the firm intention of the French Government to conduct further atmospheric nuclear tests.

The Australian Government was therefore brought unavoidably to the point of having to institute proceedings in this Court. This was done by the filing of an Application on 9 May 1973. A Note to the French President was delivered on the same day, informing him of the institution of proceedings and that the Australian Government was also seeking, through the procedures of the Court, protection against further tests pending the Court's decision.

The Australian Government has done all that it can to explain its position to the French Government. However, the French Government refuses to give an undertaking not to carry out further atmospheric tests. The rigidity of the attitude of the French Government is shown by a statement made in the French Parliament on 2 May 1973. That statement made it quite clear that France did not envisage any cancellation or modification of its programme of nuclear testing at Mururoa Atoll as originally planned. France refuses to divulge to Australia and the rest of the world the date, type and yield of future explosions. These may be of a size and yield hitherto unequalled. France has refused to give any assurance that a major explosion will not be conducted this year. It refuses even now to give to the Australian Government reasonable notice of tests which it proposes to hold. There is every reason to believe that the French Government plans to hold further atmospheric nuclear tests at its centre in the Pacific Ocean in the near future.

The third military appropriation law relating to the French nuclear testing programme covers the 1971-1975 period and authorizes the continued development of a strategic nuclear force. There is reason to believe that the period of development could be extended beyond 1975. How soon the tests are scheduled to begin is impossible for us to tell. As Annex 1 to the request shows, tests have

in the past been held as early as mid-May. Mid-May is past. A test could therefore be held at any moment.

As paragraph 70 of the request points out, the French Government has already made the preparations necessary to activate Dangerous Zones on the very shortest notice, and urgent advice of their activation could be given at any moment. Hence the urgency with which the Government of Australia has been compelled to seek from the Court the laying-down of provisional measures of protection.

Mr. President, one of our primary legal propositions is that the deposit of radio-active fall-out from nuclear tests infringes the inviolability of our territorial sovereignty. That proposition does not require Australia to establish the exact extent of the danger of these radio-active materials of which we are the unwilling target. This radio-active debris which French atmospheric nuclear explosions inevitably deposit on our soil invades our people's bones and lungs and critical body organs. Every man, woman and child and foetus in Australia has in his or her body radio-active material from the French as well as other atmospheric tests.

The processes of fall-out deposit and the resulting up-take of radio-active material by the Australian people is irreversible; the legal injury involved is irreparable.

Mr. President, the position in relation to fall-out can be summarized as follows: firstly, natural conditions render inevitable the deposition on Australian soil of radio-active debris from atmospheric nuclear explosions by France at Mururoa Atoll. Secondly, that debris will enter into the very bodies of, and externally surround, all members of the Australian population, thus subjecting them to additional ionizing radiation. Thirdly, ionizing radiation is inherently harmful to human life. Fourthly, there is a serious danger that any addition of ionizing radiation, however small, is harmful. The prudent scientific approach is to assume that there is no threshold or safe limit. Fifthly, it is an established principle that there should be no exposure to ionizing radiation from artificial sources without a compensating benefit. Sixthly, it is for each country itself to decide the levels of artificial ionizing radiation to which its people are to be subjected and to balance the risks involved against any compensating benefits.

As to (1) *Fall-out on Australia*, and (2) *General Distribution and Absorption by Persons*, it is certain that radio-active debris from France's past and future explosions in the Pacific has been and will be deposited on Australian soil and waters. Above Mururoa in the troposphere and stratosphere there are prevailing winds. They are predominantly, but not wholly, westerly winds which circle the globe at high speeds. When nuclear weapons are exploded in the atmosphere at Mururoa, radio-active debris which every explosion produces is hurled upward and is then carried around the earth towards the east by the prevailing winds. As it is carried on its journey it falls on the lands and oceans below. Radio-active matter is thus distributed throughout the southern hemisphere. The processes involved leading to fall-out are described in greater detail in paragraphs 27 to 30 of the Application.

In addition, when radio-active material is injected into the stratosphere a slow exchange takes place between the stratospheres of the northern and southern hemispheres. This is set out in paragraph 30 of the Application.

The significance of the tropospheric and stratospheric winds is that when France explodes her bombs in the atmosphere over Mururoa, she explodes them in a real sense over Australia and other nations and peoples of the southern hemisphere.

The explosions are, of course, of smaller moment to the nations and peoples

of the northern hemisphere, for the bulk of the debris from the explosions in the Pacific is distributed over the Pacific peoples. It is not, however, confined to them because of the exchange of radio-active debris between the stratospheres of the two hemispheres. The explosions thus essentially affect the whole earth and every person on earth.

The distance separating Australia and Mururoa does not prevent deposition on Australia. When the Pacific site was chosen because France could no longer explode her bombs in the Sahara, she was aware that the source of danger to Australia lay in the prevailing upper atmospheric winds moving in an easterly direction carrying with them nuclear debris created by the explosions.

Although the meteorological conditions referred to are normal, one cannot overlook the possibility that the direction of the wind and the local and more remote meteorological patterns may change unexpectedly. As well, unforeseen rain may occur. Factors such as these may produce a radical departure from the predicted fall-out patterns. This has happened before.

I should add, Mr. President, that the probability that unforeseen or exceptional conditions will occur and affect the fall-out over Australia is very small.

The dangers in this respect are greatest rather for the developing countries, some independent, some still non-self-governing, closer to the test site. For instance, after the test of 12 September 1966, radio-active debris was unexpectedly transported in the reverse direction, i.e., from east to west, giving high levels of fall-out in Fiji, which has applied to intervène in the present proceedings. This phenomenon is usually described as "blow-back".

In *Le Monde* on 17 August 1971 it was reported that on the night of 12 and 13 June 1971 there was, over the Tureia Atoll, an unforeseen conjunction of a contaminated air layer and rain, a phenomenon described as "rain-out". The report is referred to in paragraph 44 of the request. Such phenomena as these add to the unpredictability of fall-out patterns and hence to the danger.

The certainty of deposit of radio-active matter on Australian soil from French tests is confirmed by Australia's monitoring programme and by the Reports of the United Nations Scientific Committee on the Effects of Atomic Radiation (UNSCEAR). It was not disputed by French Government scientists during recent talks in Australia. While there were differences between the scientists, I quote from that part of the report[1] on which there was general agreement:

> "There was general agreement that the technical methods used by the Australian authorities for measuring quantities of radiation fall-out are satisfactory and are in accordance with international practice. A large degree of agreement was reached regarding the levels of dose commitment in Australia due to past French tests."

And in a moment, Mr. President, I will refer to the meaning of this commitment in this connection.

> "The estimates of those dose commitments in millirads are as follows (for strontium-90 and caesium-137, the lower figures are preferred by the French scientists according to their methods of estimation; the Australian scientists' estimates are the higher figures)."

And I here may refer to a table. If it meets the convenience of the Court, may it be incorporated in the record as an annex? It is a short table with figures which has been mentioned to the Registrar. That shows the totals in respect of the various elements which indicate fall-out from those tests on Australian soil.

[1] See p. 540, *infra*.

TABLE FROM AGREED PART OF REPORT OF TALKS BETWEEN AUSTRALIAN AND FRENCH SCIENTISTS

(for strontium-90 and caesium-137, the lower figures are preferred by the French scientists according to their method of estimation; the Australian scientists' estimates are the higher figures)

| *Element* | *Thyroid (young children)* | *Thyroid (older children and adults)* | *Blood forming cells* | *Bone cells* | *Whole body* |
|---|---|---|---|---|---|
| Iodine-131 | 97 | 9 | 0 | 0 | 0 |
| Short-lived | 1.5 | 1.5 | 1.5 | 1.5 | 1.5 |
| Strontium-90 | 0 | 0 | 4.0-6.2 | 5.6-8.5 | 0 |
| Caesium-137 (External) | 2.0-3.0 | 2.0-3.0 | 2.0-3.0 | 2.0-3.0 | 2.0-3.0 |
| Caesium-137 (Internal) | 0.9-1.3 | 0.9-1.3 | 0.9-1.3 | 0.9-1.3 | 0.9-1.3 |
| Carbon-14 | 0.2 | 0.2 | 0.2 | 0.3 | 0.2 |
| *Total* (in round figures) | 102-103 | 14-15 | 9-12 | 10-15 | 5-6 |

There is a general scientific acceptance that deposition of fall-out occurs in an all pervading manner. Subject to fluctuations, the nuclear fall-out is such that the whole environment and every person is subjected to it. This has led to the formulation and general acceptance of the concept of dose commitments, that is, doses which on the average each person has or will receive because of various sources of ionizing radiation to which he is exposed. These are of course averages.

The concept of dose commitments from nuclear tests is a recognition that every person is surrounded by and ingests radio-active substances and, therefore, is subject to radiation doses from atmospheric nuclear tests. This proposition is incontrovertible.

Three of the most important radio-active substances produced by nuclear explosions are strontium-90, caesium-137 and iodine-131. There are also other "fresh fission products". The Australian monitoring programme consists of 25 centres in Australia and a further centre at Lae in the Trust Territory of New Guinea. In addition, daily milk samples from the nine major milk supplies situated in various locations in Australia are assayed to determine the presence in milk of iodine-131. The comprehensive Australian monitoring programme permits the assessment of dose commitments for the Australian population due to fall-out of all fresh fission products, including iodine-131, strontium-90 and caesium-137. Details of this programme are given in paragraphs 54 and 55 of the request.

The programme has detected radio-active material produced from the French tests in fall-out throughout Australia. The measurements of radio-active fall-out monitored in accordance with the programme, have been published in official reports and in the *Australian Journal of Science* and have been formally submitted to UNSCEAR as official Australian information. Mention is made in paragraphs 56 and 57 of the request of the measurements and of their publication.

I next mention some passages from the 1972 UNSCEAR Report which also established the release into the Pacific area, from the French tests, of radio-active material. Thus UNSCEAR stated: "In the southern hemisphere in mid-1969, 75 per cent. of the strontium-90 activity in surface air is ascribed to the September tests in the Southern Pacific." (The reference is Vol. 1, p. 44, para. 180, of the 1972 UNSCEAR Report.)

Table 29 of the 1972 UNSCEAR Report shows that the concentration of caesium-137 in milk for Australia rose progressively in recent years so that by the year 1970 the Australian figure exceeded that of the United Kingdom. By the same year the values for the two countries relating to strontium-90 were equal. (The reference is to Vol. I, p. 87, table 29, of the 1972 UNSCEAR Report.)

This progressive increase reflects the effects upon Australia of atmospheric testing, including that conducted by France, upon the Australian environment, and further establishes that there has been radio-active contamination of the environment.

But the matter does not rest there. Paragraph 178 of the 1972 UNSCEAR Report (Vol. 1, p. 43) states:

> "The stratospheric inventory of strontium-90 in both hemispheres increased temporarily after the tests in 1967, 1968, 1969 and 1970. Apart from those peaks, however, there has not been much change in the stratospheric inventory of strontium-90 since 1967, the level being maintained relatively steady by the atmospheric nuclear tests carried out during the last three years."

Paragraph 179 contains the statement that:

> "In 1969 strontium-90 deposition was about equally divided between the hemispheres. This is the first time that the annual fall-out in the southern hemisphere has been equal to or greater than that in the northern hemisphere. However, the southern deposition in 1969-1970 was only about half that recorded in the years 1962-1965 in spite of recent tests there. It can be seen from tables 23 and 24 that the global cumulative deposit of strontium-90 has changed little over the last few years, the annual deposition being just sufficient to compensate for strontium-90 that has decayed on the ground."

There then follows in paragraph 180 the statement I have quoted earlier that in the southern hemisphere in mid-1969 75 per cent. of the strontium-90 activity in surface air was ascribed to the September tests by France in the South Pacific.

I also draw the attention of the Members of the Court to paragraph 14 of Chapter 1 of the 1972 Report referring to the presence of iodine-131 in milk in a number of countries after each of the 1970 and 1971 series of tests in the southern hemisphere. I would but add that the concluding words of paragraph 13 of the same Chapter strongly indicate that the post-1970 tests will have added inevitably to the nuclear debris in our atmosphere.

The references I have made to the 1972 Report of UNSCEAR bearing upon the deposition and dispersion in the southern hemisphere and in Australia of France's radio-active debris are not exhaustive.

There is another feature of radio-active fall-out that is of particular significance. I have earlier referred to the radio-active substances strontium-90, iodine-131 and caesium-137. These substances are produced by nuclear explosions and do not occur naturally.

Strontium-90, when ingested in the form of contaminated food, is transferred

to the human bone. It is retained there and irradiates bone marrow and bone cells. The mechanism of transference from food to bone is referred to in the 1972 UNSCEAR Report, Volume 1, at pages 47 to 50.

Iodine-131 which is ingested mainly through milk is concentrated in the thyroid and irradiates that gland more than any other tissue.

This statement may be found in paragraph 14, page 4, of the 1972 UNSCEAR Report, which is Annex 8 to the Request.

Caesium-137 when ingested in the form of contaminated food is rapidly distributed in the human body, approximately 80 per cent. in muscle and 8 per cent. in the bone. These percentages are again taken from the 1972 UNSCEAR Report, Volume 1, at page 52, paragraph 231.

Thus, in one of their aspects, nuclear explosions implant into the human body a source of irradiation which resides there for periods of time which depend on the radio-active material involved.

I would next wish to point out one simple and obvious fact. Once these radio-active substances are deposited in the various forms we have mentioned, they contaminate food which is consumed by populations. Once deposited they cannot be removed and once ingested they inevitably irradiate the human body and its critical organs in the ways I have mentioned.

Thus France cannot undo the damage each explosion may cause to Australia and its people. Once deposited Australia cannot remove the consequences of those deposits. Those consequences are therefore irreversible. To the extent that they infringe legal rights the damage is forever done and the right can never be restored.

To the extent that they may injure human bodies, the same consequences ensue. I would but add to what I have said, the following statement in paragraph 45 of the 1958 UNSCEAR Report, which may be found in Annex 3 at page 40:

> "Prevention of the effects of radiation is rendered more difficult, and complete protection against it impossible, because changes which already occur during the irradiation lead to later damage."

We therefore submit that there is a certainty that future atmospheric tests at Mururoa Atoll will result in the deposit in Australia of radio-active substances produced in those nuclear explosions and that as a result everyone in Australia will be subjected to additional ionising radiation.

Mr. President I have now reached the end of the first two points related to the extent of fall-out and its absorption by individuals. I turn to (3) *Harmfulness of Ionizing Radiation.*

Radio-active debris is inherently a source of ionizing radiation. Man has always been subject to natural sources of ionizing radiation, the levels of which vary from place to place. It is important to understand the significance of these two sources of radiation, and their relationship one to the other. The steps involved in that understanding are straightforward and fundamental.

The first step is that nuclear debris from French tests *adds* to background radiation from natural sources. It is not something to be compared with background radiation as if it were separate from it. It adds harm to our population. It is not relevant that the levels of natural radiation may be larger than that of the artificial ones caused by the tests.

The second step is that all ionizing radiation is hostile to life and is harmful. World scientific opinion regards ionizing radiation as harmful to life. In my remarks on this topic I shall refer firstly to a short but lucid and compelling statement by an eminent scientist, Dr. Karl Z. Morgan, who is the Director,

Health Physics Division, Oakridge National Laboratory, Oakridge, Tennessee, the United States of America. This is what Dr. Morgan said:

> "If we reflect for a moment on what happens when radiation passes through our bodies, I think it is easy to understand why one would expect some radiation damage even at the lowest doses or dose rates or why there cannot be a threshold dose below which there could not be resulting damage. When ionizing radiation at the level of permissible environmental exposure strikes the human body, whether it be from diagnostic X-rays, an improperly designed or shielded color television set, radon daughters inhaled in a uranium mine, or from radio-nuclides ingested by drinking water downstream from a nuclear power plant, there are many millions of photons or high-energy ionizing particles that pass through parts of the body each second. As a result, energy exchanges take place which cause hundreds of cells to undergo various degrees of damage (the physicist would say the entropy or disorganisation of the very intricate and complex information centers of the cells has increased). Some cells are damaged only slightly and perhaps can be repaired completely. Other cells are destroyed, and, within certain limits, they represent no serious damage because there are millions of other cells immediately available to take over their function. It is those cells of the body which receive ionizing radiation and undergo physical and chemical changes and yet survive to reproduce their perturbated forms which may be precursors of cancer that are of the most concern to us. The same is true in the case of germ cells in our gonads which may survive radiation exposure only to take part in the conception of a child which, as a consequence, may suffer early death due to leukaemia or central nervous system cancers or may suffer some serious mental retardation such as mongoloidism or physical deformity."

The reference is to hearings before the subcommittee on Air and Water Pollution of the Committee on Public Works, United States Senate, Ninety-First Congress, 5 August 1970, page 648.

As Dr. Morgan shows, ionizing radiation damages some cells perhaps only slightly, destroys other cells, but further and most importantly subjects to a third type of injury cells which survive to reproduce diseases such as cancer and leukaemia and to give rise to deleterious effects in future generations.

Dr. Morgan went on to say on page 665:

> "Since natural background radiation is a component of man's environment, he has on this basis been subjected to radiation damage ever since his existence. I believe any additions to this background radiation merely increase the probability that man will suffer radiation damage during his lifetime or pass on to future generations genetic damage which may be expressed in terms of minor handicaps or defects or it may result in defects such as microcephaly, mongoloidism, blindness, lameness or early death."

Paragraph 45 of Chapter II of the 1962 UNSCEAR Report to be found in Annex 4 of the request, states:

> "The first effects of radiation on living matter are physical, in that they affect atoms and molecules irrespective of their arrangement in living structures. A result is the splitting of molecules into fragments known as radicals and ions. These fragments are deprived of the chemical stability characteristic of the original molecule."

Further, paragraph 46 of the 1962 UNSCEAR Report goes on to elaborate this topic in these terms:

"Radicals may interact both between themselves and with unaltered molecules, thus giving rise to new chemical compounds and upsetting the chemical balance of cells. Since water constitutes about 70 per cent. of the cell, radicals arising from the splitting of water molecules are important in the initial chemical changes induced by radiation."

This paragraph indicates that the destructive character of radiation is not exhausted by the statement contained in quoted paragraph 45. For it says that the radicals into which radiation may reduce a stable molecule of living matter may interact with other radicals and also with other molecules as yet unaffected so as to give rise to new chemical compounds and so as to upset the chemical balance that the unaffected cells possessed.

A further consequence is stated in paragraph 47:

"All the essential constituents of cells and in particular complex molecules like proteins and nucleoproteins, may be affected through the action of radicals. They may also be injured by radiation directly, however, without the intervention of radicals. The respective role of the direct and indirect action of radiation in bringing about cellular lesions is not yet clear; it is probable that in most effects both modes of action operate."

What I wish to observe of this last paragraph is its statement that essential constituents of cells may be injured by radiation directly in addition to the injury which the intervention of radicals may effect upon them.

Further, paragraph 49 of the 1962 UNSCEAR Report contains this statement: "Cellular death is an over-all and ultimate result of irradiation."

Strontium-90, caesium-137 and iodine-131 are, as I have mentioned, three dangerous radio-active end products of nuclear explosions. Produced by nuclear destruction, they in turn cause molecular destruction; they may split the molecules that comprise our flesh, bones and organs into fragments. In human terms that is exactly what the above-quoted paragraphs are stating. The paragraphs additionally say that the fragments to which radiation may reduce the molecules of living matter are fragments which are deprived of the molecular stability which the unaffected molecule of living matter possessed. This fact itself establishes the hostile character and destructive nature of ionizing radiation.

The paragraphs from the 1962 UNSCEAR Report which I have quoted thus indicate in greater detail the nature of the damage to which Dr. Morgan referred in simpler and, it may be, more lucid terms. They describe the destructive quality and characteristics of the effect of ionizing radiation on living matter.

This brings me to the end of what I have to say about the harmfulness of ionizing radiation.

As to (4) *Effects of Low Doses.*

I wish now to turn to an allied subject and to indicate in the same manner, that is by reference to recognized scientific works, the probability that radiation in the smallest doses is dangerous to mankind. Dr. Morgan has said, at page 646 of the document to which I have already referred:

"I believe present evidence refers to the fact that most, if not all, types and forms of chronic, radiation-induced damage (with the possible exception of cataractogenesis) relate more or less linearly to the accumulated dose, and that there is no justification for one to assume the existence of a threshold below which these forms of damage would not result."

Out of the many references set forth in the Australian Request, I draw the

Court's attention to page 89, *supra*, paragraph 48, of Annex 4, containing the following statement by UNSCEAR in 1962:

> "*It is clearly established that exposure to radiation, even in doses substantially lower than those producing acute effects, may occasionally give rise to a wide variety of harmful effects including cancer, leukaemia and inherited abnormalities which in some cases may not be easily distinguishable from naturally occurring conditions or identifiable as due to radiation. Because of the available evidence that genetic damage occurs at the lowest levels as yet experimentally tested, it is prudent to assume that some genetic damage may follow any dose of radiation, however small.*"

The statement that I have just quoted is preceded by a statement on page 88, *supra*, paragraph 34, in the following terms:

> "The study of the relationship between, dose and effect at cellular and subcellular levels does not give any indication of the existence of threshold doses and leads to the conclusion that certain biological effects can follow irradiation, however small the dose may be."

In the UNSCEAR Report for the year 1966, referred to in paragraph 23 of the request, is the statement that it is clear that with any increase of radiation levels on earth, the amount of genetic damage will increase with the accumulated dose.

Australia's request in paragraphs 48 and 49 has set out some statements contained in Publication 9 of the International Commission on Radiological Protection (ICRP). ICRP is a recognized and responsible international authority. Its approach to the question of radiation protection reflects the dangers that exposure to radiation in any quantity may cause. Thus, subparagraph (i) of paragraph 49 of the request refers to ICRP's view that any exposure to radiation may carry some risk for the development of somatic effects, including leukaemia and other malignancies, and of hereditary effects. ICRP proceeds to state:

> "The assumption is made that, down to the lowest levels of dose, the risk of inducing disease or disability increases with the dose accumulated by the individual. This assumption implies that there is no wholly "safe" dose of radiation. The Commission recognizes that this is a conservative assumption, and that some effects may require a minimum or threshold dose. However, in the absence of positive knowledge, the Commission believes that the policy of assuming a risk of injury at low doses is the most reasonable basis for radiation protection."

Thus, prudent scientific opinion of great weight indicates that in the state of present knowledge, exposure to radiation, however minute the quantity, may be attended by human injury. A similar approach is disclosed in the November 1972 Report of the Advisory Committee on the Biological Effects of Ionizing Radiation, of the Division of Medical Sciences of the United States National Academy of Sciences. The full title of the Report is: *The Effects on Populations of Exposure to Low Levels of Ionizing Radiation*[1]. Copies of this Report have been lodged with the Registrar for reference. Paragraph 46 of Australia's request refers to the Report. The Report reaffirmed the principles that any radiation should be regarded as harmful and that no—I repeat no—exposure

[1] II, p. 364.

to ionizing radiation should be permitted without the expectation of a compensating benefit.

I have referred to the UNSCEAR Reports, the publications of ICRP and the Report of the Committee of the National Academy of Sciences of the United States, to all of which Australia's Request refers for the purpose of showing what is the state of informed scientific opinion on the effects of ionizing radiation. I would submit, in the words of paragraph 41 of Australia's Request, that Reports of UNSCEAR can be accepted as objective statements of scientific facts in the light of scientific knowledge at the time of each Report.

The same may be said of the Report of the Committee of the National Academy of Sciences of the United States and of the publications of ICRP. There can be no doubt that those eminent scientists of many nations, including France and Australia, who participated in the preparation of the UNSCEAR Reports regarded, and continue to regard, ionizing radiation as inherently harmful to mankind.

The General Assembly having considered those reports demanded the cessation of atmospheric nuclear tests.

Mr. President, the trend of scientific opinion evidenced by the extracts I have read is clear enough, that there is no threshold below which ionizing radiation is not harmful. Given its inherent harmfulness, given the fact that it tends to cellular destruction, which the passages I have earlier quoted demonstrate, what other conclusion is open, as the prudent and probable one, but that it retains its destructive characteristics whatever the level of dose? Particularly is that so when one remembers that every amount of artificial ionizing radiation goes to *add* to the levels of natural ionizing radiation in which mankind lives. Science establishes that dangers lie in exposure to ionizing radiation. The full extent of these dangers is not known. Scientists vary in their views and this adds to the concern of the Australian Government and the anxiety of the Australian people.

There are difficulties in stating in numerical terms the numbers of lives terminated both now and prospectively and the diseases inflicted upon human beings by ionizing radiation. One reason for this lies in the non-specific character, at least on the basis of present scientific knowledge, of the diseases to which these radiations give rise. The difficulties are aggravated where one is seeking a numerical statement of the injuries in human terms that ionizing radiation in low doses may inflict. Thus the Report of the Committee of the National Academy of Sciences of the United States, which was directed to the effects on populations of exposure to low levels of ionizing radiation, points out on page 7:

> "But if in fact any level of radiation will cause some harm (no threshold), and in fact entire populations of nations or of the world are exposed to additional man-made radiation, then for decisions about radiation protection, it becomes necessary to quantify the risks; that is, to estimate the probabilities or frequencies of effects. Such estimates, as discussed later, are fraught with uncertainty. However, they are needed as a basis for logical decision-making and may serve to stimulate the gaining of data for assessment of comparative hazards from technological options and development, at the same time promoting better public understanding of the issues."

Nevertheless, estimates have been attempted and formulations of the appropriate scientific methods to be employed in working out the numerical statements of such estimates appear in the UNSCEAR Reports and have been otherwise scientifically accepted. Thus, paragraph 59 of the request correctly states that, using approaches adopted by UNSCEAR in its second to sixth

Reports, the doses to which the paragraph refers may be expressed as dose commitments to the Australian population.

Dose commitment is a measure of the amount of radiation already absorbed and to be absorbed in the future from the present store of nuclear debris, by each and every member of the Australian population. The procedures in broad outline by which assessments of total harm may be arrived at are stated in paragraph 60 of the request. Having referred to the fact that dose commitments are capable of evaluation, the paragraph goes on to state that these commitments, together with estimates of risk for the induction of cancer and for diseases of genetic origin may be used to compute harm commitments to the Australian population expressed as the expected number of additional cases of cancer and of diseases of genetic origin.

On 1 May 1973 there was tabled in the Australian Parliament (see para. 63 of the request) a Report of the Australian Academy of Science, the material conclusions of which, in summary form and as finally expressed by the Academy, are set out in that paragraph of the request. The Court is asked to look closely, as I am sure it will, at the risks of death and disability referred to by the Australian Academy. However, I feel it would be helpful to the Court if I were to present here, in a different form, assessments of harm to populations—which scientists call "harm commitments".

Harm commitments may be calculated on the basis of the dose commitments to the Australian population from French nuclear weapon tests in the Pacific in the period 1966 to 1972 and of the risk factors which the Australian Academy of Science used in its report. These risk factors adopted by the Academy were derived from the 1972 UNSCEAR Report and from the Report of the National Academy of Science of the United States. Because a range of dose commitments were arrived at during the May 1973 discussions between Australian and French scientists, a range of harm commitments has been computed by applying what is called a "linear non-threshold" relationship between dose and effect. By this is meant effects are proportional to dose however small the dose may be.

As a result of French nuclear weapons tests in the Pacific in the seven-year period 1966 to 1972, the harm commitments to the Australian population are 24 to 26 cases of thyroid cancer, 11 to 14 cases of leukaemia and other cancers (excluding thyroid cancer) and approximately 1 death or serious disability from genetic causes during the first generation and 15 to 18 deaths or serious disabilities in all subsequent generations.

On those calculations, on that assumption, should France repeat its 1966 to 1972 pattern of nuclear weapon tests in the Pacific, each seven years of such past practice could be expected to give rise to the same additional total number of cases of cancer and genetic effects as I have already mentioned.

Harm commitments are derived by the product of dose commitment, risk factors and the number of population at risk. The harm commitments just quoted were derived for the Australian population of 13 million. The total population of the southern hemisphere is some 30 times greater than the population of Australia. Accordingly the total harm commitments to the population of the southern hemisphere from French nuclear tests already conducted in the Pacific will be many times greater than those for Australia.

The conclusion, therefore, is that Australian citizens and citizens of the southern hemisphere and future citizens of Australia and the southern hemisphere will pay with their lives for France's decision, in the face of constantly expressed disapprobation by world public opinion, to commence and to continue atmospheric nuclear weapon tests.

It is in circumstances such as these, as paragraph 65 of the request makes

clear, that the Australian Government is gravely concerned. The imprecision and uncertainty of the limits of danger to populations, in terms of lives lost or damaged and future generations harmed, serve but to render the danger the graver.

Mr. President, I wish to refer the Court specifically to paragraphs 61 and 62 of the request. The Court will note from paragraph 61 that the French Government has sought to make use of past reports of the Australian National Radiation Advisory Committee (NRAC) to support its view that no significant risk to the Australian population is involved as a result of its testing programme.

I shall read the comments made in those paragraphs of the request.

> "61. ... these [referring to the Reports] have only a limited, if any, bearing on the situation. The NRAC has produced a report on each series of tests but it has not reported on the possible cumulative consequences of fall-out from all series of the tests.
>
> 62. In formulating its views on each series of tests, the NRAC chose to adopt an approach of determining the relative risk for each series rather than that of assessing the cumulative harm to the Australian population from all the nuclear tests carried out in the Pacific in the atmosphere by the French Republic. The approach adopted by the NRAC involved in the main the comparison of the expected effects from the tests with those from natural background radiation and viewing the significance of the expected effects against the incidence of death and disability in the Australian population. Because of the growing concern in the Australian population about the possible effects of the continued atmospheric nuclear testing by the French Republic in the Pacific, Australia is obliged to consider the cumulative effect of these tests and to assess the risks not in relative terms, but in absolute terms."

The late President John Kennedy of the United States of America, in his address in July 1963, urging the United States adherence to the Partial Test Ban Treaty, put the matter simply:

> "The number of children and grandchildren with cancer in their bones, with leukaemia in their blood, or with poison in their lungs might seem statistically small to some, in comparison with natural health hazards, but this is not a natural health hazaard—and it is not a statistical issue. The loss of even one human life, or the malformation of even one baby—who may be born long after we are gone—should be of concern to us all. Our children and grandchildren are not merely statistics toward which we can be indifferent."

I have indicated that the risks involved in French testing in the southern hemisphere are considerably greater than one or two deaths.

*The Court adjourned from 4.15 p.m. to 4.40 p.m.*

The recent meeting of Australian and French scientists agreed on assessment of the dose commitments to the Australian population from all past nuclear tests. It is of concern to the Australian Government that these dose commitments, which include a contribution from past French nuclear tests in the atmosphere in the Pacific, range up to values measurable in years of equivalents of natural background radiation exposure. To the thyroid gland of infants there is the equivalent of approximately two years' such exposure. To blood forming cells and bone cells there is the equivalent of approximately one year's such

exposure. To the whole body and to the thyroid gland of older children and adults, there is the equivalent of approximately over half-a-year's such exposure. And, if I may repeat, this is the average in respect of every single one of the population.

The Australian Government must view these dose commitments to which French nuclear weapon testing has contributed, and the consequences to the health of its population of those doses, in the light of the intention by France to add to these dose commitments by further nuclear weapon testing in the atmosphere at its Pacific test centre. Also, there are, of course, variations in the levels of fall-out from French tests over a country of such wide expanse and climate conditions as Australia.

Thus, for infants who feed on fresh cows' milk derived from one major Australian milk production area, the dose commitments to their thyroids in the seven-year period, 1966 to 1972, of French nuclear weapon testing in the atmosphere in the Pacific ranged up to the equivalent of approximately three years' additional exposure to natural background radiation. Can there be any wonder that this concerns the Australian Government and creates anxiety among the Australian people? This concern and anxiety is the greater as France prepares to undertake further nuclear weapon testing in the atmosphere in the Pacific on which it will provide neither information on the dates nor on the number of the explosions and the yield of these devices.

This brings me to the end of our submission on the effects of low doses.

As to (5) and (6) *No Exposure Without Compensating Benefit*, to be decided by each country itself:

Resolution 1762 A of the General Assembly of 6 November 1962 viewed with "the utmost apprehension" the data contained in the Report of UNSCEAR of that year. That concern has been continuously reiterated by resolutions of the General Assembly. The references are set forth in paragraphs 17 to 40 of the Australian request and in the annexes to the request. The request also sets forth, in Annex 19, a resolution adopted by the United Nations Conference on the Human Environment. No doubt taking the UNSCEAR Reports into account, the resolution states the belief of that United Nations Conference that all exposures of mankind to ionizing radiation should be kept to the minimum possible and should be justified by benefits that would not otherwise be obtained.

The Australian Government in common with the governments of other nations has attempted to use artificial ionizing radiation only where there is a benefit to its population arising from its use.

The principles upon which it and other nations have proceeded are stated in paragraph 36 of the Application, where it is said that in taking steps to protect their peoples from the threat posed by controllable sources of ionizing radiation, Australia and other nations have acted consistently in accordance with two principles.

The first principle is that any ionizing radiation, however slight, is potentially harmful; and the second principle is that people should not be subjected to man-made ionizing radiation unless there is a compensating benefit. This is, of course, the application of the principles which ICRP has consistently advocated. No responsible government may do less. Once it is accepted that ionizing radiation is potentially harmful, then its use must be controlled and should only be justified by reference to the benefits that its use may bring.

The exercise of the choice to promote such exposure is but one aspect of the right that each sovereign State possesses, has exercised and will continue to exercise.

As I have mentioned earlier, the result of atmospheric testing is the subjection

of innocent populations to the risk of death and pain and irreversible injury. Those scientific evaluations which the Government of Australia possesses indicate that such is the case with Australia. Though the number may be small, it is certain that death and suffering have been and will be caused by the tests. Their continuance will certainly aggravate that harm.

The constant reiteration by the United Nations of its condemnation of atmospheric tests establishes, if proof were necessary, that the testing of nuclear devices in the atmosphere is an abnormal occurrence and a cause of unique and special concern to the international community.

Atmospheric nuclear testing is comparable to no other State activity. It is no ordinary activity of the State, the consequences of which can be disposed of by payment of pecuniary damages. The very fact that the international community has so consistently called for the cessation of atmospheric tests means that the community has rejected such an interpretation of them.

One is left therefore only with the fact that France, against the expressed condemnation of the international community, has for her own benefit initiated and continued atmospheric nuclear weapon tests; that she intends to continue them; that Australia's citizens will pay and have paid a price for this conduct. Should further tests be carried out, this and future generations will suffer further.

Mr. President, I have endeavoured to take the Court, in an ordered way, through the consequences for Australia and its people of continued atmospheric nuclear testing by France. May I now indicate in outline the relation of these matters to the legal issues.

What I have already said establishes that radio-active substances are inevitably deposited on Australian soil as a result of French atmospheric tests. That debris will enter into the very bodies of, and externally surround, all members of the Australian population, subjecting them to additional ionizing radiation that is harmful down to the smallest dose. The only responsible approach is to accept the principle, widely recognized, that there should be no exposure to ionizing radiation from artificial sources without compensating benefits.

It is our submission, Mr. President, that in these circumstances the sovereignty of Australia would be clearly infringed by the deposition upon Australian soil of radio-active substances from further French tests in the Pacific. The relevant aspect of sovereignty is its territorial aspect. Territorial sovereignty is the most fundamental and elementary concept of the law of international relations. Australia is entitled to maintain and to assert her territorial integrity. It should be in no way obliged passively to accept the littering by France of its soil and environment with man-made nuclear pollution, pending the Court's final decision. It is not to the point that Australia is not able to estimate the *exact* degree of harm to every member of its population affected by the activity of the French Government. This is a scientific impossibility. What is certain is that this harm exists.

Only the Australian people, through their own elected representatives, are entitled to decide what shall happen on Australian soil. Australia is also entitled to assert this claim because of 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. It possesses this right of choice because it is an independent, sovereign State. One of, indeed the first of, the basic principles of the United Nations Organization set forth in Article 2 of the Charter is "the sovereign equality of all its Members". Only Australia is competent to determine the degree of risk of irradiation from man-made radio-active nuclides which it is prepared to accept. Australia's discretion

in this matter is as absolute as the right of all States to decide the measures to be adopted to exclude infectious diseases such as cholera and smallpox.

France's infringement of Australia's sovereignty and its interference with Australia's independent right to decide constitutes breaches of obligations on its part, under customary international law. If I may use words with which this Court is familiar, between independent States respect for territorial sovereignty is an essential foundation of international relations.

In addition to these submissions Australia will contend that the conducting of atmospheric nuclear weapon tests is contrary to a prohibition of customary international law. Part of that submission will be the proposition that the 1963 Partial Test Ban Treaty, set forth in Annex 10 to the request, has become the expression of a general principle of international law definitively received into the *opinio juris* of members of the international community, so far as at least atmospheric nuclear weapon tests are concerned. To make good these submissions, reliance will be placed on the Partial Test Ban Treaty itself, to which over 90 States are full parties, and also on a constant and repeated condemnation of atmospheric nuclear testing expressed in the resolutions of the General Assembly.

Mr. President, the General Assembly resolutions are relevant in the sense that they constitute a clear expression of the juridical conscience of mankind. As early as November 1962 the General Assembly adopted resolution 1762 A (Annex 9 to the request), in which it recited as follows:

> "*Fully conscious* that world opinion demands the immediate cessation of all nuclear tests,
>
> *Viewing with the utmost apprehension* the data contained in the report of the United Nations Scientific Committee on the Effects of Atomic Radiation, and
>
> *Convinced* that no efforts should be spared to achieve prompt agreement on the cessation of all nuclear tests in all environments."

The General Assembly then condemned all nuclear weapon tests and asked that such tests should cease immediately. Resolutions similar in effect have been passed yearly, with the exception of 1964. On 16 December 1971 the General Assembly stated that it viewed with the utmost apprehension the harmful consequences of nuclear weapon tests for the health of present and future generations of mankind and was fully conscious that world opinion has, over the years demanded the immediate and complete cessation of all nuclear weapon tests in all environments. It also reiterated solemnly and most emphatically its condemnation of all nuclear weapon tests and urged all governments of nuclear weapon States to bring to a halt all nuclear weapon tests at the earliest possible date. In June 1972 the United Nations Conference on the Human Environment, held at Stockholm, considered that there was radio-active contamination of the environment from nuclear weapon tests, and taking into account the UNSCEAR Reports, condemned nuclear weapon tests *especially those carried out in the atmosphere*. The resolution called on those States intending to carry out tests to abandon them since they may lead to further contamination of the environment. The Stockholm resolution is set forth in Annex 19 to the request. Indeed, I draw the Court's attention to all the resolutions and other international instruments set forth in Annexes 9 to 21 of the Australian request. This collection is not an exhaustive one. Australia will be contending, indeed, that the case for there being a prohibition on atmospheric testing under customary international law is almost overwhelming.

If this submission is correct, it follows that Australia, in common with other

States, may assert in relation to the proposed French tests in the Pacific, its right to be free from atmospheric nuclear weapon tests by any country.

I cannot, of course, speak for other countries of the region. I think I should note at this stage the presence in the Court of the representatives of New Zealand. They will be advancing their own arguments in the *Nuclear Tests* case instituted by them. I also note that Fiji has applied to intervene in these proceedings and that the Court's decision on its Application will no doubt shortly be given. Their presence reflects the widespread concern among South Pacific States over the consequences of continued atmospheric nuclear testing in the region.

The Solicitor-General will develop further the legal arguments which I have presented, to that degree appropriate on this hearing. He will also indicate arguments that Australia will ultimately advance, including submissions relating to infringement of the freedom of the high seas and of the superjacent airspace. His argument will also develop the jurisdictional aspects, again to the extent necessary at this stage of the proceedings.

Mr. President and Members of the Court, the Australian Government has followed the procedures of this Court. It has put its submissions and has come to this Court prepared to deal with any arguments or submissions which might be put against us in accordance with the procedures of the Court. It does not doubt that the Court will observe its procedures.

Australia appreciates that the considerations of due process will never be absent from the mind of the Court. Neither the Court nor Australia should have to deal with 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.

I need hardly add that if the Court should feel, after having heard our case, that there is any point on which it wishes us to develop further argument we should be very glad to give the Court whatever additional assistance we can.

Mr. President and Members of the Court, Australia has not resorted lightly to the action here brought before you. We have been moved by high considerations of human welfare. It grieves us that France, a nation so often distinguished in the past by its attachment to reason, justice and compassion, should still contemplate action which subjects present and future generations to the risk of premature, painful and grotesque forms of death and sickness. Yet there is more involved here than the action of France. If this Court, the highest judicial tribunal yet evolved by man, does not interpose itself in the path of further atmospheric nuclear testing by France, who can doubt that others, not yet armed with the weapon of holocaust, will conclude that they may follow the French example with legal impunity. And each of them will add its share to the invisible but malignant cloud that overhangs the future of men everywhere.

There are many interested parties watching these proceedings. It would be no mere rhetoric to remind you that one interest which cannot be represented is that of posterity. Yet, if unrepresented and silent, it must not be forgotten. The unborn generations have a vital interest in these proceedings. What you do or do not do will have implications for them. One way or another, the decision you are moving towards will be historic, for it will affect the course of human history.

## ARGUMENT OF MR. ELLICOTT

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Mr. ELLICOTT: Mr. President and Members of the Court. In this speech I propose to deal with three matters and in the following order:

1. I shall deal further with the nature of Australia's case against France on the merits. The basic facts relevant to its case and the basic propositions of law in support of it have just been presented by the Attorney-General but it may be of assistance to the Court, having these matters in mind, to develop in greater detail the questions of law which arise in this case. This should also be of some assistance to the Court in appreciating the direct and close relationship between the provisional measures sought by Australia and the substantive relief which it seeks on the merits.

2. I shall put to the Court Australia's submissions in law as to why an order for provisional measures should be made.

3. I propose to deal with the basis of the Court's jurisdiction to hear this case.

I now pass to indicate briefly the nature of Australia's complaint in law against France.

In its Application, Australia asks the Court to declare that the carrying out by France of further atmospheric nuclear tests in the South Pacific Ocean is not consistent with the applicable rules of international law. It also requests the Court to order that the French Republic shall not carry out any further such tests.

As the Court will be aware, the literature of international law has reflected a wide range of arguments supporting the conclusion that atmospheric nuclear testing is illegal in international law. At one end of the spectrum are contentions to the effect that the use of nuclear weapons is unlawful and that it follows therefrom that the testing and possession of such weapons is unlawful. At the other end of the spectrum is an argument which does not involve a consideration of the legality of the use of nuclear weapons but restricts itself to an assertion that in any event atmospheric testing of nuclear devices is unlawful. It is to this latter argument that Australia draws particular attention. It involves, amongst other things, a consideration of the law-creating effect of the Test Ban Treaty of 1963 read in conjunction with the resolutions of international organizations, often adopted by substantial majorities, calling for an end to nuclear testing in the atmosphere. These resolutions are not dependent upon assumptions regarding the illegality of any use of nuclear weapons but flow from the growing concern of the international community to reduce or eliminate hazards to human health and unnecessary or unjustifiable sources of environmental pollution.

The Court will readily call to mind the many resolutions of the United Nations condemning nuclear testing in the atmosphere. Some of these are set out in Annexes 9 to 21 of the Australian request and have been referred to by the Attorney-General. A very recent example of world concern with and condemnation of nuclear testing in the atmosphere is found in the work of the United Nations Conference on the Human Environment held at Stockholm in June 1972. As the Court will see from Annex 19 to the request for provisional measures, resolution 3 (1) of that Conference bears very directly on the question of

the legality of nuclear tests. Two very important points are made in the Preamble: the first is that there is radio-active contamination of the environment from nuclear weapons tests; the second is that all exposures of mankind to radiation should be kept to the minimum possible and should be justified by benefits that would otherwise not be obtained. On the basis of these considerations, together with a reference to the Partial Test Ban Treaty and others, the resolution, first, condemned nuclear weapons tests, especially those carried out in the atmosphere, and, second, called upon States to abandon any plans to carry out such tests.

The concern so specifically demonstrated in this resolution is confirmed in Principles 6, 7 and 21 of the Declaration adopted at the same Conference.

Principle 6 deals with the discharge of toxic substances into the environment.

Principle 7 refers to the pollution of the seas.

While these two principles provide evidence of community concern to eliminate pollution of the environment by substances which are released by atmospheric nuclear tests, it is the third, Principle 21, which is even more directly pertinent—for this goes to the very centre of the problem in the present case.

> "States have, in accordance with the Charter of the United Nations and the principles of international law, the *sovereign right* to exploit their own resources pursuant to their own environmental policies, and the *responsibility* to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." (Emphasis added.)

I shall presently be commenting upon the relevance of this Principle to the assertion in this case of those rights which are exclusive to Australia. At this moment, however, I do no more than suggest the significance of pronouncements of this character as evidencing the evolution of a rule of customary international law which prohibits State conduct tending towards pollution and the creation of hazards to human health and the environment and in particular a rule prohibiting the conduct of atmospheric nuclear tests.

The specific function of the Stockholm resolution and declarations is that they reflect what the community regards as an acceptable standard of conduct in these matters—and correlatively what the community regards as an unacceptable standard. In view of the fact that the protection of human health and the environment is a matter of which the international community has only relatively recently become conscious, it stands to reason that the traditional standards of State freedom to pursue activities which may affect them must undergo some restriction. This being so, the Court may well feel that the criteria which normally govern the determination of the contents of customary international law are satisfied when the *opinio juris* of the vast majority of States is evidenced in this form. Atmospheric nuclear testing is of course an activity which has never been accepted as traditional or normal and has received universal condemnation. The emergence of a rule of international law against it is therefore not surprising and indeed is inevitable.

The development of the law relating to the protection of the environment from atmospheric nuclear testing is, I would respectfully suggest, one of those developments analogous to the emergence of the law of outer space of which you, Mr. President, spoke in your dissenting opinion in the *North Sea Continental Shelf* case. And in relation to such developments you expressed the view (at p. 232) that "the Court would... take cognizance of the birth of a new rule, once the general practice States have pursued has crossed the threshold from haphazard and discretionary action into the sphere of law".

The fact that these observations were made in a dissenting opinion does not, I venture to submit, mean that they do not have the support of the Court as a whole. They are not to be read as inconsistent with what the Court itself then said.

As the Court will immediately appreciate, legal considerations of the kind set out give rise to rights which can be invoked by any State. They are general rights corresponding to the obligations of a State which, in the language of the Court in the *Barcelona Traction* case are owed "towards the international community as a whole". These: "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*."

It is not necessary for present purposes to develop any further Australia's reliance on a rule of international law prohibiting nuclear testing in the atmosphere. Enough has, I hope, been said in general terms to indicate the nature and substance of the rule and how it has developed. There are other arguments which the Australian Government invokes. They are in a sense more specific and would in themselves be sufficiently comprehensive and strong to bear the whole weight of the contention that the conduct by France of atmospheric tests violates Australia's rights in international law.

With your leave, it is to these arguments that I should now briefly turn. They are identified in headings (ii) and (iii) of paragraph 49 of the Application. They involve two assertions. The first is that fall-out from the French tests has violated and will violate Australian sovereignty; the second is that the conduct of the tests, and the measures associated with them, involve a violation of the freedom of the high seas.

As the Attorney-General has pointed out, one solid foundation lies on the bedrock of Australian territorial sovereignty. The proposition that a State is sovereign over its territory is a commonplace of international law. It is reflected in the emphasis which the Charter of the United Nations places upon such concepts as territorial integrity and political independence. It has furthermore been recognized in the jurisprudence of this very Court.

For this purpose, I doubt whether it is necessary to go beyond a reference to one particular case.

In the *Corfu Channel* case, on the Merits, one of the two principal questions which the Parties submitted to the Court was the legality of the so-called Operation Retail. This occurred when, some time after the mining of the two British destroyers which occasioned the main proceedings in the Court, the British Navy carried out a minesweeping operation in Albanian territorial waters. This was done without Albanian consent. In rejecting the various grounds on which the British Government sought to justify its action the Court said:

> "Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty." (*I.C.J. Reports 1949*, p. 35.)

I pause here to ask rhetorically whether there is any difference between Albanian sovereignty and Australian sovereignty; whether there is a difference between the intrusion of naval vessels into the territory of another State which

causes no damage, on the one hand, and, on the other, the deposit on the territory of another State of radio-active fall-out which, for this purpose alone, I shall assume not to be dangerous. The answer is, of course, that there is no difference; and as the former was a violation of territorial sovereignty so is the latter. As was pointed out by the Attorney-General, the inevitable consequence and therefore the extended consequence of French testing in the atmosphere is the deposit on Australian soil of radio-active material.

While the *Corfu Channel* case represents the clearest judicial acknowledgement of the inviolability of territorial sovereignty, I should identify a material respect in which it may be distinguished from the present case. In that case, the violation of Albanian sovereignty was not associated with the use by the United Kingdom of its own territory. No question was there raised regarding the mutual rights and duties of two States in relation to the use of their territories. In the present context, however, it might be suggested that the tests carried out on Mururoa Atoll represent no more than a legitimate use by France of territory under her sovereignty and that, accordingly, the situation must be governed by the law governing the mutual conduct of neighbours, if that is a correct description of the territorial relationship between Mururoa Atoll and Australia. Of this I shall have more to say.

In broaching this aspect of the matter I do not wish to be taken as accepting the validity of the assumption upon which it rests—namely that Mururoa may simply be treated like any other part of French territory. This is a matter on which we reserve our position. One is, however, bound to ask whether there is any rule of international law which permits a State by virtue of the use of its territory to infringe the sovereignty of another State. To answer this question absolutely in the negative might be to go too far. At the same time, Australia will contend that in the circumstances of this case, France's conduct infringes the rights of Australia. Though it is inappropriate to develop this contention fully at this moment, two elements may be mentioned as relevant to it:

First, one may say that France simply has no right to conduct atmospheric nuclear tests. I have already mentioned some of the considerations bearing on this point. I may perhaps be permitted, though, to recall the words employed by Judge Jiménez de Aréchaga in the chapter which he contributed to the *Manual of International Law* on "The Constituent Elements of State Responsibility". He spoke thus of the effect of atomic radiation resulting from nuclear tests:

> "It should not be included within the principle of risk, but under the general principle of State responsibility for unlawful acts, since a State is not entitled to conduct nuclear tests in its territory or on the high seas which cause damage on or to foreign States. If a nuclear test produces fall-out beyond the territorial limits of the State conducting it the State should be absolutely liable under the normal rules of State responsibility."

The second factor relevant to the infringement of Australia's rights lies in the nature of the act and of the damage to which it gives rise. The Court has already heard some scientific detail about the tests. It is manifest that they constitute an unusual, abnormal, non-natural and ultra-hazardous activity. Any analogy drawn between them and other uses of a State's territory which may trouble a neighbour are unhelpful because the degree of difference is so great as to amount to a difference of kind. Nuclear tests are not comparable to the use of waters by an upper riparian or to the emission of noxious fumes by factories. They are an activity *sui generis* by reason of their motivation, their sheer physical size and their potential consequences. The trespass to which they give rise is not transient or short-lived; it is long-enduring. The damage which they cause is not always

immediate or obvious; it is sometimes latent, complex and difficult to distinguish from damage from other causes. But the fact that it is statistical damage—and *it is* statistical damage—does not make it any the less real. It is worth noting again Principle 21 of the Stockholm Declaration which makes no concession to the sovereign right of States to use their territory to cause damage to the environment. The obligation of States is expressed absolutely and without qualification:

> "States have... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

There is another aspect of Australian sovereignty which is infringed by French nuclear testing in the atmosphere and this has also been outlined by the Attorney-General. That is 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 the effects of ionizing radiation from artificial sources. The Attorney-General has stressed the importance of controlling radiation because it is inherently harmful. He has also pointed to the universally accepted principle that there should be no additional exposure of people or territory to radiation without a compensating benefit. The right to decide this must rest with each sovereign country. It alone can decide whether the benefit to its population will outweigh the risk of harm. French tests in the atmosphere inevitably expose the Australian people and territory to additional radiation. Since Australia sees no benefit to it or its people from such exposure, the threatened action of France is clearly a threatened infringement and usurpation of Australia's sovereign right to determine for its people whether they shall be subjected to additional radiation and, if so, to what extent. This, in my Government's respectful submission, would be a grave impairment of its sovereignty.

I will not dwell further upon these points. They will be developed in the Australian Memorial. In the meantime, the mention of them will serve to show that the Australian Government is not unmindful of arguments which may be raised against its case, though it places confidence in considerations such as those just indicated.

Having spoken of the illegality of the French conduct in relation to Australian territorial sovereignty, it remains for me to say a word about that conduct in relation to the freedom of the high seas. Australia is a party to the Geneva Convention on the High Seas, 1958, but France is not. Nonetheless, having regard to the generally accepted status of that Convention as a codification of the law relating to the high seas, it will be convenient to follow its articles in identifying those aspects of the French tests which involve a violation of the law of the sea.

The Court needs no reminding of the terms of Article 2 which names four freedoms. Three are relevant here: freedom of navigation; freedom of fishing and freedom to fly over the high seas. May I invite the Court's attention to the map which forms Annex 1 to the Application. The Court will observe that around Hao and Mururoa there are small areas which bear the mark NTP 1 and NTP 2. These are areas which are permanently prohibited to aircraft. They extend beyond the territorial waters of Hao and Mururoa. In addition there is a category of dangerous zones: a smaller but nonetheless substantial one which is dangerous to shipping and a very large one which is dangerous to aircraft. Both these dangerous zones embrace large areas of the high seas. Paragraph 45 of the Australian Application refers to an incident in 1972 when action was taken by the French authorities to inhibit and interfere with the presence of a

foreign vessel on the high seas, in an area designated a dangerous zone. However, it does not seem that at this stage evidence of actual interference is called for. When a State purports to declare areas of the high seas prohibited or dangerous that is, in the eyes of international law, a sufficient interference with the rights of others.

There is, in my submission, no basis on which those interferences can be justified. I am, of course, conscious of the fact that the high seas are free for the use of all. Indeed this is expressly acknowledged in the last sentence of Article 2 of the High Seas Convention:

> "These freedoms, and others which are recognized by the general principles of international law, 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."

No doubt in due course the Court will be asked to decide which interest must prevail in the Pacific, the French interest in the atmospheric testing of nuclear weapons or the more peaceful interests of States in the right to freedom of navigation and overflight.

Finally, before leaving the law relating to the use of the high seas, mention may also be made of Article 25 of the High Seas Convention:

> "(1) Every State shall take measures to prevent pollution of the seas from the dumping of radio-active waste, taking into account any standards and regulations which may be formulated by the competent international organizations.
>
> (2) All States shall co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radio-active materials or other harmful agents."

Mr. President and Members of the Court, this brings me to the end of my outline statement of the substantive law applicable to the merits of Australia's claim. In my submission this outline should suffice to show the serious and well-founded character of the Australian case in support of its contention that French conduct of nuclear tests in the South Pacific Ocean is not consistent with applicable rules of international law.

I now propose to deal with the question of provisional measures. In doing so I shall put submissions to the Court as to its jurisdiction to lay down such measures, and as to the grounds upon which it should exercise that jurisdiction. I shall also indicate to the Court why these grounds are satisfied in this case.

There are three headings under which I propose to address my submissions. First, the matter will be considered by reference to general international law; second, by reference to the General Act, Article 33; and third, by reference to Article 41 of the Statute.

I begin with the position under general international law. When interpreting the text of the General Act and the Statute dealing specifically with provisional measures, it is relevant to recall the existence under customary international law of an inherent power in international tribunals to indicate such measures, and to bear in mind the purpose for which such an inherent power exists. For, as will be seen, there is a risk that by overlooking the customary origins of the express power more stringent requirements for the exercise of the Court's power may be established than are truly called for. The point was simply and clearly made by the late Judge Hudson in his survey entitled *International Tribunals Past and Future*, 1944. He said:

> "While a proceeding is pending before an international tribunal, good faith would seem to require that neither of the parties should attempt to alter the situation existing in such a way as to add to the difficulties of the tribunal." (P. 96.)

He then quoted the passage from the *Electricity Company of Sofia and Bulgaria* case in which the Permanent Court laid it down as a "principle universally accepted by international tribunals" that the parties "must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute". Judge Hudson saw the numerous provisions empowering tribunals to take interim action for the protection of one or more of the parties as a reinforcement of this principle.

This principle has been recalled in more recent times by the Third Chamber of the Arbitral Commission on Property Rights and Interests in Germany. It said: "We have no doubt of our inherent power to issue such orders as may be necessary to conserve the respective rights of the parties" (*ILR*, 1958-I, Vol. 25, at p. 523).

It is scarcely necessary for me to express specifically the applications of this general principle in the present case. It is obvious that good faith and the conservation of the rights of the Parties demand that further atmospheric testing should cease prior to the judgment of the Court. For if such tests take place, it is manifest that the very thing will have happened to prevent which Australia has sought the protection of the Court in the present case.

I pass now to the next heading under which I make my submissions regarding the laying-down of provisional measures: the General Act itself. In the next part of my speech I shall develop the contention that the General Act constitutes the principal basis for the exercise by the Court of jurisdiction in this case. However, the reference to the General Act goes further than the establishment of the Court's jurisdiction. For once the Court is acting under Chapter II of the General Act, it is also entitled, and we would submit, bound to apply the relevant parts of Chapter IV. These include Article 33.

The first paragraph of this Article provides:

> "1. In all cases where a dispute forms the object of arbitration or judicial proceedings, and particularly if the question on which the parties differ arises out of acts already committed or on the point of being committed, the Permanent Court of International Justice, acting in accordance with Article 41 of its Statute, or the Arbitral Tribunal, shall lay down within the shortest possible time the provisional measures to be adopted. The parties to the dispute shall be bound to accept such measures."

The second paragraph relates to proceedings before a Conciliation Commission and is not relevant. The third paragraph provides:

> "The parties undertake to abstain from all measures likely to react prejudicially upon the execution of the judicial or arbitral decision or upon the arrangements proposed by the Conciliation Commission and, in general, to abstain from any sort of action whatsoever which may aggravate or extend the dispute."

With the leave of the Court, I would now comment upon certain features of this Article, and in this connection, Mr. President and Members of the Court, you may perhaps find it more convenient to have before you the texts of both the General Act and the Statute of the Court.

First, one must observe that the provisions of Article 33 of the General Act are not in every respect identical with those of Article 41 of the Statute of the Court. Article 33 (1) is particularly directed to a situation where the question on which the parties differ arises out of acts already committed or on the point of being committed and provides for what the Court should do in those circumstances. Article 41 is more general in its terms and describes a general power in the Court to indicate provisional measures to preserve the respective rights of either party if it considers the circumstances so require. The description which Article 41 (1) of the Statute contains of the objective of the measures "*to preserve the respective rights of the parties*" is reflected in Article 33 (3) of the General Act which requires the parties to abstain from measures likely to react prejudicially upon the execution of the judicial decision.

A second respect in which Article 33 (1) of the General Act is not identical with Article 41 (1) of the Statute is in the language employed to describe what the Court is to do. Article 33 (1) of the General Act uses mandatory language. It says the Court *shall* lay down provisional measures if it thinks the conduct of a party is likely to react prejudicially upon the execution of a judgment. Article 41 (1) of the Statute of the Court, on the other hand, says that the Court *may*, if it considers that circumstances so require, indicate appropriate provisional measures.

It is also appropriate to note the speed of action required of the Court under Article 33 (1). The Court shall lay down "within the shortest possible time" the provisional measures to be adopted. No comparable express prescription appears in Article 41 of the Statute.

It will be noted however that Article 33 of the General Act contains a specific reference to Article 41 of the Statute, i.e., the Statute of the Permanent Court which was in substance identical with Article 41 of the Statute of this Court. What is the function of the introduction in Article 33 of the words "acting in accordance with Article 41 of its Statute"?

It is our submission that although Article 41 in terms only confers a power, it confers on the Court a judicial discretion which, in appropriate circumstances, the Court is bound to exercise at the request of an injured party. It is what might be called a power coupled with a duty, i.e., a duty to exercise the power in appropriate circumstances. Thus if a party has committed or is about to commit acts which are likely to prejudice the rights of another party, the Court in the exercise of its power under Article 41 should, as soon as possible, indicate those provisional measures which the Court thinks appropriate to preserve the latter party's rights.

So regarded, Article 33 would merely be spelling out in precise terms the duty which was upon the Permanent Court and, we submit, is upon this Court under Article 41, when, pending the final hearing, acts have been or are about to be committed by one party to the detriment of another.

Indeed, Article 66, paragraph 2, of the Rules of Court is consistent with this view of Article 41 of the Statute for, after according a request for interim measures priority over all other cases, it then expressly declares that "the decision thereon shall be treated as a matter of urgency". The practice of the Court is also consistent with this view for it has always acted, as it has in this case, expeditiously upon the request for provisional measures.

Finally, I should recall the express provision in Article 33 (1) of the General Act that "the parties to the dispute shall be bound to accept such measures", that is to say, the provisional measures laid down by the Court. Article 41 of the Statute of the Court is silent upon this point. There are, however, authorities of the rank of the late Judge Hudson who have expressed the view that notwith-

standing this silence, interim measures indicated under Article 41 of the Statute are binding upon the parties; and it may well be that the point is no longer one open to doubt. So considered, Article 33 of the General Act is again spelling out the obligation which is upon a party to whom provisional measures are indicated under Article 41. That is to say, the party is bound to accept them. If this is not the correct view of Article 41, the express language of Article 33 of the General Act puts the matter beyond controversy in a case in which provisional measures are laid down under that Article.

If our submission is accepted that Article 41 of the Statute placed upon the Court and the parties the same duties or obligations as are spelled out in Article 33 (1) of the General Act, it is not necessary to rely upon Article 33 (1) as a separate basis for the Court's jurisdiction to lay down provisional measures. If, on the other hand, it is not accepted, Article 33 (1) is a special provision upon which the Court is entitled to base its jurisdiction in this case, and under which France would be bound to accept such measures.

The latter point, mainly that it would be one under which France would be bound to accept such measures, is one upon which the Australian Government is obliged to lay emphasis, bearing in mind the circumstances which have developed in this case. One can only conclude from the attitude expressed by the French Government in recent statements made on its behalf, from the letter addressed by it to this Court and from its failure to appear here, that it may not treat an indication of provisional or interim measures as binding on it. For this reason, the Australian Government would ask that the Court will see fit in any Order which it may make on provisional measures to recall France's obligation to accept them in the clear terms of the language of the last sentence of Article 33 (1) and to remind France of its obligation under Article 33 (3). This my Government would ask whether the Court decided to found its jurisdiction to make such Order on Article 33 of the General Act or Article 41 of the Statute.

I have submitted that Article 33 (1) of the General Act has no wider application than Article 41 of this Court's Statute. If this is not so, it is necessary to consider it separately, and this I now propose to do on the assumption that our main submission is not correct.

My first submission is that the events have occurred which in particular bring Article 33 into operation, that is to say, the question on which the parties differ arises out of acts on the point of being committed.

There are three distinct elements in this submission. First, the act is further atmospheric nuclear testing. Second, it is about to take place. Of this there can be no doubt. The French Government has been invited to undertake that testing will not take place. It has refused to give the undertaking. As appears from paragraph 18 of Australia's Application, the French Government on 2 May this year indicated that regardless of the protests made by Australia and other countries it did not envisage any modification or cancellation of its programme of nuclear testing as originally planned. This plan would extend testing at least until 1975. In these circumstances, it can hardly be supposed that the French Government could say that further testing is not about to take place. Third, the legality of this further testing is the question on which the Parties differ. Again, this is not a point on which there can any longer exist doubt. The French Government has been informed of the principal grounds on which the Government of Australia challenges the legality of the continuance of the tests. The French Government does not accept the validity of those grounds. It insists upon legality of its conduct. Hence the difference, the dispute between the Parties.

My second submission in support of the application of Article 33 is that the test to be applied to decide whether an act which is on the point of being com-

mitted should be prohibited by provisional measures is reflected in the third paragraph of Article 33. This test is whether the act is likely to react prejudicially upon the execution of the judicial decision. Strangely enough, the duty established by the first paragraph to indicate provisional measures is not, in the text, expressly related to the circumstances dealt with in the third paragraph. But it would run counter to the sense of the Article, read as a whole, to suggest that the identification of the acts to be made the subject of provisional measures under the first paragraph should be governed by criteria other than those set out in the third paragraph. Later in my submission I will deal with the tests applicable when the Court is acting pursuant to Article 41. It may indeed be thought that those tests are really no different in substance to those which I have submitted apply in relation to Article 33.

This, of course, is another reason for adopting our main submission in relation to Article 33. However at the moment my argument is confined to the application of Article 33 of the General Act.

My next contention on the application of this Article is that the conduct of further atmospheric tests would justify the Court laying down provisional measures under Article 33. Such tests would clearly be likely to react prejudicially upon the execution of the Court's judgment and they would certainly aggravate the dispute. At this point I must invite the Court to recall the terms in which the Government of Australia has framed its final conclusions in the Application. The Government of Australia 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.

The Court will, I am sure, bear with me if I repeat something which has already been said. The Attorney-General has dealt at some length with the effects of atmospheric nuclear testing and there is no need for me to repeat what he said. But one stark and terrible fact is that the effects of nuclear testing are irreversible. This is so even in relation to the closure of the high seas and all that is associated with it. Once a person has been prevented from going about his business on or over the high seas, that interference cannot be reversed. In some instances it may perhaps be remedied by the payment of damages. But where the activity is pursued for other than commercial reasons, damages are not to the point at all. An absolute right has been infringed which no pecuniary compensation can mend. Furthermore, the fact that in this part of the world relatively few ships and aircraft might be affected is not to the point. It is with the nature of the French action and its effect on rights that we are concerned.

International law does not refuse to encompass a dispute merely because the rights of a few are involved or because the case does not involve matters of great moment between States. The case of the derelict prau named *The Costa Rica Packet* (Moore's *International Arbitrations*, Vol. V, p. 4948), and the case of *Savarkar* (Scott, *Hague Court Reports* (1916), p. 276) the Indian who escaped from detention on a British ship which stopped at Marseilles en route to India, demonstrate the willingness of States and international tribunals to uphold the application of the principles of international law even to episodes relatively minor when compared with the interests at stake in the present proceedings.

It is therefore appropriate to assert the point of principle which is involved in even a temporary interference with two of the main elements of the freedom of the high seas, namely the right to navigate freely and the right to fly over the high seas. And if the point of principle is validly raised, there is equally substance in the view that the duty to respect the freedom of the seas is the duty to refrain from interference, not the right to interfere subject to payment of damages.

The third element in that freedom is, as already stated, freedom of fishing. Both in and around the areas declared by France in the past as dangerous, nationals of all States, Australia included, are entitled to take fish. While a temporary prevention of actual fishing may be no more—but equally no less—serious than a temporary inhibition of freedom to sail and fly, the serious effect to which radio-active fall-out may have upon the marine ecology cannot be ignored. Even if the precise extent of this effect should be a matter of controversy, then it is beyond the power of France to remedy or reverse that effect if judgment is given against it in these proceedings.

However, the infringement of the freedom of the seas is only one aspect of the Australian case.

*The Court rose at 5.55 p.m.*

## SECOND PUBLIC SITTING (22 V 73, 10 a.m.)

*Present:* [See sitting of 21 V 73.]

Mr. ELLICOTT: Mr. President and Members of the Court. When the Court adjourned last evening I was developing my submission that the threatened conduct of further atmospheric tests by the French Government would justify the Court laying down provisional measures, under Article 33. I developed that in relation to the infringement of the freedom of the high seas. However, the infringement of the freedom of the seas is only one aspect of the Australian case. A principal feature of the Australian complaint is that radio-active fall-out, occasioned by the French tests, has been deposited upon Australian soil and will be deposited there again by future tests. In the recent talks between French and Australian scientists the fact that previous French tests had caused fall-out over Australian territory and that the Australian population had received additional radiation as a result thereof was conceded by the French scientists.

There can be no doubt that if France continues its tests there will be further fall-out over Australia and further radiation received by its population. The hazard which that fall-out will pose to our population is not possible to foretell, not only because of the inherent uncertainties as to the precise effect of radiation, but also because France has refused to give any information as to the nature and yield of the devices which it proposes to explode and the years over which their tests will continue. There are, in our submission, four assumptions which the Court is entitled to and should make for the purposes of this Application for provisional measures:

1. That France's present intention is to continue testing in the atmosphere and that this testing may continue beyond 1975;
2. that those tests will lead to radio-active fall-out on and over Australian territory leading to additional radiation to the Australian population;
3. that the volume of fall-out and radiation could be greater than that resulting from previous tests;
4. that there is a real risk that serious harm could be suffered by Australia and its population as a result of further tests.

Now if, as I have submitted, Australia possesses, as aspects of its sovereignty, territorial integrity and the right to determine what acts shall take place within its territory for which it seeks judicial recognition and protection, one comes to the question whether the criteria for the application of Article 33 of the General Act are satisfied. These criteria are, as I have already submitted to the Court, those identified in Article 33 (3). Thus, one asks, is further atmospheric nuclear testing, which even France accepts will lead to some radio-active deposit on Australian soil, likely to react prejudicially upon the execution of the Court's decision? The answer is self-evidently in the affirmative.

Once the testing has taken place, the violation of Australia's territorial integrity is inevitable. And once the violation has occurred, it cannot be withdrawn. Similarly, once the testing has taken place, Australia's right to determine whether Australia and its people are to be exposed to the effects of artificial ionizing radiation is frustrated and impaired in an essential respect. Once frustrated and impaired it cannot be restored. Consequently, if the rights of the plaintiff State are adequately to be preserved, the need for a provisional measure prohibiting

French atmospheric tests in the period prior to judgment is inescapable. Further testing would anticipate a judgment of the Court in France's favour and thereby react prejudicially upon the execution of a judgment in Australia's favour. Clearly enough, to use the words of Article 33 (3), it would also aggravate the dispute.

And so I come to my final submission on the operation of Article 33. It is that once it has been shown that circumstances exist which warrant the laying-down of provisional measures, then the Court is under a positive duty to prescribe appropriate measures. It does not possess a discretion. The language of the first sentence of Article 33 is mandatory. The Court "shall lay down within the shortest possible time the provisional measures to be adopted".

Mr. President and Members of the Court: I now propose to present Australia's submissions as to the applicability of Article 41 of the Court's Statute. In dealing with Article 33, I have already indicated our first submission, namely that although Article 41 is not cast in mandatory terms, the power which it reposes in the Court is one which the Court is bound to exercise at the request of a party in appropriate circumstances. Thus, if one party to a dispute pending before the Court is about to commit an act which could prejudice the rights in issue of the other party, the Court, in exercise of its power under Article 41, is bound to consider the matter with a sense of urgency and to indicate the provisional measures, if any, which it considers appropriate to preserve the rights of the party likely to be injured.

Of course in this case, so far as the Court's action is concerned, this is not a point of any significance, for the Court is acting with a real sense of urgency. The significance of the point is in determining whether Article 33 of the General Act adds anything to what may be implicit in Article 41. We have submitted that it does not but that, if it does, Article 33 provides a sound basis in this case for the Court's jurisdiction to lay down provisional measures. Nevertheless, for some reason—perhaps the soundness of our submission as to the effect of Article 41—the Court might prefer to rest its power to indicate provisional measures upon Article 41. Therefore it may be of assistance to the Court to examine Article 41 and its relevance to this case.

For this purpose, I propose to refer in a little detail to the two cases in which the present Court has made Orders indicating interim measures of protection. They are the *Anglo-Iranian Oil Co.* case and the *Fisheries Jurisdiction* case.

It may be helpful if I divide my examination into two parts. In the first, I propose to identify the formal statement by the Court of the pre-conditions for the indication of interim measures. In the second, I shall summarize the effect of the arguments and evidence which were presented to the Court and accepted by it as meeting these conditions.

Turning first to the standard prescribed in the *Anglo-Iranian Oil Co.* case, one finds the following statement:

> "Whereas the object of interim measures of protection provided for in the Statute is to preserve the respective rights of the Parties pending the decision of the Court, and whereas... it follows that the Court must be concerned to preserve by such measures the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent." (*I.C.J. Reports 1951*, p. 93.)

The test employed in the *Fisheries Jurisdiction* case (1972) was expressed in the following terms:

> "21. Whereas the right of the Court to indicate provisional measures as provided for in 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 judgment should not be anticipated by reason of any initiative regarding the measures which are in issue;

22. Whereas the immediate implementation by Iceland of its Regulations would, by anticipating the Court's judgment, prejudice the rights claimed by the United Kingdom and affect the possibility of their full restoration in the event of a judgment in its favour." (*I.C.J. Reports 1972*, p. 16.)

In short, one finds in the *Anglo-Iranian Oil Co.* case that provisional measures are intended to preserve the rights which may be subsequently adjudged by the Court to belong to either party. In the *Fisheries Jurisdiction* case there is added the consideration that irreparable prejudice should not be caused to the rights which are the subject of the dispute. The word "irreparable" is not repeated in the second paragraph of the Court's statement, and the impact of that qualification is significantly diminished when the Court speaks simply of certain Icelandic conduct that would "affect the possibility of their full restoration [that is the full restoration of the United Kingdom's fishing rights] in the event of a judgment in its favour".

In order to ascertain more exactly the requirements laid down by the Court, it is now necessary to turn to the second part of this examination, a consideration of the material and arguments which were actually deployed by the applicants in these two cases.

In the *Anglo-Iranian Oil Co.* case the United Kingdom, in effect, requested the Court to indicate that the Iranian Government should continue to permit the Anglo-Iranian Oil Company to carry on its operations as in the period before the enactment of the nationalization law. The Court, in its Order of 5 July 1951, met this request and added to it a suggestion that the Parties should by agreement establish a Board of Supervision which would, amongst other things, arrange that the revenue of the Company in excess of its needs for the maintenance of operations should be paid to a stakeholder.

It is, perhaps, important to note that the standard which the British Government set itself to meet was that laid down by the Permanent Court in the case of the *Electricity Company of Sofia and Bulgaria* in these words:

> "The parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute." (*P.C.I.J., Series A/B, No. 79*, p. 199.)

It is also important to note in passing that the text adopted in that case reflects the language of Article 33 (3) of the General Act to which we have already referred.

An analysis of the evidence and argument put forward by the British Government will show, it is submitted, that there was nothing in the Iranian action which could not be remedied in pecuniary terms. Nonetheless, and here is the point of importance, the Court found in the prejudice relied upon by the British Government a sufficient basis for an indication of provisional measures which, in effect, called upon the Iranian Government to suspend entirely the application of its Nationalization Law until after the Court's judgment.

The Court's Order in the *Fisheries Jurisdiction* case is open to the same analysis. Again the evidence and argument put forward on behalf of the United

Kingdom and the Federal Republic of Germany will show that there was really nothing in the items of prejudice listed by the United Kingdom and Germany which could not have been remedied by the payment of damages. Yet, and here again is the significant point, the Court did not consider that this ultimate possibility of remedying the wrong by damages deprived the consequences which would have been suffered by the applicants of the quality of being "irreparable prejudice" in the sense attached to that term by the Court.

This analysis, which of course does not cover all judicial decisions on this subject may be summarized as follows: in the *Anglo-Iranian Oil Co.* case the Court considered that in exercise of its jurisdiction under Article 41, the Court must be concerned to preserve the rights which it may subsequently adjudge to belong to either party. In the *Fisheries Jurisdiction* case the Court thought that Article 41 presupposed two things: first that irreparable prejudice should not be caused to rights which are the subject of dispute in legal proceedings; and second that the Court's judgment should not be anticipated by reason of any initiative regarding the Icelandic measures which were an issue there. In neither case did the Court decline to lay down interim measures even though it appears that the prejudice threatened might have been compensated by damages. What the Court was concerned about was the prejudice to the rights of the Parties which, because they could not be fully restored in the event of a favourable judgment for the plaintiff, appears to have been regarded in the *Fisheries Jurisdiction* case as "irreparable".

In the *Fisheries Jurisdiction* case the immediate implementation of Iceland's regulations by anticipating the Court's judgment would prejudice the rights claimed by the United Kingdom and the Federal Republic of Germany and affect the possibility of their full restoration in the event of a judgment in their favour.

In the *Electricity Company of Sofia and Bulgaria* case the Court regarded Article 41 of the Statute of the Permanent Court as applying a universally accepted proposition that parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given in the case and should not allow any step which might aggravate or extend this dispute.

Mr. President, in the light of this analysis it is submitted that the Court in the exercise of its powers under Article 41 should indicate provisional measures whenever it is satisfied that acts threatened by one party will anticipate the Court's judgment, prejudice the rights of another party and affect the possibility of their full restoration in the event of a favourable judgment. It is submitted that this formulation of the test adequately expresses the intention behind Article 41 and it is generally consistent with the tests adopted by the Permanent Court and in Article 33 of the General Act. It is clear that on occasions the words "irreparable prejudice" have been used by the Court as part of the test. However, those words do not mean the same as not able to be compensated by damages. An analysis of the two cases I have referred to shows this. The words "irreparable prejudice" are used in relation to rights and so understood are consistent with the formulation of the test I have submitted.

It is now appropriate for me to return once more to the prejudice which Australia would suffer if France were to continue further atmospheric nuclear testing pending the judgment of the Court in this case. I have already developed the point at some length in relation to my submissions regarding Article 33. What I said there is no less applicable in the context of Article 41, whether it bears the construction I sought to place upon it or not. Clearly the Court's judgment would be anticipated. The rights of Australia would be prejudiced

in the manner I have already discussed and, because of the nature of radiation, it would be impossible to restore Australia's rights in the event of a favourable judgment.

However, there are certain aspects which it is reasonable to recall briefly. The first is the effect of radio-active fall-out on Australian soil. One matter in issue here is Australia's right to territorial integrity and her right absolutely to determine for herself what substances enter her territory. It is of course conceivable that a State, when it violates the territory of another, may make suitable satisfaction by payment of damages. But that cannot be the case where one State so to speak scatters over the whole surface of another a fine and irremovable dust of which the consequences cannot be foretold. Such a situation falls as fully within the Court's conception of "irreparable" or "irremediable" prejudice as it is possible to go. This would be so even if the radio-active fall-out is innocent. When it is noxious in any degree whatsoever, the Court is confronted by an *a fortiori* case.

This approach to the matter appears even more fully justified when it is borne in mind that the Court is not here faced with an inherently dangerous activity pursued for the general benefit of mankind. This is not a case where a State is experimenting with potentially dangerous chemicals in order, let us say, to develop a universally valuable pesticide or fertilizer. It is not even a case of a State using nuclear devices for peaceful purposes. The Court has before it a situation in which the testing is taking place for selfish and limited purposes.

It is for this reason that I have not thought it necessary to examine before the Court the situations in which a State might under existing law have to accept some intrusion upon its territorial sovereignty as the corollary of the lawful exercise by a neighbour of rights arising from the sovereignty of the latter. I have not pursued this examination because it is totally irrelevant in this case. This is, no doubt, so apparent to the Court that I need say no more about it.

To conclude this part of my address I would simply submit that, for the reasons I have given, the Court clearly has competence acting under Article 33 (1) of the General Act or Article 41 of the Statute to lay down provisional measures in this case and that the grounds for doing so are sufficiently established. I also submit that the appropriate provisional measure is that set out at the end of Australia's request, namely that the French Government should desist from any further atmospheric nuclear tests pending the judgment of the Court in this case.

Mr. President and Members of the Court, I want now to deal with the jurisdiction of the Court to hear and determine this case.

Strictly speaking, at this stage of the case the question of the Court's jurisdiction is not really in issue. There has, as the Court will recall, even been a case, the *Anglo-Iranian Oil Co.* case, in which at a stage following the indication of interim measures, the Court held that it did not possess jurisdiction to proceed to a consideration of the merits. This case illustrates the amplitude of the power which the Court possesses for the indication of provisional measures without determining its ultimate jurisdiction on the merits.

An even stronger example is found in the *Interhandel* case. There the Court considered a request for interim measures without examining the question of jurisdiction, notwithstanding the fact that the defendant State raised at that stage a preliminary objection and sought to make an issue of the Court's competence. It may be noted that the Court reached this decision even though there was, on one view, a manifest absence of jurisdiction on the merits.

In the *Fisheries Jurisdiction* case the Court for the first time expressly stated the test which it would apply. It said:

> "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, yet it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest." (*I.C.J. Reports 1972*, p. 15.)

The Court elaborated upon this condition by saying subsequently that the relevant instrument in that case appeared "prima facie to afford a possible basis on which the jurisdiction of the Court might be defined", which of course is another way, with respect, of saying the same thing, i.e., the absence of jurisdiction on the merits is not manifest.

The Court thus expressed its views in that case in two ways, and those I have just elaborated. Australia has approached this case on the basis that the standard to be applied is the same as that employed in the *Fisheries Jurisdiction* case. It has done so for two reasons. One is that it is natural that the Court should adhere to a formula and a standard crystallized, stated and applied less than 12 months ago.

The other reason is that if the Court were to apply a higher standard, which would of course involve a distinct element of novelty and in effect a revision of the Court's earlier attitude, such a change would obscure the line between the process of indicating provisional measures of protection and the more substantial task of determining whether the Court actually possesses jurisdiction. This is a distinction which the Court has hitherto clearly maintained, and it has repeatedly so affirmed. In the *Anglo-Iranian Oil Co.* case the Court said that a decision given under Article 41 of the Statute: "In no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the respondent to submit argument against such jurisdiction" (*I.C.J. Reports 1951*, p. 93).

The same point was made six years later in the *Interhandel* case. It was repeated once more in the *Fisheries Jurisdiction* case. The jurisprudence of the Court on this matter is constant; and it is consistent with principle. It is moreover a reflection of the requirements of practice. The procedure prescribed in the Rules of the Court does not contemplate the development of extended and possibly complex argument on the question of jurisdiction. Thus there is nothing in paragraph 1 of Article 66 which requires the applicant State, when formulating its request, to develop its case on jurisdiction in any detail. The applicant is directed only to specify the case to which the request relates, the rights to be protected and the provisional measures of which the indication is proposed. The request is the only written pleading involved in provisional measures proceedings. The proceedings are identified in paragraph 2 of Article 66 as "a matter of urgency". It would therefore be inappropriate for the applicant to enter into a detailed argument on jurisdiction. Correspondingly, it would be inappropriate for the respondent State to raise in its oral reply fundamental issues of jurisdiction which could affect the whole course of the case and which would, were the established rule not what it is, call for immediate response.

Mr. President, these practical considerations which justify the rule established by the Court are particularly relevant when one considers the effect of the French Note of 16 May 1973 addressed to the Court and the annex attached to it. The appearance in the case of these texts, when the respondent chooses not to appear, is entirely beyond the contemplation of the Statute or the Rules of Court. It ought indeed to be entirely disregarded.

However, the fact remains that the Court has received from the French Government a communication which bears upon the Court's jurisdiction and

what the communication says may conceivably have some effect upon the Court. In those circumstances, what is the right course for Australia to pursue?

Naturally, the Government of Australia recalls at this moment the course taken in the *Fisheries Jurisdiction* case. In that case, a letter from the Government of Iceland dated 29 May 1972 had been received by the Court before the British Government filed its request for the indication of provisional measures. This letter, the essential terms of which are set out in paragraph 10 of the Court's Judgment on its jurisdiction defined very briefly Iceland's attitude to the Court's jurisdiction. In his speech on provisional measures, the Attorney-General of the United Kingdom did not enter into any detailed consideration of the question of jurisdiction and did not on that occasion attempt to answer the contentions of the Government of Iceland. The question of jurisdiction was made the subject of a separate stage of the proceedings when, on 18 April 1972, the Court ordered the filing of written pleadings by the parties on the question of jurisdiction and in due course gave Judgment on 2 February 1973 limited to this point.

In the present case, the French Government has chosen to follow the precedent set by Iceland in that case. In that case the United Kingdom invoked only one ground of jurisdiction, to which the letter from Iceland briefly referred. In this case, the Australian Government invokes two independent grounds. One rests on Article 36 (1) of the Statute of the Court, read with the General Act, and Article 37 of the Statute of the Court; the other rests on Article 36 (2) of the Statute, read together with the French declaration of 20 May 1966. The letter of the French Government of 16 May 1973 rejects both these grounds of jurisdiction. The rejection of the General Act is developed at some length in a memorandum annex. The rejection of the Court's jurisdiction under Article 36 (2) is based, so it would appear, upon the invocation of one of the reservations appended to the French declaration. This reservation excluded the jurisdiction of the Court in the case of disputes concerning activities relating to national defence.

Now, having regard to the Court's practice and jurisprudence on this matter which I have already referred to, I submit that the Court will not expect me to deal in the fullest detail with the question of jurisdiction and therefore with all the points made in the French Note and the annex thereto. This is a matter for a later stage in the case. But, as already indicated, the Court's practice has consistently been not to require full examination of the Court's jurisdiction at the provisional measures stage. I shall, therefore, limit myself at the present time to a consideration of the Court's jurisdiction aimed at showing that its absence is not manifest. It is significant that in the French Note itself manifest absence of jurisdiction appears to be the reason suggested by the French Government for not appearing here today.

Perhaps the strongest and most effective demonstration that the absence of the Court's jurisdiction is not manifest is that the French Government has found it necessary to devote an annex of no less than 18 pages to the development of its contentions that the Court lacks jurisdiction on just one of the two grounds invoked by Australia, namely the General Act. This annex contains some 20 separate points to each of which the Government of Australia is in a position to provide a convincing answer. These will, at the proper stage and in the proper manner, be given. But when a defendant government finds it necessary to raise 20 points in respect of one main ground of jurisdiction alone, it is obvious that there is much to debate; and in these circumstances it is impossible to say that the Court is manifestly without jurisdiction.

But fair though such an answer to the French Note and appendix might be, I do not see it as giving to the Court the assistance which at this stage of the

case it may properly regard itself as entitled to expect from the Australian Government, and I shall have to go into some detail.

I have already referred to the two bases of jurisdiction which are expressly invoked in paragraph 50 of the Application. For convenience, I shall call them respectively "the General Act" and "the Optional Clause". They are independent of each other and each is self-sustaining.

Before going further, I might perhaps say a word about the effect of the co-existence of these two separate and independent sources of jurisdiction. The point is well established—but bears repetition—that when two sources of jurisdiction exist at the same time, each may be employed. Neither weakens the other.

The Permanent Court in a well-known passage in the *Electricity Company of Sofia and Bulgaria* case stated:

> "... 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 ultimate result that no jurisdiction would remain". (*P.C.I.J., Series A/B, No. 77*, at p. 76.)

And if more needed to be said on the question, it would suffice to refer to the words of Judge Basdevant in the case of the *Norwegian Loans*. After quoting the passage from the *Electricity Company of Sofia and Bulgaria* case which I have just read, Judge Basdevant continued:

> "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 as between France and Norway. The clause is not sufficient to set aside the juridical 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. 75-76.)

Towards the end of its annex the French Government appears to be suggesting that the clear terms of the General Act have in some way been over-ridden by the reservation of the French declaration under the Optional Clause. Reference is made in support of this view to Article 103 of the Charter of the United Nations. This provides that: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." From this provision the French annex concludes that the obligations assumed under the head of Article 36 of the Statute must therefore prevail over those of the 1928 Agreement. However no reason whatever is given in support of this conclusion.

The explanation of why no reasoning is provided is, I would suggest, that there are no reasons to be given. There are three principal grounds on which it is possible to meet the contention that the French Declaration of 1966 constitutes an obligation under the Charter which must override the General Act.

The first is that, properly understood, there is no conflict at all. The two instruments can clearly stand together: they are compatible ways of dealing with similar subject-matters.

The second reason is that it is not correct to suggest, as the French annex

does by implication, that the obligations assumed by States which have made declarations under the Optional Clause have the same status as the Statute of the Court itself. It is, of course, quite true that the Statute is, under Article 92, an integral part of the Charter. But it does not follow that the relationships created between States which make declarations under Article 36 (2) of the Statute are themselves to be assimilated to obligations under the Charter.

In its Judgment of 26 November 1957 on the preliminary objections in the case concerning *Right of Passage over Indian Territory* the Court considered the nature of the relationship created by such declarations. From the way in which the Court dealt with the second preliminary objection it is evident that the Court regarded the relationship between parties to the Optional Clause as a contractual relationship arising from the fact that they have both made declarations within the framework of the Optional Clause. Thus, the Court said:

> "The Court considers that, by the deposit of its Declaration of Acceptance with the Secretary-General, the accepting State becomes a Party to the system of the Optional Clause in relation to the other declarant States, with all the rights and obligations deriving from Article 36. The contractual relation between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established, '*ipso facto* and without special agreement', by the fact of the making of the Declaration." (*I.C.J. Reports 1957*, p. 146.)

A few lines later the Court referred to the consensual bond, which is the basis of the Optional Clause.

Starting, then, from the position thus acknowledged by the Court, that the filing of a declaration under the Optional Clause establishes a contractual relationship, a consensual bond, with the other declarant, one asks how that relationship can be identical with the relationship existing under the Charter and the Statute. Clearly, it is not a Charter relationship. Nor is it the relationship created by the Statute, for all Members of the United Nations are bound by that relationship, while only some are bound by the Optional Clause. To say that the relationship exists within the framework of the Statute—which is the only logical alternative—is not to say that the obligation thus established is an obligation under the Charter. The obligation under the Optional Clause declaration is not an obligation under the Charter, because all the obligations under the Charter and the Statute, as such, are already spelled out and are equal for all parties. Obligations under the Optional Clause are extra commitments which originate from outside and, it should be noted, are in some cases even assumed by States who are not members of the United Nations and are not bound by the Charter. This, for example, was the case with Liechtenstein in the *Nottebohm* case.

So much then for the second reason why the French declaration under the Optional Clause cannot affect the General Act. The Optional Clause declaration is not, we submit, a Charter obligation. The third reason is that even if Optional Clause obligations could be regarded as obligations under the Charter, Article 103 is concerned with conflicts of obligations, not of rights—conflicts of obligations, not of rights. When the Charter referred to obligations it had in mind commitments or burdens. The function of Article 103 was to secure the release of Members from commitments which would require the Member to do something incompatible with the burdens or commitments by which it was bound under the Charter.

So the French proposition may be tested in the following way: if Australia owes France an obligation under one instrument and the Charter prescribes a

heavier obligation, then the Charter will prevail. What then is the obligation which Australia owes France under the General Act? It is the obligation to submit to the jurisdiction of the Court under the General Act if France invokes it. What obligation has Australia accepted under the Optional Clause? It is to accept the jurisdiction of the Court as a defendant if France chooses to invoke it. It is only heavier if Australia's reservations under the Optional Clause are less restrictive than those under the General Act. To this question the content of the French reservations is quite irrelevant.

Now, one may ask, does the French reservation become any more relevant when the matter is approached the other way round? What obligation does France owe Australia under the General Act? It is the obligation to submit to the jurisdiction of the Court under the General Act if Australia invokes it. What obligation has France accepted under the Optional Clause? It is to accept the jurisdiction of the Court as defendant if Australia chooses to invoke it. It is only heavier if France's reservations under the Optional Clause are less restrictive than those attached by France to its acceptance of the General Act. But in this case the reservation upon which France appears to be relying—the reservation of national defence—is not less restrictive but more restrictive than its reservation under the General Act. However, once again there is no conflict of obligations.

In short, the French contention on this point is, we submit with respect, specious. I have only troubled to scrutinize it so closely because close analysis is required in order to expose its defects. And, we would submit, Mr. President, close analysis of each of the other French propositions in the annex as well as the letter would lead to the same result.

Nonetheless, with your permission, I ought perhaps to examine the other argument used in the French annex for the purpose of suggesting that the General Act is over-ridden by the French reservation to the Optional Clause. This is stated simply as follows: if the argument based on Article 103 is not correct "one is led to the ordinary problem of a later treaty bearing on the same subject as a previous treaty in the relations between the same countries".

Indeed one is, Mr. President. But the identification of a problem is not the same thing as solving it. The French annex is somewhat thrifty in the demonstration of this point, and the question which it raises is a large one.

What does it amount to? It is really this: when two or more States conclude an agreement which contains provisions for the judicial settlement of disputes by the International Court of Justice, the terms of that agreement may be unilaterally modified by one party, in a manner totally inconsistent with the terms of that treaty, simply by changing the terms of its acceptance of the Optional Clause.

Mr. President, this is a curious notion. Let us look back at an earlier paragraph in the French annex. The Court's attention is there drawn to the strict terms of the General Act regarding denunciation and reservation. The Court will remember that the French Government notes with pride the precision with which it filed its own additional reservation to the General Act, just three days before the correct deadline in 1939. The Court will recall, too, how the deposit by the Australian Government of a reservation outside the stated time-limit is branded as a breach of the General Act so material as, in effect—and here I have paraphrased the language of Article 60 (2) *(b)* of the Vienna Convention—to entitle France to invoke it as a ground for suspending the operation of the General Act between herself and Australia. The characterization of the Australian reservation as a breach is clearly wrong; and the assessment of its consequences is manifestly an exaggeration. But the point that really matters in the

present context is the emphasis which at this point in its Annex the French Government is placing upon the strictness of the provisions in the General Act regarding termination and reservations.

The relevant provisions are in Part IV of the General Act. Article 38 deals with accession to the Act. Article 39 (1), which I need not read, permits parties to make their acceptances conditional upon the reservations exhaustively enumerated in that Article. The paragraph ends with the provision that those reservations must be indicated at the time of accession. An important distinction is then made in the Act between the procedures for the increase and the reduction of obligations under accessions.

Article 40 provides that a party whose accession has been only partial, or was made subject to reservations, may at any moment, by means of a simple declaration, either extend the scope of his accession or abandon all or part of his reservations. Under Article 44 (2) such a declaration shall become effective only from the ninetieth day following the date of their receipt by the Secretary-General of the League of Nations. Thus we have a relatively simple procedure for increasing the scope of jurisdictional obligations at any time.

But when it comes to reducing the scope of such obligations, the requirements are much more strict. This matter is dealt with in Article 45, which covers denunciation. Paragraph 4 of this Article states "a denunciation may be partial only, or may consist in notification of reservations not previously made". *Denunciation can only become effective at the end of the successive periods* of five years, provided that they have been filed at least six months before the expiration of the current period.

Here then the Court has a treaty which contains specific, precise and strict requirements regarding the modification of the obligations of the Parties. Yet the French Government now suggests that all those express provisions may be completely set aside and rendered meaningless by a unilateral declaration capable of being made at any time under the Optional Clause of the Statute of the Court. The proposition just does not seem reasonable.

There is, moreover, another point which is highly relevant. The General Act was drawn up against the background of the Statute of the Permanent Court. It was clearly intended as an additional or supplementary instrument for recourse to the Court. In Article 29 (1) and (2) of the General Act there will be found a clear acknowledgement that where a special procedure is laid down in other conventions in force, the dispute shall be settled in conformity with the provisions of the Conventions. But the General Act certainly did not contemplate that the Statute of the Court itself would be regarded as another Convention capable of ousting the procedure of the General Act. The General Act is replete with references to the Statute of the Court—Articles 30, 33, 34 *(b)*, 37 (1) and 41. They all show that the parties to the General Act were aware at the time of its conclusion of the existence of the Statute of the Court and, accordingly, of the scope for reservations under the Optional Clause. But they did not for a moment conceive that the Optional Clause system could be used to undermine the effectiveness of the obligations contracted under the General Act.

Further confirmation of the total independence of the two spheres of jurisdiction is itself provided by the conduct of France. The French annex informs the Court that France made a declaration under the Optional Clause and acceded to the General Act at the same time. Why should it have accepted both instruments if its contention is correct that the General Act is limited by the Optional Clause? If the answer is that the General Act covers matters other than judicial settlement, then one asks why was France's accession to the General Act, as it could have been, not limited to Chapters I and III, dealing with

conciliation and arbitration, leaving judicial settlement aside to the Statute of the Court. In truth, France, in common with the other States which acceded to the General Act, did so with its eyes wide open and in full appreciation of the standing of the General Act as an instrument independently conferring jurisdiction upon the Court.

Moreover, as a matter of fact, it is not a correct representation of the position simply to say, as the French Annex does (at II, p. 353):

> "... France, in 1931, it was even two articles of the same law which authorized the ratification of the acceptance of the General Act and of the optional clause of Article 36 (2). The links between the two modes of submitting disputes for pacific settlement were in this way particularly stressed."

Examination of the *Journal officiel de la République française* shows that, as stated, a law was passed on 8 April 1931 authorizing the President of the Republic, first, to accede to the General Act and second, to ratify the declaration under the Optional Clause which had been deposited by France on 19 September 1929, 16 months previously. Further examination of the *Journal*, however, shows that the General Act was separately adhered to in Geneva on 21 May 1931 and was separately promulgated by a Presidential Decree dated 15 July 1931, which appeared in the *Journal officiel* on 26 April 1931.

It is worth observing also that in the eyes of Mr. Aristide Briand, the French Minister for Foreign Affairs, the accession to the General Act possessed an independent significance of its own, for this is what he said in his letter of 10 April 1931 to the Secretary-General of the League of Nations:

> "I have the honour to inform you that, after the Chamber of Deputies, the Senate at its meeting of March 5th unanimously approved the draft law authorising the President of the French Republic to accede to the General Act.
>
> The French Government is now in a position to deposit its definitive accession with the Secretariat of the League of Nations. However, taking account of the wishes of Parliament, and in order to emphasise the importance French opinion attaches to this Act, I intend to deposit an accession myself during the next session of the Council of the League."

These points do not bear out the assertion in the annex of the "close links" between France's accession to the General Act and its declaration under the Optional Clause. The two texts were separately prepared, separately deposited and separately promulgated. And when the General Act was deposited it was seen as of such importance as to warrant personal action by the Foreign Minister.

A further item of French conduct demonstrating the independence of the General Act from the Optional Clause declaration is the following:

The French annex recalls that in July 1939 France deposited a reservation to the General Act in full compliance with the requirements of Article 45. Why did it do that? According to the French Government, it would have been sufficient if it had simply added a reservation to its acceptance of the Optional Clause. The very fact that the French Government pursued the course it did is indicative of its own view that the General Act was quite independent of the Optional Clause and that it fell to be modified by different procedures.

What then is left to support the view that a reservation of the Optional Clause in 1966 has a totally different effect to a reservation made under the Optional Clause in 1939? Only, one must presume, the suggestion that Article 103 of the Charter has some magical effect. This, Mr. President, for the reasons which I have already given, I would submit that it has not.

But it is right to probe the French contention somewhat further. If it is correct (as France suggests) to regard declarations under the Optional Clause as capable of modifying pre-existing undertakings regarding judicial settlement, France has in effect discovered a device for unilaterally releasing itself at any time from treaty commitments to judicial settlement. She can solemnly accept today a clause for compulsory settlement of disputes in an agreement in which the parties may regard such a clause as a vital element. Tomorrow, she can—with, so she would claim, full propriety—deposit a new reservation under the Optional Clause excluding from the Court's jurisdiction the category of disputes covered by that obligation assumed from the previous day. Her invention, in short, can go a very long way.

Now, the French Government has foreseen the criticism to which its thesis is thus exposed. It has sought to cover the situation by this observation (at **II**, p. 356, of the annex) that "the 1928 Act [is not an agreement including, for disputes relating to the application of its terms], a clause conferring jurisdiction on the Court ... but a text of which the sole object is the peaceful settlement of disputes, and in particular judicial settlement". As a statement of the difference between the General Act and other treaties this is an unexceptional statement. But in truth it says nothing which is relevant to the problem. In particular, it does not say why the distinction which it draws between the two categories of treaties should mean that what can be done to the General Act cannot be done to clauses for judicial settlement in other treaties. After all, the mechanics of the operation are identical in both situations.

When the French doctrine is applied to the full range of treaties which it may affect, the impact is quite startling. The *I.C.J. Yearbook 1971-1972* of this Court lists no less than 11 bilateral treaties and 28 multilateral treaties to which France is a party and which, according to the *I.C.J. Yearbook* (pp. 86-98), contain clauses relating to the jurisdiction of the Court in contentious cases.

There is another strange element in the French thesis, which adds to its fallaciousness. This is that it can operate only where the party against whom France seeks to invoke its Optional Clause reservation has itself also made a declaration under the Optional Clause. Thus the State which seeks to demonstrate in the fullest public manner its participation in the judicial life of the international community by accepting both the General Act and the Optional Clause is penalized. But the State which accepts only the General Act is not so penalized. It just does not make sense.

Perhaps I may summarize my argument on this point by putting it in a slightly different way. Paragraph 1 and paragraph 2 of Article 36 contemplate two entirely distinct systems of establishing the jurisdiction of the Court. Paragraph 2 creates the Optional Clause system. The two systems were never intended to affect each other; and in all their half-century of operation they never have.

Mr. President and Members of the Court, this brings me to the end of the consideration of but one pair of points raised by the French annex. I have been obliged to do so at length because if these arguments are to be tackled at all their refutation inescapably calls for some elaboration. Even so, I have dealt with them superficially and must reserve the right of the Government of Australia to deal with them more fully at a later stage in the proceedings.

The Court will recall that my argument so far has been devoted to the elaboration of points connected with one basic contention. This is that the existence of more than one route of access to the Court does not affect the others. Each is independent. The fact that Australia and France are linked by both the General Act and the Optional Clause means that the Court may look first at one and then at the other as separate and distinct bases of jurisdiction. It does

not mean that the vices of the French acceptance of the Optional Clause can sully the virtues of the French acceptance of the General Act.

It remains for me now, Mr. President, to examine in more detail each of the two bases of jurisdiction invoked by the Australian Government. It will be convenient first to make my submissions regarding the application of Article 36 (2) and then turn to the operation of the General Act.

By way of preface, I should observe that the French reservation is either one the content of which is capable of objective examination and assessment or it is not. To take the consequence of the latter case first, if the content is not capable of objective determination, the Court is in the presence of a so-called "automatic" or self-judging reservation. In that case I shall wish to submit that such a reservation is invalid because it runs counter to the whole policy of the Statute; should be severed from the rest of the French Declaration, and cannot therefore in any circumstances be invoked. To this alternative I shall return.

For the moment I shall pursue the first, that the French reservation is one with an objective content. In that case I contend that the French Note of 16 May 1973 fails effectively to invoke it. This is because where the reservation is one which is dependent upon the objective determination by the Court that certain conditions are satisfied, some attempt must be made by the Party relying on the reservation to justify the use of it. In the present case the French Government says in its Note no more than this:

> "Now it cannot be contested that the French Nuclear Tests in the Pacific which the Australian Government considers to be unlawful form part of a programme of nuclear weapon development and therefore constitute one of those activities connected with national defence which the French Declaration of 1966 intended to exclude."

The question must be asked, Mr. President, whether this paragraph provides the Court with a sufficient basis on which to decide whether nuclear weapon development falls within the concept of "national defence". One possibility, of course, is that the concept of "national defence" is so wide and so dependent upon subjective assessment of the State invoking it that it is beyond the scope of judicial review. However if that is the case, one falls once more into the area of self-judging reservations which I have reserved for consideration in a moment.

On the basis that the conditions prescribed in the French reservation are not to be subjectively decided—to use the language of the *Asylum* case, are not to be "unilaterally qualified"—then one must seek some objective content to the expression "national defence". Today, what can national defence mean? Presumably it must have a meaning related to Article 41 of the Charter:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against [a Member of the United Nations]."

If national defence does not relate to this, to what does it relate? The Court is not told and the Court should not have to speculate. If, on the other hand, national defence does relate to Article 51, the Court must be satisfied that this nuclear weapon development can reasonably and lawfully have some connection with national defence. This involves consideration of a number of factors. One is whether the nuclear weapons, the kind which France is developing, have a role to play in defence. Or are they merely aggressive weapons? And some will no doubt question whether their use even in defence is lawful and whether, therefore, the Court can sanction their development in the context of so-called national defence. Again, some will ask whether it is possible to assess the

relevance of national defence without some identification of the State against whom the State is defending itself. Is France preparing to defend itself against Sweden or the Lebanon? Or against the United States or the Soviet Union? If she denies the possibility of attack from any quarter, then how can she speak of defence, and can she in this day and age legitimately contemplate the breach by other Members of the United Nations of their obligations under Article 2 (4) of the Charter? After all, was it not France which was a party to the proceedings in the *Lac Lanoux* case, in which the Tribunal, under the distinguished presidency of Judge Petrén, observed that States were not entitled to rights in contemplation of a breach by other States of their obligations?

There remains yet a further basis upon which the effectiveness of the reservation to deny the Court's jurisdiction to determine this case is open to challenge. Australia contends that atmospheric nuclear testing is illegal under customary international law. The reservation would not, we submit, extend to activities which are illegal under that law. There is further, at least, committed to the Court the question whether it should construe the reservation as extending so far and, further, the question whether, if it does, the reservation is a valid one.

Mr. President, these questions are all pertinent to the determination of whether France has satisfied the conditions of her own reservation. And France has not provided the Court with any material to assist it in a determination of those questions in her favour. Nor, having regard to the highly political character of these questions, is it appropriate for the Court to answer them in her absence and without her assistance.

This being so I challenge the assumption, so readily made in the French Note, that the case for the application of its reservation is self-evident. Our submission is that in any event the mere existence of the French reservation, upon the assumption that it has an objectively definable content, cannot be taken as creating a situation in which the Court is now manifestly without jurisdiction under Article 36 (2).

And so I pass to the other possibility—that the French reservation must be treated as being totally subjective or, in other words, self-judging or automatic. In this event, there are two points to make.

The first starts from the fact that a self-judging or automatic reservation is not self-operative. It has to be invoked. If it is not invoked, then the prima facie jurisdiction, which the Court possesses under the declaration, remains undisturbed. The Court is no more entitled to exercise the option of a State to invoke a reservation than it is, for example, to modify an application by assuming it to be based on a ground of jurisdiction not actually asserted. The only issue which needs to be discussed at this juncture, therefore, is whether the French Note of 16 May amounts to a valid invocation of a relevant reservation.

In this connection, I would submit that the French Note is not a receivable act of which the Court can take formal notice. There is no provision in the Statute, or the Rules, which contemplates recourse to a reservation in this way. The only way in which a party to the optional clause can invoke a reservation is by appearance and specific appeal to the reservation.

Thus, in the *Interhandel* case, when the United States sought to invoke its so-called automatic or self-judging reservation, it appeared in response to the Court's decision to hold a hearing on interim measures and then formally invoked its reservation. France has not done this. She has not appeared and she has denied the jurisdiction of the Court. In terms of general principles of civil procedure, which must underlie and supplement the Rules of the Court, her action is a nullity. And, this being so, the Court cannot treat any reservation, whatever its content, as having been invoked. The prima facie jurisdiction under

Article 36 (2) has not been displaced. For the Court to adopt any other procedure is to accord to a State which breaches the Court's procedure the same protection as one which abides by it. The application of the notion of equality in this way would make a mockery of the Court's system of procedure.

The second submission I wish to make on the assumption that the French reservation is an automatic one, and on the further assumption—which I do not concede—that the reservation has been validly invoked, is that the reservation is void as being contrary to the Statute or as being too uncertain.

I may dispose of the point of uncertainty first. For the relevance and operation of the concept of uncertainty, it is unnecessary for me to go beyond the passages in the annex to the French Note. Did not the French Government there criticize an Australian reservation to the General Act on the ground of uncertainty? Compared with the uncertainty of the expression "national defence", the Australian reservation is crystal clear. If the content of the French reservation is not to be exposed to objective assessment, then, in truth, its content is totally uncertain and can play no part in the determination of legal obligation.

I return to my contention that the French reservation, as a self-judging reservation, is void as being contrary to the fundamental policy of the Statute of the Court. It is sufficient for me to refer to the considerations set out by Judge Sir Hersch Lauterpacht in his well-known separate opinion in the *Norwegian Loans* case and his dissenting opinion in the *Interhandel* case, as well as the opinions of Judges Sir Percy Spender, Klaestad and Armand-Ugon in the latter case. In essence, these considerations amount to saying that where it is for the Court to judge upon questions relating to its own jurisdiction, any claim by a party to deprive the Court of this power after the application in a case has been filed violates the Statute of the Court. And, as the Court will recall, the Judges whose opinions I have mentioned have divided equally upon the question of severability of an invalid reservation.

So the question is open, and has never been examined, whether a reservation of the type now under consideration should be given any scope whatever. The reasons which have been given by those judges of the Court who considered that a subjective reservation of domestic jurisdiction could be severed from the declarations under the Optional Clause do not apply here, because the French declaration antedated the national defence reservation by many years. The latter was only added in 1966. The two texts—of the declaration and the reservation—are thus clearly independent of each other and can easily be severed. In these circumstances, my contention is that the declaration stands and the reservation falls. France is thus bound by the jurisdiction of the Court under Article 36 (2) without any barrier to the Court's jurisdiction being interposed.

Now, Mr. President, I have put those submissions to you in a very terse and summary form. But this is not a hearing on jurisdiction: this is a hearing on provisional measures, and my task is merely to satisfy the Court that it is not manifestly without jurisdiction. I hope, in relation to Article 36 (2) of the Statute, that I have succeeded in doing that.

*The Court adjourned from 11.50 a.m. to 11.40 a.m.*

With your leave, Mr. President, I shall now turn to the question of the Court's jurisdiction under the General Act. I propose to proceed first on the basis that the General Act of 1928 is in force in order to show that the relevant conditions of that Act are satisfied in the present case. A convenient way in which to approach the matter will be to start from Article 17 of the General Act:

"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 my submission that all the requirements of this Article are satisfied in the present case. First of all, there is a *dispute* between the Parties. This, I venture to suggest, is so plain from the diplomatic correspondence and the reports of the discussions between the Parties that I need not develop the point further.

Second, the dispute is between *Parties*. Both Australia and France acceded to the General Act, by coincidence on the same day, 21 May 1931. Neither Australia nor France has taken steps to denounce the General Act pursuant to the terms of Article 45, so both States remain a party to it.

Third, the Parties are in dispute as to *their respective rights*; Australia, in its Note of 3 January 1973 to the French Government, stated that in its opinion the conduct of further atmospheric tests would be unlawful. For its part, the French Government took the position in its reply of 7 February 1973 that "it is convinced that its nuclear tests have not violated any rule of international law". In the subsequent diplomatic exchanges neither Government altered its position. The existence of a dispute as to *rights* is, therefore, evident. Australia contends that further tests will violate its rights in international law, as outlined in paragraph 49 of the Application; France takes the opposite position.

Fourth, it is necessary to turn to the *reservations* of the Parties which are found in Annexes 15 and 16 of the Australian Application. First those of France. The French accession was limited in the first place to disputes arising after French accession with regard to situations or facts subsequent thereto. Clearly the present dispute meets that requirement.

Next, the French accession excluded disputes "bearing on a question left by international law to the exclusive competence of the State". Again, it is manifest that a dispute which raises such issues as the violation by France of Australia's territorial sovereignty and the infringement of the freedom of the seas does not fall within this limitation.

The other reservations in the French accession relate to disputes submitted to the Council of the League of Nations and to the law to be applied by arbitral tribunals. Again, neither is relevant in this case.

In February 1939 the French Government added a reservation excluding "disputes relating to any events that may occur in the course of a war in which the French Government is involved". So far as the Australian Government is aware, the French Government was not involved in any war at the date of the Application in this case and the dispute cannot therefore relate to an event which may occur in the course of a war. Thus it is apparent that the present dispute does not fall within any of the French reservations.

It is necessary next to examine the Australian reservations. First, Australia excluded disputes arising prior to its accession or relating to situations or facts prior to that accession. This reservation is obviously irrelevant.

Next, Australia excluded disputes in regard to which the parties agreed to some other method of peaceful settlement. The Parties have not agreed to any such method.

Thirdly, Australia excluded disputes with other members of the British Commonwealth of Nations. France is not such a member.

Fourthly, Australia excluded disputes concerning questions which according to international law are solely within the domestic jurisdiction of States. I have

already indicated in relation to a similar French reservation why this is irrelevant.

Fifthly, Australia excluded disputes with any party to the General Act who was not a member of the League of Nations. France was at all material times prior to the dissolution of the League a member of that Organization. A comparable reference to membership of the League was considered by the Court in the *South West Africa* case. Paragraph 2 of Article 7 of the Mandate provided that "if any dispute should arise between the Mandatory and another Member of the League of Nations" relating to the interpretation or application of the Mandate, it should be submitted to the Permanent Court of International Justice. South Africa contended, to use the words of the Judgment, "that since all Member States of the League necessarily lost their membership and its accompanying rights when the League itself ceased to exist on April 19, 1946, there could no longer be 'another Member of the League of Nations' today". This contention was rejected by the Court. If then Liberia and Ethiopia were in 1962 Members of the League for the purposes of a jurisdictional clause, so equally is France today.

The Australian accession also contained reservations in connection with disputes under consideration by the Council of the League. They are manifestly not relevant now. There remains only the Australian reservation made at the outbreak of the Second World War in which it excluded any dispute "arising out of events occurring during present crisis". This too is irrelevant in the present case. It is evident, therefore, that no relevant reservation limits or excludes the jurisdiction of the Court in these proceedings.

Next, in this examination of the terms of Article 17 of the General Act, it is appropriate to note that provision is made for the submission of disputes to "the Permanent Court of International Justice". This has to be read in the light of Article 37 of the Statute of the present Court, which provides for the substitution of a reference to the International Court of Justice.

Finally, it may be observed that the terms of Article 17 apply "unless the parties agree to have resort to an arbitral tribunal". There has been no such agreement between the Parties. The Court is thus confronted by a situation in which every condition of Article 17 of the General Act is satisfied. There is, therefore, no reason why that Article should not serve to vest jurisdiction in this Court in these proceedings.

It is at this point—having indicated how the conditions of the General Act are satisfied in this case—that I turn to my submission that the General Act of 1928 is still valid and in force between the parties to it.

Neither France nor Australia has sought to denounce the treaty. Consequently, the only basis on which it can be alleged that the General Act has ceased to bind them is the operation of some more general consideration. This consideration is stated in the annex to the French Note of 16 May 1973 to be that the treaty is recognized as no longer being in force and that its lack of effectiveness and the desuetude into which it has fallen prevent it from over-riding the French reservation added to its optional clause declaration in 1966. I have already made my submission to the effect that the French reservation of 1966 has nothing to do with the General Act, and I shall not repeat that. I pause only to mention that, in the crucial introductory paragraph of the French annex, the alleged lack of effectiveness and the desuetude of the General Act are essentially linked with the French contention regarding the effect of the 1966 reservation to the optional clause. It may be, therefore, that the French Government is not asserting that the alleged lack of effectiveness and desuetude of the General Act have any relevance by themselves.

However, for present purposes, I doubt whether the Court would wish me to

dissect so closely the text of the French annex. I therefore propose to concentrate on two aspects of the discussion which seem to be of particular significance. The first is the correct interpretation of the *Norwegian Loans* case. The second is the proper assessment of the General Assembly discussion of the General Act at the time of the preparation of the Revised General Act.

I shall begin with an examination of the *Norwegian Loans* case because it is there that one finds the clearest expression of judicial opinion, in the dissenting opinion of Judge Basdevant, on the continuing validity and applicability of the General Act. The French annex purports to dismiss this judicial opinion. Having regard to the respect and esteem in which Mr. Basdevant was held during his lifetime of service to international law, as a professor of international law at the University of Paris, as Legal Adviser to the French Government, as agent and counsel in cases before the Permanent Court, as a Judge of this Court, and in due course as its President, it would be unthinkable that his views should be so lightly dismissed.

I shall now read to the Court a little more from Judge Basdevant's opinion in the *Norwegian Loans* case than appears in the annex to the French Note. Judge Basdevant's discussion of the General Act begins with a passage which, significantly, is omitted from the French annex. He said, at page 74:

> "In the matter of compulsory jurisdiction, France and Norway are not bound only by the Declarations to which they subscribed on the basis of Article 36, paragraph 2, of the Statute of the Court. They are bound also by the General Act of September 26, 1928, to which they have both acceded. This Act is, so far as they are concerned, one of those 'treaties and conventions in force' which establish the jurisdiction of the Court and which are referred to in Article 36, paragraph 1, of the Statute. For the purposes of the application of this Act, Article 37 of the Statute has substituted the International Court of Justice for the Permanent Court of International Justice. This act was mentioned in the Observations of the French Government and was subsequently invoked explicitly at the hearing of May 14th by the Agent of that Government. It was mentioned at the hearing of May 21st, by Counsel for the Norwegian Government. At no time has any doubt been raised as to the fact that this Act is binding as between France and Norway.
>
> There is no reason to think that this General Act should not receive the attention of the Court."

And he then continued with the paragraph quoted in the French annex.

Nothing could be clearer than those observations of Judge Basdevant. He said three things, each of which is directly contrary to the contentions now advanced by the French Government. He said (1) the General Act was in force; (2) the present Court was substituted for the Permanent Court by Article 37 of the Statute; and (3) the General Act had been invoked by France.

Now let us see what the Court said on the subject—this is better than indulging in the speculation about what Judge Basdevant did and how the Court must have reasoned, which is the main ingredient of this part of the French annex.

The Court said (*I.C.J. Reports 1957*, pp. 24 and 25):

> "The French Government also referred to the Franco-Norwegian Arbitration Convention of 1904 and to the General Act of Geneva of September 26, 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.

> 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.
>
> 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 those 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."

From this quotation it becomes apparent that the Court neither expressed nor implied any disagreement with Judge Basdevant regarding the first two points made by him, namely that the General Act was in force and that Article 37 of the Statute applied to it. The only point of disagreement was the third—namely the nature and effect of the French reliance upon the General Act.

Judge Basdevant's observations on the General Act thus stand in a very different position from those of Judge Armand-Ugon in the *Barcelona Traction* case. The latter are also referred to in the French annex as an authority on the interpretation of Article 37 of the Statute in relation to the General Act. These views, however, related to a point on which the majority of the Court specifically reached an opposite conclusion. The Court rejected the reasoning of Judge Armand-Ugon. It did not reject the reasoning of Judge Basdevant, at any rate, upon the first two points—which for present purposes are the ones that really matter.

It is necessary, however, to examine more closely the way in which France invoked the General Act in the *Norwegian Loans* case—and how the difference of opinion between the Court and Judge Basdevant may have come about.

In its Application of 6 July 1955, France invoked only Article 36 (2) of the Statute. On 20 April 1956 Norway filed certain preliminary objections to the Court's jurisdiction. One of those asserted that the dispute related to internal and not international law; a second asserted that the dispute related to situations of fact arising before the French acceptance of the Court's jurisdiction.

To these objections the French Government replied on 31 August 1956 with its "Observations and Conclusions". This contains no less than three separate references to the General Act.

First, at page 172 of the *I.C.J. Pleadings, Norwegian Loans*, the French Government said:

> "The general refusal of arbitration by Norway is a violation of international engagements between France and Norway on which the Court is naturally competent to decide, since it involves a breach of the arbitration convention between France and Norway of 9 July 1904, of the Hague Convention No. 2 of 18 October 1907, of the accession without reservation by France (21 May 1931) and Norway (11 June 1930) to the General Act of 26 September 1928 or of the acceptance of the compulsory jurisdiction of the Court by the two States."

The second reference, at page 173—the French Government refers to the 1904 Arbitration Convention and to Article 36 of the Statute and to the General Act. It said:

"Chapter II of the General Act of Geneva of 26 September 1928 on judicial settlement contemplates 'all disputes with regard to which the parties are in conflict as to their respective rights'. Whatever may be the terms of the obligations assumed by France and Norway in those various instruments, they cover in any event the present case. The Government of the French Republic has a difference of views with the Norwegian Government which, in proceeding from a claim of its nationals, constitutes an international dispute. By its nature this dispute falls within the scope of compulsory arbitration and may be brought directly before an international judge in application of treaty rules *in force* between France and Norway." (Emphasis added.)

The continuing in force in 1956 of the General Act is emphasized again in the paragraph at the bottom of the same page (p. 173):

"Despite its patient efforts [I quote] at settlement by diplomatic means, the Government of the Republic notes today that Norway, in its 'Preliminary Objections' absolutely refuses to accept arbitration. This refusal is unlawful because it is contrary to a series of treaty obligations binding upon Norway according to which the present dispute between France and Norway is a case for compulsory arbitration."

The third express reference is to be found at page 180 and is in these terms:

"If the Norwegian thesis is to be understood in the sense that it is only the International Court of Justice which is without jurisdiction, the Permanent Court of Arbitration being competent in its place, the French Government would observe that its offer of arbitration has been met by an absolute refusal by Norway of any form of arbitration. The Government of the Republic is thus bound to ask the Court to find that by reason of this refusal of an offer of arbitration there has been a violation of the Convention of 9 July 1904, the Convention of 18 October 1907 and of the General Act of 26 September 1928."

So here, Mr. President, within the pages of one French pleading alone, the Court is confronted by no less than three specific and unqualified assertions that the General Act was in force and capable of being invoked. Thus, nine years after the event—namely the demise of the League—which is now said by the Government of France to have killed the General Act, it is being invoked by the Government of France. Yet the Court is now asked to accept that it is manifest that the General Act is no longer in force. What happened, one might ask, between 1956 and 1973 to make it now manifest? Indeed, what happened between those dates that has any bearing on the validity of the General Act in these proceedings? The answer, we submit, is nothing has happened.

Now, there was nothing casual or intermittent about the invocation of the General Act in the French Observations of 31 August 1956, submitted by the Agent of the French Government. In less than three weeks what had been said to the Court in the Observations was formally repeated to the Norwegian Government in a Note from the French Ministry of Foreign Affairs dated 17 September 1956. The text of the Note can be found at page 301 of Volume I of the *I.C.J. Pleadings*. The French Government apparently decided to renew its appeal to the Norwegian Government to agree to arbitration even if the latter would not accept the jurisdiction of the Court. And so, in the course of the Note, the French Government said:

> "The Government of the Republic has the honour to note that a formal refusal of all arbitration in a dispute at the present time submitted to the Court would assume great importance. By the Arbitration Convention of 9 July 1904, the Second Hague Convention of 18 October 1907, the General Act of 26 September 1928, Norway has accepted, in relation to France, the formal obligations of arbitration. The Government of the Republic would be sorry if it were obliged to note that the undertakings resulting from these agreements were not to be fulfilled."

Clearly, the words of the French Note convey no other impression than that of the existence in force of the General Act at the date of that Note, 17 September 1956.

The Norwegian Government replied to the French Note on 9 October 1956, gently reminding the French Government that the matter was already under consideration by the Court and should be dealt with within the framework of the Court's procedure. So it was not until its Memorial, dated 20 December 1956, that the Norwegian Government dealt with the references to the General Act. There are two significant features of the way in which the Norwegian Government approached this task, which can be seen at pages 220-221 of Volume I of the *I.C.J. Pleadings*. First, at no moment did it suggest that the General Act was no longer in force. To put it at its lowest, here is a point which either did not occur to, or was rejected by, Norwegian counsel, who included Professor Bourquin, generally acknowledged as one of the most skilled and distinguished advocates ever to have appeared before this Court. Is it then a point so clear that it *manifestly* deprives the Court of jurisdiction in the present case? So there, then, is one point of significance in the Norwegian Counter-Memorial: the fact that it did not itself suggest that the General Act was no longer in force.

The second point of significance is that the Norwegian Government specifically stated that the three conventions mentioned by France, of which one was the General Act, had never previously been invoked in the case. The Norwegian Government concluded that "if the French Government considers that it can establish the complaint that Norway has not conformed to its obligations under these conventions, one would put oneself in the presence of a new claim".

The French Reply of 20 February 1957 made no reference whatsoever to the General Act. The Norwegian Rejoinder of 25 April 1957 referred to this fact, and its consequences, in its opening paragraphs:

> "It [that is the Norwegian Government] observes in the first place that the French Government places no further reliance in its Reply upon either the French-Norwegian Arbitration Convention of 9 July 1904 or the General Act of Geneva of 26 September 1928, to which it accorded a major importance in its observations and conclusions on the preliminary objections. The arguments which it drew from them and to which the Norwegian Government had replied in its Counter-Memorial thus seem to have been abandoned."

The Norwegian Rejoinder also noted that no further mention had been made by the French Government of its Note of 17 September 1956 in which, as the Court will remember, the French Government had again referred to the General Act.

Now, Mr. President, we come to the oral hearings in the case. You will, I am sure, forgive me for dealing with the case in such detail, but it is necessary for three reasons. First, it demonstrates how, in the view of France, the General Act was in force and applicable in 1956; and, second, it shows how careful analysis will reveal the fallacious nature of the French annex; and, third, this is

the only opportunity which is available to me, in the course of provisional measures proceedings, to assist the Court in appreciating the error of the contentions advanced in the French annex.

During the oral hearings, the distinguished French Agent reintroduced the subject of the General Act. He did this on 14 May 1957 when discussing the question of whether the non-payment of contract debts was in the domain of questions governed by international law. The relevant passages of his speech are to be found at pages 59 and 60 of Volume II of the *I.C.J. Pleadings*. The Agent said that the Norwegian refusal of arbitration had a bearing on the payment of Norway's international obligations. He continued as follows:

> "The Norwegian Government directs its efforts to the idea that, if there is a refusal of arbitration contrary to the international engagements of Norway, this is a different problem, a new claim. To this purely procedural argument the Government of the Republic replies in two ways."

First, the Agent said that the French reference to the treaties was a reply to a Norwegian objection to the Court's competence. Second, the Agent observed that France had repeatedly sought arbitration. He continued:

> "Once more, this time before the Court—on which Norway, like France, has conferred sovereignty over every legal issue—the Government of the Republic appeals to the Norwegian Government to accept the jurisdiction of the Court. As my eminent colleague, the Norwegian Agent, knows, the agreement of the parties is possible at any stage of the procedure. So once more, I must, in the name of the Government of the Republic, remind him of the formal undertakings of Norway, first under the French-Norwegian arbitration treaty of 9 July 1904..., then of Article 17 of the General Act of 26 September 1928: 'All disputes with regard to which the parties are in conflict as to their respective rights... shall be submitted for decision to the Permanent Court of International Justice.' This provision is applicable unless the parties choose an arbitrator, something which Norway has continually refused.
>
> The Court thus had jurisdiction in our case, on the Application which the Government of the Republic had made to it on the basis of Article 36, paragraph 2, of the Statute, because there is a point of international law raised in a dispute of international law between two States."

Here one finds the French Agent invoking the General Act as if it were a valid and effective treaty. Not only does he do that; he refers also specifically to Article 17, to which the Government of Australia also refers. And then, most important of all, in understanding why the Court did not agree with Judge Basdevant, the French Agent limited his statement of the basis of the Court's jurisdiction to Article 36 (2)—*the optional clause. For some reason, he did* not invoke the General Act as itself being a basis of the Court's jurisdiction. But that reason, whatever it may have been, could not have been, in the light of the way in which the Act was cited elsewhere, any feeling on the part of France that the Act was no longer in force. If it was sufficiently in force to form the basis for the assertion of an obligation—and I emphasize "obligation"—to arbitrate, it was sufficiently in force to serve as a foundation for the Court's own jurisdiction.

The passage which I have just quoted from the speech of the French Agent is the explicit invocation of the General Act to which Judge Basdevant referred in the passage of his opinion which I quoted earlier in my speech. That to some persons at the time it appeared something less than explicit, is indicated by the

speech of counsel for Norway on 21 May 1957 (*I.C.J. Pleadings*, Vol. II, p. 125). He felt obliged—as understandably he might—to comment:

> "On this last point [as I understand it, the reference to the General Act and other treaties requiring arbitration] I confess that I am not certain that I am correctly interpreting his [the French Agent's] text, which seems to me, to tell the truth, a trifle ambiguous. As it is an important question, on which it is necessary that we should be clear, he will, I am sure wish to provide the necessary clarification."

No clarification was provided. So, it is understandable that on this point the Court and Judge Basdevant should have parted company. Judge Basdevant took the view that France had invoked the General Act as a basis for the Court's jurisdiction. The Court took the view that France had not. Thus, the Court did not differ from Judge Basdevant on the question of whether the General Act was still in force. It simply decided that the General Act could not be taken into account.

Mr. President, I have spent a great deal of the Court's time in examining the *Norwegian Loans* case. A few moments ago, I mentioned some of the reasons why. Now I can add two more: first, it contains, as I originally suggested, an expression of judicial opinion of the highest authority—that of Judge Basdevant—clearly to the effect that the General Act was in force in 1956. The Court did not dissent from this view. The absence of discussion of the point in the Court's own Judgment does not—contrary to the suggestion in the French annex—imply any disagreement between the Court and Judge Basdevant on the status of the General Act. It is only that the Court did not consider that France had invoked the Act and therefore it was not open to the Court to take it into consideration.

The second reason why the case is so important is totally independent of the Judgment of the Court or the opinion of Judge Basdevant. It stems from the declared attitude of France itself. This attitude was that the General Act was an international instrument still in force. That position is quite contrary to the one which France now adopts. Why should the attitude of France be so important? It is because the French Government in the very Note of 16 May 1973 in which it rejected the jurisdiction of the Court relied, in relation to the status of the General Act, upon the attitude of the interested parties, and, to quote the Note, "en premier lieu de la France". While I do not concede that this is necessarily the right reason for attributing significance to the French attitude towards the General Act, it is at any rate in the present case a reason which France cannot reject as unsound.

One further point is established beyond controversy by this examination of the French pleadings in the *Norwegian Loans* case. It is the total falsity of the suggestion, which appears at II, page 354 of the French Annex, to the effect that "the French position with regard to the 1928 Act is only explicable by the conviction that in 1955 it had fallen into desuetude". In that case, why was the French Government repeatedly relying on it? Why did the French Government formally, in the face of this Court, invite the Norwegian Government to accept the jurisdiction of the Court in implementation of an obligation dependent upon an instrument now said to have been obsolete and, so it would appear, even then have been believed to be obsolete? The question, Mr. President, is a rhetorical one.

The French reliance upon the General Act in the *Norwegian Loans* case —especially the firmness and lack of qualification with which it was constantly reasserted—creates something of a predicament in the present case. The content

of the French contentions is clear. Either the contentions were right or they were wrong. If they were right—as the Government of Australia believes—what assurance is there before the Court to show that the legal position as it was in 1956 has changed in any material respect? And if, on the other hand, the French contentions were wrong in 1955, one is bound to ask whether, after the mature reflection which clearly preceded the arguments in the *Norwegian Loans* case, the Government which made the statements then made is now more likely to be correct when advancing the opposite views in a manner which excludes any opportunity for forensic debate.

On this aspect of the case, therefore, Mr. President, my submission is that the opinion of Judge Basdevant in the *Norwegian Loans* case, read together with the position so precisely adopted in that case by the French Government, provides irrefutable support for the proposition that the General Act is still in force. That is a submission which goes very much further than the contention that the jurisdiction of the Court is not manifestly defective.

I now turn to a consideration of the relevance to the continuing validity of the General Act of the conclusion of the Revised General Act under the auspices of the General Assembly of the United Nations. The Court will, I venture to believe, receive with some relief the news that I shall not deal with this point so fully as I did with the point regarding the *Norwegian Loans* case.

Even if the French Government had not introduced the annex into this case, it would have been our intention to have referred to the General Assembly resolution 268 (III) of 28 April 1949 as providing further evidence that the General Act is in force or at any rate is not manifestly lacking in force. The terms of the French annex only serve to emphasize the need to refer to this resolution.

There are three recitals in the preamble to this resolution which must be read:

> "Whereas the efficacy of the General Act ... 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, ...
>
> Whereas the amendments hereinafter mentioned are of a nature to restore to the General Act its original efficacy,
>
> Whereas these amendments will only apply as between States having acceded to the General Act as thus amended and, as a consequence, will not affect the rights of such parties to the Act as established on 26 September 1928 *who should claim to invoke it in so far as it might still be operative.*" (Emphasis added.)

These recitals are then followed by the operative part of the resolution which consists of seven paragraphs. One of these, paragraph *(a)*, is concerned with the substitution of the words "International Court of Justice" for "Permanent Court of International Justice" wherever the latter words appear in the General Act. The remaining six paragraphs all contain amendments to other parts of the General Act which were affected by the disappearance of the League. For example, the reference to the Acting President of the Council of the League is replaced by a reference to the President of the General Assembly of the United Nations and the references to the Secretary-General of the League are replaced by references to the Secretary-General of the United Nations. Altogether, the replacement of the Permanent Court by the International Court affects 12 articles of the General Act; the other amendments affect 10 articles.

It will be readily apparent, therefore, that reliance upon Article 37 of the Statute of the Court to effect the replacement of the old Court by the present Court would only have been a partial solution to the problems affecting the

General Act as a result of the demise of the League. To suggest, as the French annex does, that the General Act was the subject of a special revision because it was dead and had to be revised distorts the function of the General Assembly resolution by pretending that the resolution was concerned only with the substitution of the present Court for the old Court. This was not the case. To restore the General Act to its full effectiveness it was necessary, as the first preambular paragraph which I have quoted makes clear, to replace also the organs of the League which had disappeared and upon whose existence such vital matters as accession and denunciation appear to depend.

The same point can be put in another way: the General Assembly, though it had the opportunity to say that the General Act was defunct, did not do so. It merely said that the efficacy of the Act was impaired and was concerned to restore its original efficacy. In the English language, if these words mean anything, they mean that the text involved was still in part effective. And it is by that partial effectiveness that the Court is endowed with jurisdiction in this case. The effect of paragraph *(c)* of the operative part of the resolution is achieved by Article 37 of the Statute—I emphasize the words "the effect of this paragraph", namely the substitution of the present Court for the old Court by Article 37. But Article 37 of the Statute could not do more than that. In particular, it could not actually revise the text of the old General Act and replace the very words of that Act by others. Hence it is natural and understandable that when the Act was revised —as it had to be—to replace, for example, the references to the Secretary-General of the League, it should also have been changed to make its actual words reflect the alteration in its effect collaterally secured by Article 37 of the Statute.

This analysis of the General Assembly resolution serves, I submit, to explain also the last phrase of the third preambular paragraph—"in so far as it might still be operative".

The Court will remember that the French annex seizes upon those words as conveying some suggestion of doubt regarding the continuing validity of the General Act. That, however, with respect, is a misinterpretation. It overlooks the fact that, as I have just indicated, some parts of the General Act were rendered inoperable by the disappearance of the League organs. Other parts—where reference was made to the Permanent Court—were kept going by the impact of Article 37 of the Statute of the present Court. So the words "in so far as" are not to be equated with "if". They are not to be read as reflecting a doubt regarding the continued validity of the whole General Act. They are, more correctly, to be read as a quantitative reference to the scope of the General Act still operative after the demise of the League—that is, as a reference to those parts of the General Act still capable of working as a result of Article 37 of the Statute. The qualification is, in other words, a reflection of the substantive extent of the inoperability of this old General Act. It is not the expression of a doubt about the whole existence of it.

But even if the resolution leading to the revision of the General Act can be read as suggesting a doubt as to the efficacy of the whole Act, which I do not accept as the case, it is still only a doubt. It is not a certainty. Even the French annex does not go so far in this connection as to suggest that the resolution reflects more than a doubt. It is true, says the annex, that the vote of the General Assembly of the United Nations and the opening for signature of a revised Act were not accompanied by any clear affirmation that the original Act had lapsed. This is a significant if not critical admission. Even the French contention recognizes that the situation created by the existence of the revised General Act is no more than one of doubt. As I have submitted, it is not even a case of doubt.

But if it is, it certainly does not satisfy the law as hitherto stated by this Court, that in provisional measures proceedings it will proceed unless it is manifestly without jurisdiction. The introduction of a doubt of the character just indicated does not create a manifest lack of jurisdiction. At most, it is a doubt—a doubt which will have to be discussed and determined at the stage of the case when questions of jurisdiction should normally be considered.

This should, Mr. President, be sufficient to dispose of the passages in the French annex referring to the General Assembly resolution and the revised General Act. There is, however, one passage in the comment on this resolution which appears in the French text and which, in our respective submission, is inaccurate and misleading.

The French annex suggests that the General Act is interesting on several counts. The first relates to the so-called dubitative quality of its expression. Of this I have already spoken.

The second comment made in the French annex is in these terms:

> "The resolution allows for the eventuality of the Act's operating if the parties agreed to make use of it. The condition is therefore that there should be agreement between the parties for the Act to be able to operate. This condition is not fulfilled in the present case."

This comment, Mr. President, appears to be without foundation. There is nothing whatsoever in the resolution to support the suggestion that it allows for the eventuality of the Act's operating if the parties agreed to make use of it. I can say no more upon the point than that.

The third comment on the General Assembly resolution in the French annex is this:

> "On the other hand, if the 1928 Act were still in force at the moment when the Revised Act was concluded, it is somewhat difficult to understand the above-cited passage of the General Assembly resolution to the effect that the amendments 'will only apply as between States having acceded to the General Act'."

I have read this sentence from page 3[1] of the revised text of the Registry's translation of the French annex. This does not fully reflect the original French in that it omits the word "revisé" after the last mention of the General Act. The result is that an already weak argument is made to look even worse. In truth, it is just because the 1928 General Act is still in force that the amendments introduced in 1949 would operate only between those States which signed the Revised Act.

Mr. President and Members of the Court, if I terminate at this point the development of my submission that the General Act of 1928 is still in force, you will have some appreciation that it is out of consideration for the Court, and not otherwise, that I do not press my arguments further at this stage. The situation in which I should have, in a speech on interim measures, been obliged to consider questions of jurisdiction in depth is both unprecedented and in a sense unsatisfactory. It arises only because of the failure of the French Government to appear and its resort to the "extra-procedural" device of an argumentative annex attached to its letter to the Court. I could not ignore a text which, however non-receivable it may be, has been received and has no doubt been seen by the Court; and I have been bound to demonstrate that its principal contention, that the General Act of 1928 is no longer in force, is notably false.

[1] II, p. 350.

Before finally leaving this point, there is one reference which it may interest the Court to have. So far I have been dealing with the position of the General Act in 1949 in the light of the General Assembly resolution of that year. Earlier I had shown in detail how in 1957 the French Government had asserted the continuing validity of the General Act before this very Court. As I suggested earlier, there is no reason in law why an instrument which was valid in 1957 should have ceased to be valid in 1973, the more so as I have answered, I hope to the satisfaction of the Court, the French contention that unilateral reservations to declarations made under Article 36 (2) can modify obligations assumed under Article 36 (1) of the Statute. Still, I ought perhaps to say just a word about the general suggestion made in the French annex to the effect that the General Act has fallen into desuetude.

The fact that a treaty is old is acknowledged by the French annex not to be a reason by itself for regarding the treaty as terminated. Nor does the fact that a treaty has not been actively invoked for a considerable time mean that it has come to an end. One looks in vain in the articles of the Vienna Convention on the Law of Treaties to find any acknowledgement of the operation of desuetude as an independent cause of the termination of a treaty. The explanation is to be found in a passage in the Commentary to draft Article 39 of the Law of Treaties, now Article 42, presented by the International Law Commission in 1966. It is there stated:

> "... the Commission considered whether 'obsolescence' or 'desuetude' should be recognised as a distinct ground of termination of treaties. But it concluded that, 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."

Do I need to say more than that there is no evidence of any consent by Australia to abandon the General Act? Nor can any such consent be implied from its conduct. In any case, France invoked the General Act only 16 years ago before this Court. And on 11 December 1964 the French Minister for Foreign Affairs referred in the National Assembly to the continued existence of the General Act as a reason why France would not then ratify the European Convention on Pacific Settlement of Disputes. It is, therefore, difficult to see in this situation any mutual agreement between Australia and France to regard the General Act as having expired.

To put the matter in another way, if the Court were to hold that the General Act had fallen into desuetude, a standard of looseness in treaty commitments would have been acknowledged which would have, to say the least, devastating effect upon the established pattern of treaty relations between States. I believe that I have said enough on this topic.

Mr. President and Members of the Court, any attempt at recapitulation of my argument must be either so detailed as to be repetitious, or so superficial as to obscure the effective substance of the grounds on which the Government of Australia makes its own case and meets the points raised in the French note and annex of 16 May.

If I may say so, Mr. President, there has probably been no previous occasion in the Court's history when a party at such a stage in the proceedings has developed an answer to an attack upon the Court's jurisdiction. The initial assumption properly made, having regard to the Statute and Rules of the Court, by the Government of Australia when it prepared for these oral hearings, was

that its task would be to establish a case that the absence of the Court's jurisdiction is not manifest.

The Government of Australia did not believe what had in international affairs previously been unthinkable, that the Government of France would not appear before this Court in these proceedings. However, surprised though the Government of Australia has been, it has endeavoured to satisfy its own conception of what is right for an applicant State before this Court to do: to provide the Court with as much assistance as time and circumstances permit.

The reliance placed by Australia on the General Act may have been unexpected, that is no fault of Australia's. She is doing no more than relying upon an instrument which could itself have been invoked against her. Equally, there is no reason for refusing to apply a treaty which in all respects material to this case shows every feature of validity. Nor is there any need to be apprehensive about giving proper effect to the General Act as invoked by Australia today, bearing in mind the Court's jurisdiction.

The Government of Australia, in invoking the General Act, does not seek to expand it beyond its proper limits. The Government of Australia is fully conscious of the requirement that jurisdiction is dependent upon consent. At the same time it is aware that the modes of giving consent are classified and regulated by Article 36 of the Statute. So far as the General Act is concerned, it is a case under Article 36 (1).

Recognition of the validity of the General Act does not mean, of course, that the Court thereby acknowledges a means of recourse in every case which may arise between the parties to the General Act. Where, in a treaty bearing upon a particular subject, provision is made for the settlement of disputes by this Court, settlement can take place only under that provision. At the same time, it must be seen that, as I have already submitted, declarations made under the Optional Clause cannot be equated with treaties containing special settlement provisions. Furthermore, Optional Clause declarations cannot in law exhaust the jurisdiction-creating will of the parties which make them. Such declarations only affect matters of customary international law, or conventional matters for which no other specific settlement procedure has been prescribed.

Mr. President, the Court will also no doubt wish to reflect on the fact that while France is bound by the General Act today, there is no reason why she should remain bound for the indefinite future, if she wishes to take the appropriate steps to release herself. As consent created the General Act, so consent can terminate it. True, the precise procedures of denunciation set out in Article 45 of the General Act cannot now be followed because of the disappearance of the Secretary-General of the League of Nations. However, he was really no more than the agent of the parties to receive notice of the denunciation. With his disappearance there is no reason why his principals, the parties to the General Act, should not regain their original powers. Consequently, there is nothing to prevent a party to the General Act from communicating at the appropriate time, that is, six months before the expiry of the five-year period, with all the other parties to inform them of that party's wish to denounce the treaty.

May I conclude 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. Those outside observers are also bound to take note of the somewhat technical character of the French contentions.

Mr. President, you will I am sure forgive me if my anxiety to place before the Court as many as possible of the considerations which appear to us to be material, has led me to assume, I hope wrongly, that my task is harder than it is. In presenting this case to the Court, Australia is acting in the interests of many beside herself. And my colleagues and I have come to regard the responsibilities resting upon us as ones which have to be discharged with an unusual degree of commitment to the cause which we serve. Accordingly, I conclude with the formal submission 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 refrain from carrying out any further atmospheric nuclear tests in the Pacific Ocean pending the judgment in this case.

Mr. President and Members of the Court, I thank you very much.

Mr. BRAZIL: Mr. President, the Registrar asked me late yesterday for the report relating to the recent discussions between Australian and French scientists referred to in the speech yesterday[1] by the Australian Attorney-General. We have been happy to provide the document in question. It has been deposited with the Registrar in the course of the morning, as I think you are probably aware[2].

With the indulgence of the Court, the Attorney-General would wish on behalf of the Government of Australia to make a short statement tomorrow morning in relation to one or two matters referred to in that document. With the completion of that statement that would complete the oral submissions that the Australian Government would wish to put to this Court at this stage.

The PRESIDENT: The Registrar will draw your attention to Article 52, paragraph 4, of the Rules of Court. Since the Attorney-General made reference to the document yesterday, the document should be produced to the Court. But the Court will be glad to hear his introduction.

*The Court rose at 12.45 p.m.*

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[1] See p. 170, *supra*.
[2] See p. 540, *infra* and II, p. 364.

## THIRD PUBLIC SITTING (23 V 73, 11.05 a.m.)

*Present*: [See sitting of 21 V 73.]

## ARGUMENT OF SENATOR MURPHY

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Senator MURPHY: Mr. President and Members of the Court. In compliance with the request made by the Court, copies of the documents issued by the Australian Academy of Science relating to the recent talks between Australian and French scientists on 7 to 9 May last were deposited with the Registrar *yesterday morning*.

Mr. President, as was indicated by the Australian Agent at the close of yesterday's public hearing, I wish to make a few short comments on the report of the meeting between Australian and French scientists. As page 170, *supra*, shows, I quoted only the agreed portion of their report. I did so solely for the purpose of establishing that the French Government scientists did not dispute *the certainty of deposit of radio-active matter on Australian soil from French* tests. The quoted portion clearly establishes this.

As the Court will see from the document which has been deposited, the agreed Part A of the report contains the table of dose commitments, to which reference was made on 21 May. The French and Australian scientists were unable to agree on the exact extent of the biological consequences. The French officials have in their Part B sought to demonstrate that *French atmospheric nuclear* weapon tests in the Pacific are without hazard by invoking dose-limits recommended by the International Commission on Radiological Protection (ICRP), by arguing that the radiation doses from those tests are small compared with those from other man-made sources of ionizing radiation and by comparing those doses with those inevitably received by populations from natural background radiation. Let me examine those propositions.

It is necessary to bear in mind that the ICRP draws a distinction between controllable sources of radiation, such as planned releases of radio-active substances from nuclear power reactors, and uncontrollable sources, such as radioactive debris from nuclear explosions. This is referred to in paragraph 50 of the request. The ICRP identified nuclear weapon explosions as an uncontrollable source of radiation.

French officials compare the radiation doses from French atmospheric nuclear tests in the Pacific with the dose-limits recommended by the ICRP, which the French wrongly suggested were for the total population. This is an unjustified and erroneous use of these dose-limits which the ICRP has recommended for controllable sources of ionizing radiation. Ionizing radiation from French atmospheric nuclear tests in the Pacific is an uncontrolled source.

Then, too, these dose-limits recommended by the ICRP are not intended for application with respect to the whole of the population of a country. Specifically they are recommended for application in the planning of radiation protection and of operational procedures so as to ensure that the radiation doses received by small population groups, living in the neighbourhood of a radiation facility, or exposed to ionizing radiation as a result of a particular practice within that country, are kept to low levels. It is explicit in the recommendations of the

ICRP, with respect to dose-limits, that national authorities in the country whose population is exposed to controllable man-made sources of ionizing radiation should make a conscious decision between the radiation risk of the practice and the benefits, social or economic, which accrue from the practice.

Australia acknowledges that it is the right of the French Government to determine the levels of radiation exposure to which the population of the French Republic is exposed. Equally, Australia claims for itself the right of determining the controls upon levels of radiation exposure to its population.

To put the point another way, the French Government has no right to impose upon the Australian Government the French Government's views of what are acceptable levels of radiation doses for the Australian people.

The Australian National Health and Medical Research Council has adopted, for application in Australia, the dose-limits recommended by the ICRP for members of the public. In making this decision the National Health and Medical Research Council explicitly accepted those dose-limits for application with respect to practices within Australia involving the use of controllable sources of man-made ionizing radiation and with respect to critical groups of its population exposed to ionizing radiation from a particular practice. It is the contention of the Australian Government that it alone has the right of regulating sources of man-made ionizing radiation within its territories, having regard to its assessment of a balance between the benefits and risks to its people. By seeking to apply for the total Australian population, with respect to its atmospheric nuclear tests, the dose-limits recommended by the ICRP for critical groups of the public, France usurps the absolute right of the Australian Government.

The action of France, by increasing the general level of radiation to which the Australian population is subjected, thus unnecessarily impairs the opportunity of Australia to exercise its sovereign right of choosing to allow its people, or some of them, in a selected area, occupation or other category, to be subjected to artificial radiation for purposes with compensating benefits.

It is incongruous for the French Government to seek to apply dose-limits recommended by the ICRP and yet to fail to recognize and apply the principles and assumptions on which that Commission bases its dose-limits. These are that "any exposure to radiation may carry some risk for the development of somatic effects, including leukaemia and other malignancies and of hereditary effects, and that down to the lowest levels of dose the risk of inducing disease or disability increases with the dose accumulated by the individual".

The French Government, in seeking to find a reassurance for its radio-active contamination of man and his environment in the dose-limits for critical groups of the public recommended by the ICRP, might also have noted the following comment in the same publication. The Commission observes that "when whole populations or large sections of populations are exposed, it becomes necessary to consider not only the magnitude of individual risks but also the number of persons exposed". The Commission points out in this context that "even when individual exposures are sufficiently low, so that the risk to the individual is acceptably small, the sum of these risks, as represented by the total burden arising from somatic and genetic doses in any population under consideration, may justify the effort required to achieve further limitations of exposure".

The Australian Government subscribes to these observations and believes that its efforts to seek provisional measures of protection through this Court, when all other approaches have failed, are justified.

I now refer to natural background radiation to which populations from the beginning of life on earth have been inevitably exposed. The French Govern-

ment has argued that the radiation doses to the Australian population, and to other populations, from its nuclear weapon testing in the atmosphere, are but small fractions of the annual natural background doses, and, indeed, that the radiation doses from the radio-active fall-out from these tests are embraced by the variations which occur in natural background doses even within a large city. However, it is implicit in this case before this Court that the Australian Government must, with respect to its people, look at the total radiation scene. I would like to quote what I regard as an important paragraph from the recommendations of the International Commission on Radiological Protection.

> "On the assumption that the risk of radiation injury is directly proportional to accumulated dose, it follows that exposure from natural background carries a probability of causing some somatic or hereditary injury which would be present even without the addition of man-made exposure. Furthermore, other environmental factors and innate causes quite unconnected with radiation may add to the risk of developing those same injuries that might be caused by radiation exposure. Thus, provided there is no synergistic effect between irradiation and other factors, the total risk of injury will be the sum of the risk from irradiation from either natural or man-made sources plus the risks resulting from environmental and other causes."

The total radiation scene for the Australian population involves natural background radiation; it involves man-made sources of radiation which have direct benefit to the Australian population; it further involves all past nuclear weapon tests, including those carried out by France in the atmosphere in the Pacific Ocean and, in particular, further nuclear weapon tests which Australia has reason to believe France proposes to carry out in the atmosphere at its Pacific Test Centre.

As set out in paragraph 51 of the request, Australia, through regulations and through codes of practice, can, and does, exercise control over man-made sources of ionizing radiation from which its population derives benefit. These controls are under constant review to take account not only of increases in scientific knowledge and technical developments, but also of the balance of benefits and risks to the Australian population.

## STATEMENT BY MR. BRAZIL

AGENT FOR THE GOVERNMENT OF AUSTRALIA

The PRESIDENT: Some of my colleagues wish to put some questions to the Agent of Australia, but before doing so will you kindly make your submissions to the Court.

Of course there will be no need for you to answer the questions immediately. The Court and I will give you every opportunity to reflect upon the answers; you can submit them in writing or at a later sitting of the Court.

Mr. BRAZIL: The Statement just made by the Attorney-General of Australia completes the statements Australia wishes to put at this stage of the proceedings, and I would now like to conclude this part of our case with the formal submission 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 Ocean, pending the judgment in this case.

## QUESTIONS BY JUDGES DILLARD, JIMÉNEZ DE ARÉCHAGA AND SIR HUMPHREY WALDOCK

Judge DILLARD: My question is as follows:

Bearing in mind that the Revised General Act of 1949 provided a method for making effective the provisions of the General Act of 1928, and thereby removing any doubt as to the continued effectiveness of most of its provisions, can you assist us by offering any explanation for the seeming lack of willingness of those States parties to the 1928 General Act, including France and Australia, to accede to the Revised Act? That question is submitted by me alone: the second question is submitted on behalf of Judge Jiménez de Aréchaga and myself. It follows:

In his statement of 22 May, at page 202, *supra*, the Solicitor-General of Australia referred to the Permanent Court's Judgment in the *Electricity Company of Sofia and Bulgaria* case.

Taking into account the special circumstances of the present proceedings, we would appreciate it if counsel for the Applicant could assist us by also examining, in relation to the present case, the views expressed in the dissenting opinions of Judges Anzilotti and Hudson, particularly on the relationship between treaty provisions on peaceful settlement and declarations containing reservations or limitations to the acceptance of the Court's jurisdiction under the Optional Clause.

Judge Sir Humphrey WALDOCK: I should be grateful if the Agent of the Government of Australia would assist me on two points relating to the substantive, as distinct from the jurisdictional, aspect of its request for the indication of interim measures of protection.

First: Does the Government formulate its request on alternative bases, that is, either on Article 33 of the General Act of 1928, or on Article 41 of the Statute of the Court, or does it formulate its request on those two Articles in combination? Secondly, does the Government contend that the Court is competent to indicate interim measures of protection on the basis of Article 33 of the General Act of 1928, without having first decided whether or not the General Act is still in force between Australia and France?

The PRESIDENT: These are the questions put to you and, as I indicated earlier, there is no need for you to reply immediately if you are not prepared to. You can submit the replies in writing or notify us as to the date at which these replies will be given. In any case, the Court will expect the Agent of Australia to hold himself at the disposal of the Court, should any other questions arise for the need of the further procedures of the Court.

Mr. BRAZIL: Mr. President, Members of the Court, the Government of Australia is grateful to have this opportunity of answering these questions, of assisting the Court further in this important matter. Naturally, we would like to take a bit of time to prepare our answers, and of course we will answer along the lines indicated by you, Mr. President, i.e., we will answer in writing at a later stage, or orally if that is desired, and I think you indicated earlier that this would be possible.

*The Court rose at 11.25 a.m.*

## FOURTH PUBLIC SITTING (25 V 73, 12.05 p.m.)

*Present:* [See sitting of 21 V 73, Judge Dillard absent.]

## ARGUMENT OF MR. BYERS

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

The PRESIDENT: The Court meets in order to give the Agent of Australia an opportunity to reply to the questions put to him by Judges Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock. Judge Dillard is unfortunately prevented from being on the Bench today in view of health, but we hope that he will be back soon.

Mr. BYERS: Mr. President, Members of the Court. May I express to the Court my sense of privilege in appearing before it in this case. In so saying, I am conscious of that luminous expression of the principles of international law that characterize the judgments of the Court. I have the honour now to present on behalf of the Australian Government the answer to Sir Humphrey Waldock's questions.

The Government of Australia interprets Sir Humphrey Waldock's questions as being concerned with the identification of the instruments to which the Court must turn as laying down the conditions under which the Court may grant interim measures of protection.

In approaching both of Sir Humphrey's questions, the Government of Australia is conscious that a difficulty might arise if further reliance is placed by it on Article 33 of the General Act in addition to Article 41 of the Court's Statute. The Government of Australia sees this difficulty as being that the Court might feel called upon to determine as a necessary condition for the application of Article 33 of the General Act the question of whether the General Act is still definitely in force. As the indication of interim measures is now a matter of pressing urgency, the Government of Australia does not consider that, at the present time, it should press further for any definite decision on the validity and effect of the General Act. At most, it is only necessary for the Government of Australia to invoke the General Act as a basis for the Court's jurisdiction under Article 36 (1) of the Statute of the Court, and provided that the Government of Australia can show that the Court is not manifestly without jurisdiction by reference to the General Act, the requirements previously laid down by the Court for the indication of interim measures under Article 41 of the Statute would be satisfied.

I turn now to the answers to the two specific questions posed by Sir Humphrey. The first question was: "Does the Government formulate its request on alternative bases, that is either on Article 33 of the General Act of 1928 or on Article 41 of the Statute of the Court, or does it formulate its request on those two Articles in combination?" The answer to this question is that the Government of Australia bases its request for interim measures first and foremost on Article 41 of the Statute of the Court—an instrument the force and effect of which is not in doubt. Subsidiarily, and only if the Court should find that it is, on the material now before it, able to reach a conclusion that the General Act is still in force, the Government of Australia has also rested its request for provisional measures on Article 33 of the General Act of 1928.

Sir Humphrey's second question was: "Does the Government contend that the Court is competent to indicate interim measures of protection on the basis of Article 33 of the General Act of 1928 without having first decided whether or not the General Act is still in force as between Australia and France?"

The answer to this question is that the Australian Government contends that the Court is competent, as already stated, to indicate interim measures of protection on the basis of Article 41 of the Statute of the Court provided that the Court is shown to be not manifestly without jurisdiction. The Australian Government also contends, in the alternative, that the Court would be entitled to indicate interim measures of protection on the basis of Article 33 of the General Act if the Court were satisfied that it was not manifestly without jurisdiction under that Act. However, in view of the dire urgency of the matter, the Government of Australia would not wish there to be any delay on the part of the Court in granting interim measures by reason of the fact that the Court found it necessary to go beyond what was needed to justify the indications of interim measures under Article 41.

The Government of Australia takes the present opportunity of recalling and emphasizing the basic distinction which it sees between the Court's jurisdiction under Article 36 (1) and 36 (2) of the Statute. It recalls the clear terms in which the Solicitor-General, on 22 May 1973, submitted that unilateral reservations made by the French Government under Article 36 (2) were incapable of restricting the jurisdiction possessed by the Court under Article 36 (1) of the Statute. This said, the Government of Australia ventures the observation that, whatever the precise source to which it points as a basis for the Court's jurisdiction, ultimately that jurisdiction must derive only from the Statute, which has opened up two different routes of access to the Court under Article 36 (1) and 36 (2) respectively. And further, that there is nothing in the words of Article 36 (2) to subtract from or contradict the jurisdiction conferred by Article 36 (1). Each of the paragraphs is an independent source of jurisdiction. But the fact that all jurisdiction derives from the Statute makes it sufficient for the Government of Australia, as already stated, to rely at the present time exclusively upon the competence of the Court to indicate interim measures of protection under Article 41 of the Statute.

We would, lastly, recall the submissions of the Solicitor-General that the content of Article 41 of the Court's Statute is identical with that of Article 33 of the General Act of 1928.

## ARGUMENT OF PROFESSOR O'CONNELL

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Professor O'CONNELL: Mr. President and Members of the Court. I appreciate the honour of replying on behalf of the Government of Australia to the question put by Judge Dillard, which is as follows:

> "Bearing in mind that the Revised General Act of 1949 provided a method for making effective the provisions of the General Act of 1928, and thereby removing any doubt as to the continued effectiveness of most of its provisions, can you assist us by offering any explanation for the seeming lack of willingness of the States parties to the 1928 General Act, including France and Australia, to accede to the Revised Act?"

Of course it must be a matter of speculation why the parties to the General Act did not accede to the Revised General Act, and the reasons could be manifold, not excluding inertia. The Australian Government can mainly assist the Court in answering this question by reference to its own participation in the history of the subject, for it has no knowledge of the internal practice of other governments. Our enquiries reveal that no conscious decision was taken in the Australian Government either to accede or not to accede to the Revised General Act. All that our enquiries do reveal is that there was no suggestion when the Revised General Act was referred to the Australian Government that Australia was not still bound by the General Act. In this respect the official Australian Treaty List, which was revised shortly after the Revised General Act was introduced, included the General Act of 1928, and each subsequent edition down to the latest in 1970 has continued to include it.

It is to be noted that the New Zealand Treaty List, which was also issued in the late 1940s, likewise listed the General Act and has continued to do so. Although there is no official French Treaty List, a list of multilateral treaties to which France is a party, prepared by Dr. Henri Rollet, and published in 1971, lists the General Act.

If one is to speculate why some governments, parties to the General Act, either consciously decided not to accede to the Revised General Act or, as is more probably the case, were indifferent to it, several reasons can be suggested. But first it may be useful to give some details of the state of the parties.

There were 21 countries which were parties to all parts of the General Act before 1946. Of these, three have become parties to all of the provisions of the Revised General Act. Two other countries which were parties to the General Act with the exception of Part III have become parties to the corresponding provisions of the Revised General Act. This merely shows that not all of the original parties to the General Act have been indifferent to the question of restoring its full efficacy.

It also reveals that the process of restoration could be slow, and that it cannot be assumed that the rest of the parties to the General Act have permanently excluded consideration of the Revised General Act. The parties to the Revised General Act and the dates of their adherence to it are as follows: Belgium, 1949; Sweden, 1950; Norway, 1951; Denmark, 1952; Luxembourg, 1961; Upper Volta, 1962; and the Netherlands, 1971. It is now just two years since the Netherlands, which was silent on the subject for 22 years, took steps to adhere

to the Revised General Act, having been a party to the General Act since 1930. Stuyt's *Repertory of Netherlands Treaties* listed the General Act as among the treaties of the Netherlands in 1953.

The important circumstance that may have had some influence on the question of acceptance of the Revised General Act is that the General Act became, in effect, a closed convention with the demise of the League of Nations in 1946, whereas the Revised General Act is open to the adherence of all Members of the United Nations and to non-member States which are parties to the Statute of this Court, as well as to others to whom a copy had been transmitted by the General Assembly.

It would be understandable if governments preferred the security of known relationships under the General Act to the open commitment which they would be obliged to make under the Revised General Act if they adhered to it, especially since, in the post-war period, the political relationships of the parties to the General Act were largely homogeneous, which would not necessarily be the case under the Revised General Act.

It would likewise be understandable if governments waited to see what countries became parties to the Revised General Act who were not parties to the General Act. In fact, it took 13 years for any non-party to the General Act to become a party to the Revised General Act, namely Upper Volta, and that State's adhesion remains unique. Not surprisingly, any reticence which parties to the General Act may have felt about an uncertain commitment would, in these circumstances, be perpetuated.

Whereas the General Act was the product of an epoch of devotion to the ideal of peaceful settlement, by means of formal machinery of conciliation, arbitration and judicial decision, it remains a fact that the period since 1949 has not been characterized by any comparable devotion to such general modes of settlement of disputes. Instead, there has been a development of *ad hoc* instruments of settlement related to special categories of dispute, for example the machinery of GATT, IMF, or EEC; and the United Nations Charter and the organs which have developed under it have afforded modes of recourse to the solution of international problems which are broader and more diversified than in the pre-war period. It is significant of this trend that the number of States which have deposited Declarations under the Optional Clause is today almost the same as it was in the late 1930s. In these circumstances it would be surprising if the Revised General Act had attracted much adherence.

The six countries which have adhered to the Revised General Act who were also parties to the General Act include Belgium, whose initiative in the matter of the Revised General Act in 1949 was prompted by an interest in making the Revised General Act once more efficacious, especially since it was desirable to provide for the substitution of the present Court for its predecessor in case of non-members of the United Nations and non-parties to the Statute of the Court to whom Article 37 of the Statute was not available.

That this was a primary consideration in the minds of the promotors of the Revised General Act is clear from the Report of the Interim Committee on the Belgian Proposal to restore the original efficacy of the General Act. In that Report the Committee said:

> "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."

Obviously what the Committee had in mind when it adopted this statement

was the problem which would arise where parties to the General Act of 1928 might seek access to the Court through Article 35 of its Statute, and, not being parties thereto, would not be covered by Article 37.

In drawing attention to the fact that the ranks of the parties to the General Act were closed in 1946 and that Article 17 thereof was available only to parties of the Court's Statute, one may suppose that some governments preferred it that way.

Perhaps the answer to Judge Dillard's question is reducible to this thought: that, although activity respecting both the General Act and the Revised General Act has been slow, it would be untrue to say that the parties to the former have all finally excluded the possibility of accession to the latter, or that those States which have become parties to the Revised General Act regard as dissolved the *vincula juris* between them and other parties to the General Act who have not become parties to the Revised General Act.

## ARGUMENT OF MR. LAUTERPACHT

COUNSEL FOR THE GOVERNMENT OF AUSTRALIA

Mr. LAUTERPACHT: Mr. President and Members of the Court. It falls to me to reply on behalf of the Government of Australia to the question put jointly by Judge Dillard and Judge Jiménez de Aréchaga. May I say how sorry I am that Judge Dillard has fallen ill and express the wishes of all those representing Australia for his speedy recovery.

I cannot help but recall, on rising before you for the first time since the *Barcelona Traction* case, the recent death of one who led me in that case, Maître Henri Rolin. His pre-eminence in the field of international advocacy was generally recognized. He was a great and beloved leader whose passing will be mourned by all who shared his dedication to the standards of law in the international community.

Turning to the question which was put to the Government of Australia, the Court will recall that after mentioning the reference in the Solicitor-General's speech to the Judgment of the Permanent Court in the *Electricity Company of Sofia and Bulgaria* case, the question continued as follows:

> "Taking into account the special circumstances of the present proceedings, we would appreciate it if counsel for the Applicant could assist us by also examining, in relation to the present case, the views expressed in the dissenting opinions to Judges Anzilotti and Hudson, particularly on the relationship between treaty provisions on peaceful settlement and declarations containing reservations or limitations to the acceptance of the Court's jurisdiction under the Optional Clause."

The Government of Australia particularly appreciates the opportunity provided by this question to amplify the brief reference to the *Electricity Company of Sofia and Bulgaria* case made in the main pleading of the Solicitor-General. As the Court will no doubt appreciate, it was simply the pressure of attempting to provide some answer to the annex to the French Note of 16 May 1973 in a very short space of time which prevented fuller examination then of this highly relevant case.

With your leave, Mr. President, may I first recall the context in which reference to the case was made. The Government of Australia claims that the jurisdiction of the Court in this case rests on two grounds: the General Act and the Optional Clause.

In his argument on 22 May the Solicitor-General of Australia developed the submission that the two sources of jurisdiction of the Court were independent of each other and that neither weakened the other. The same point was made by my learned friend, Mr. Byers, a few moments ago. In this connection the Solicitor-General quoted one passage from the *Electricity Company of Sofia and Bulgaria* case and another from Judge Basdevant's dissenting opinion in the *Norwegian Loans* case.

The question posed by Judge Dillard and Judge Jiménez de Aréchaga invites the Government of Australia to look more closely at the *Electricity Company of Sofia and Bulgaria* case and this I shall now do. In so doing, I apologize for the fact that there will be some slight measure of repetition of what the learned

Agent for New Zealand said earlier this morning. It will not be a large repetition but I ask for the Court's indulgence.

The case, it will be recalled, was brought by Belgium against Bulgaria. The substantive cause of action arose out of the treatment by Bulgaria of a Belgian company operating in Bulgaria and that substantive cause of action does not matter for present purposes. In that case, as in this, two grounds of jurisdiction were invoked. The first consisted of the declarations made by Bulgaria in 1921 and Belgium in 1926 under the Optional Clause. The second ground of jurisdiction was the treaty of conciliation, arbitration and judicial settlement concluded between the two countries in 1931. This treaty may, for convenience, be described as a sort of bilateral general act of a kind promoted by the League of Nations at the same time as the General Act itself was drawn up and in material content very similar to the General Act.

The question of the effect of the Belgian invocation of two grounds of jurisdiction was not raised by the Bulgarian Government. It arose, it would seem, almost by accident in the course of argument by counsel for the plaintiff State, Belgium. One morning he observed that relations between the two countries were for a period governed by the 1931 Treaty alone. That afternoon he retracted this view—see *P.C.I.J., Series A/B, No. 77*, at page 75.

However, the point was pursued within the Court. Although the Judgment is itself relatively brief in its treatment of the question, it is evident from the way in which the matter was dealt with in the dissenting opinions that the point was thoroughly considered by the Court. It is therefore significant that the Court's conclusion on the matter was quite clear. On 22 May the Solicitor-General quoted one sentence from the Judgment. I ought to repeat that sentence because it both follows and leads into others which were not quoted but are, nevertheless, very material when the case is receiving this fuller consideration.

Thus the whole relevant passage of the Judgment reads as follows (*ibid.*, p. 76):

> "The Court holds that the suggestions first made by Counsel for the Belgian Government cannot be regarded as having the effect of modifying that Party's attitude in regard to this question. The Belgian Government in fact has always been in agreement with the Bulgarian Government in holding that, when the Application was filed, their declarations accepting the Court's jurisdiction as compulsory were still in force."

I pause here, Mr. President, merely to recall that the declarations referred to were earlier in time than the 1931 Treaty. The Court then continued:

> "The Court shares the view of the Parties. In its opinion, 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 ultimate result that no jurisdiction would remain."

Once more, Mr. President, I pause to observe that the Court was here expressing its independent judgment. It did not regard itself as bound to echo the views of the Parties. I resume the quotation:

> "In concluding the Treaty of conciliation, arbitration and judicial settlement, the object of Belgium and Bulgaria was to institute a very complete system of mutual obligations with a view to the pacific settlement of any disputes which might arise between them. There is, however, no justification for holding that in so doing they intended to weaken the

obligations which they had previously entered into with a similar purpose, and especially where such obligations were more extensive than those ensuing from the Treaty.

It follows that if, in a particular case, a dispute could not be referred to the Court under the Treaty [the later instrument], whereas it might be submitted to it under the declarations of Belgium and Bulgaria accepting as compulsory the jurisdiction of the Court [the earlier instruments], in accordance with Article 36 of the Statute, the Treaty [the later instrument] cannot be adduced to prevent those declarations from exercising their effects and disputes from being thus submitted to the Court."

This is as far as it was necessary for the Court to take its discussion of the subject. The Court manifestly refused to accept a later instrument conferring jurisdiction on it as automatically overriding an earlier instrument. The Court emphasized the continuing force of the earlier instrument especially, as it said, "*where such obligations were more extensive than those ensuing from the* Treaty".

This decision was reached by a vote of nine judges to five. The minority included Judges Anzilotti and Hudson to whose opinions I shall refer in a moment. But it is worth recalling that the majority included judges of comparable calibre and experience in the persons of, amongst others, the President, Mr. Guerrero, the Vice-President Sir Cecil Hurst, as well as Messrs. Fromageot and De Visscher.

Now the decision of the Court, read by itself, provides powerful support for the submissions of the Government of Australia. There, as here, were two sources of jurisdiction; there, as here, the earlier source of jurisdiction was more extensive, that is less restricted by reservations than the later source. I have not mentioned this point previously, but the significant difference in the *Electricity Company of Sofia and Bulgaria* case between the optional clause declarations and the 1931 Treaty was that the latter contained a provision making exhaustion of local remedies a condition precedent to the proceedings. This made more precise the rule of customary international law that would otherwise have applied, and significantly reduced the benefit of the 1931 Treaty to the claimant State, Belgium.

So, as I have said, there, as here, the later source of jurisdiction was more restrictive than the earlier one. Further, there is a respect in which the *Electricity Company of Sofia and Bulgaria* case was even stronger than the present case. Although, as was indicated in the Solicitor-General's speech, the effect of declarations made under the optional clause is to establish a consensual or contractual bond between the declarant States, there is no specifically agreed coming together of intentions. Each declarant enjoys a discretion within a wide, but not unlimited range, to determine the scope of his own intention to accept jurisdiction. The intentions are only effective to create jurisdiction in so far as they are coincident. But when there is a bilateral treaty, under which the parties accept the jurisdiction of the Court, as there was in 1931, there is a much more specific meeting of wills. In the *Electricity Company of Sofia and Bulgaria* case this meeting of wills, by reason of the provision regarding the local remedies rule, expressly squeezed the range of matters included in the Court's jurisdiction smaller than it had been under the optional clause declarations. And yet, even in that situation, where it was a treaty, so to speak, trying to override, or possibly override, earlier declarations, even in that case the Court did not regard this express restriction in the Treaty as effective to limit the effect of the earlier coincident individual acceptances of the optional clause.

In terms of citing a clear precedent to this Court from its previous practice, it would be difficult to find one which is more in point than the *Electricity Company of Sofia and Bulgaria* case. And it would be sufficient to end this reference to that case at this point, but in the question put to the Australian Government specific reference was made to the dissenting opinions of Judges Hudson and Anzilotti. I must, therefore, say something about those opinions.

First, I shall examine the opinion of Judge Anzilotti. Needless to say, I shall restrict myself to that part of it which deals with the effect of concurrent sources of jurisdiction.

The starting point of Judge Anzilotti's approach was that the declarations under the optional clause and the Treaty "constitute two conventions... which lay down different rules for the same thing, namely recourse to the Court" (*ibid.*, p. 89).

The next stage was the proposition that "in the same legal system, there cannot at the same time exist two rules relating to the same fact and attaching to these facts contradictory consequences" (*ibid.*, p. 90).

Now, this categorical statement of this proposition by Judge Anzilotti, as applicable to the situation before him, can be challenged. However, there is no need for me to do so here. For present purposes alone, I accept his starting point. What matters is how he approached the resolution of the conflict which he detected between the two sources of the Court's jurisdiction.

Thus we come to the third element in his approach, the determination of the intention of the Parties to the 1931 Treaty. He put his point as follows: "The Treaty being of later date than the Declaration, it is in the text of the former [that is to say the Treaty] that we must seek the intention of the Parties in regard to rules previously in force" (*ibid.*, p. 91).

Here then is a point of major importance. When seeking to resolve the conflict between the two sources of jurisdiction, Judge Anzilotti looked to the later instrument. Why? Not simply because it is later in time, but because only by looking at the later instrument "can we [and again I use his words] seek the intention of the Parties in regard to rules presently in force".

Now obviously it is simply a matter of common-sense to acknowledge that the parties to a treaty are free to vary their joint intention by means of a subsequent treaty. If one is looking for joint intention at a given moment, manifestly one cannot ignore the terms of the latest text prior to that moment. That is why Judge Anzilotti was concerned with time, not for its own sake but in relation to the identification of intention. He reverts to this element several times in the course of the crucial section of his opinion: "This interpretation [and I shall revert presently to what his interpretation was] seems to me to be in perfect accord with the intention of the Parties when they concluded their Treaty..."

The same concern with intention is reflected a few paragraphs later when he contrasts with the purpose of the Treaty an interpretation which he believes to be wrong. He then describes his conclusion as only "a logical consequence of the purpose and plan of this Treaty".

Now, one does not speak of the logical consequence of the purpose and plan of the treaty unless, of course, one has in mind the dominating influence of the intention of the parties.

Having thus identified Judge Anzilotti's overriding concern to implement the intention of the Parties, and for that reason to look at the later instrument, I need say only this on the substantive aspect of the interpretation: he concluded that the Treaty covers all disputes contemplated in the declarations and subjects them to its specific rules. That was his interpretation of the intention of the Parties. I am not so much concerned with his conclusion as I am with his

method. Now to defer for a moment the consideration of the rest of the relevant part of Judge Anzilotti's opinion, may I attempt to apply his doctrine of intention to the present case.

I need hardly say that the crucial element in Judge Anzilotti's approach is the common intention of the Parties. He repeatedly speaks of the intention of the Parties—in the plural. He is, after all, trying to interpret a bilateral treaty which must represent a meeting of two intentions. He is manifestly not concerned with the effect of unilateral intention.

Now, in the present case what material does one have in hand for determining the intentions of the Parties? We have, first, their accession to the General Act in 1931. Now about the scope of the relationship established at that moment, I hope I may assume that there is no controversy. The question then is, what evidence is there of a later common intention to depart from the earlier position? The answer is, none. The point is that the Court is here concerned with one specific feature of the French declaration, the 1966 reservation relating to national defence, and the question whether that narrows the jurisdiction created by the 1928 General Act.

On Judge Anzilotti's approach, the concept of national defence could limit the jurisdiction created by the earlier text if it represented the common intention of the Parties to change what had previously been agreed upon. If, therefore, the element of national defence had been included within a treaty between Australia and France, Judge Anzilotti's condition might have been met. The same might perhaps have been true if the Australian Government had made a similar reservation at about the same time. In that event there would have been some basis for the suggestion of a common intention sufficient to override the earlier common grant of jurisdiction created by the 1928 Act. But the facts in this case do not warrant that assertion. All that the Court has before it is a unilateral assertion of intention, that of France. There is no evidence of any explicit common intent of the Parties to subtract from their previously agreed relationship the whole sector of disputes covered by the concept of national defence.

The idea that a unilateral assertion of intention can override a common intention is so contrary to the most fundamental notions of the law of treaties that I would be wasting the time of the Court if I were to pursue that point further.

So much, then, for the application to this case of Judge Anzilotti's main idea, that of the overriding force of a common intention properly identified.

But that is not the end of what Judge Anzilotti had to say. There follows a section in which he deals with the consequences of the overriding intention of the Parties to the later instrument. But for one circumstance, his view would have been that the later instrument abrogated the earlier instrument, that is, put an end to it completely and irreversibly. The circumstances which led him to a different conclusion were that the periods of validity of the declaration and of the Treaty were different, with the life of the declaration continuing beyond that of the Treaty.

The Bulgarian Declaration, it may be recalled, contained no limitation of time. The Belgian Declaration was stated to be for a period of 15 years. The 1931 Treaty, like the General Act, was concluded for a period of five years, subject to automatic renewal for periods of five years unless denounced. It was actually denounced by Bulgaria in August 1937 and thus expired in February 1938. I mention these points because they show that there was no inherent reason why the declarations under the optional clause made by Belgium and Bulgaria should have continued beyond the life of the Treaty. If Bulgaria had

not denounced the Treaty, the Treaty could have gone on until 1943 or longer, while the Belgian Declaration would have expired in 1941. So, really, when Judge Anzilotti spoke of the differing lives of the two sources of jurisdiction, the critical point for him was the non-identity of their lives, and the possibility that the earlier instrument might survive the later. Not the fact that it did. After all the Parties would have been uncertain about this fact at the time of the conclusion of the later Treaty.

May I translate this approach of Judge Anzilotti into terms of the present case? The earlier instrument, the General Act, was concluded for periods of five years. It has not been denounced by either Party. The later instruments, the declarations of Australia and France, while not specifically limited in time, both contain reservations of the right of either Party to end or change them at any moment. Thus, it is in law quite possible for the General Act to survive either or both of the declarations of the Parties. Of course, this assumes the continuing validity of the General Act after 1945, but the whole discussion of the *Electricity Company of Sofia and Bulgaria* case presupposes that assumption.

Assuming further an assumption, which, of course, I do not share—that the French 1966 Declaration somehow overrode the common intention of the parties in the 1928 General Act, making that assumption, it would still only have the effect of suspending the General Act. Consequently, if the alleged effect of the French reservation of 1966 on the contractual relations of France and Australia were brought to an end by Australia's termination of its own declaration, the suspense in which the General Act was resting would give way to resurrection. This possibility was clearly foreshadowed in the last sentence of Judge Anzilotti's opinion, and he said: "I need scarcely add that the Belgian Government could have submitted a fresh application based this time upon the Belgian and Bulgarian Declarations that became again applicable in relations between the two States from February 4th 1938 onwards." 4 February 1938 was as I stated a few moments ago, the date on which the denunciation by Bulgaria of the 1931 Treaty brought that second and later source of jurisdiction to an end.

There is, I believe, nothing more which is material to this case to be extracted from Judge Anzilotti's opinion. Without admitting the correctness of his approach, when contrasted with that of the Court itself, the important point is that that approach, when applied to the facts of this case, leads to the conclusion that the unilateral French reservation of 1966 does not override the common intention of the Parties reflected in their accession to the General Act. And even if it did, to continue with the application of Judge Anzilotti's reasoning, it would only do so on a suspensory basis which could be brought to an end at any time by the withdrawal of Australia's declaration under the optional clause. I only mention this last point because it throws into such strong light the strange and anomalous character of the whole of the argument regarding the overriding effect of the 1966 French reservation.

Mr. President and Members of the Court, I must ask you now to bear with me while I look at Judge Hudson's opinion, though I hope that I can deal with it more briefly.

Judge Hudson, like Judge Anzilotti, was troubled by the existence of two sources of jurisdiction for the Court. Like Judge Anzilotti, Judge Hudson concluded that the 1931 Treaty overrode the earlier optional clause declarations. Judge Hudson's solution to the problem was dictated by two considerations. The principal one, which was not discussed at all by Judge Anzilotti, was that the terms of the optional clause would give way to other agreed methods of settlement. Judge Hudson's alternative approach closely paralleled Judge

Anzilotti's reliance upon the intention of the parties. I shall deal with each of these approaches in turn.

Judge Hudson began by identifying the conflict between the optional clause declarations and the 1931 Treaty. In so doing, he drew particular attention to the condition which appeared in the Belgian optional clause declaration of 1925, namely that the jurisdiction of the Court was not recognized in cases where the parties have agreed or shall agree to have recourse to another method of pacific settlement. He regarded this condition as agreed between the Parties, presumably because of the rule of reciprocity governing declarations under the optional clause.

After a close scrutiny of the points of difference between the two sources of jurisdiction, he said:

> "The two systems being different, it would seem that this is a case in which the Parties have agreed, in the terms of the Belgian declaration, 'to have recourse to another method of pacific settlement'. If this conclusion be sound, the reciprocal declarations by Belgium and Bulgaria are not to be applied as a source of jurisdiction in this case, and the Court's jurisdiction may be sought only in the Treaty of 1931." (*Ibid.*, p. 124.)

Judge Hudson's idea can be pursued in the context of the present case. Examination of both the French and the Australian declarations under the optional clause shows that each contains the exclusion of disputes for which the Parties have agreed to have recourse to another method of pacific settlement. Thus one is led to ask, have the Parties agreed to have recourse to any other mode of pacific settlement? What, for this purpose, is another mode of pacific settlement? We have the authority of Judge Hudson for holding that the 1931 Treaty between Belgium and Bulgaria was "another method of pacific settlement" in relation to the optional clause relationship of those two countries. I have already indicated that that 1931 Belgian-Bulgarian Treaty was a sort of bilateral General Act. That being so, one may reasonably suggest that the General Act itself is also "another mode of pacific settlement" in the context of the Australian-French relationship established by their acceptances of the optional clause. The fact that the General Act preceded the optional clause declarations makes no difference, since the wording of the exclusion is sufficiently broad to cover prior as well as subsequently established alternative modes of settlement.

The second aspect of Judge Hudson's examination of the relationship of the two sources of jurisdiction is distinctly subordinate to the first. But it resembles in its major respect the approach of Judge Anzilotti based upon the intention of the parties. Judge Hudson said:

> "Called upon to choose which of the two texts is to govern in this case, the Court must apply a general principle of law, and it must say that the expression of the Parties' intention which is the later in point of time should prevail over that which is the earlier." (*Ibid.*, p. 125.)

But Judge Hudson did not introduce this reference to the effect of later instruments as an absolute proposition. Some lines later he introduced other subrules of interpretation, namely that the special prevails over the general and that the more extensive prevails over the less extensive. But all these devices would appear to be, in Judge Hudson's thinking, merely instruments to assist in the determination of intention.

It is not, I think, necessary for me once again to analyse the role of intention in this problem. I have already done it at length when examining Judge Anzilotti's opinion. It can be said though, when looking at Judge Hudson's subrules,

that only one can really be applied in this case—that the more extensive is to be preferred to the less extensive; and that therefore the more ample jurisdiction under the General Act is to be preferred to the less ample competence deriving from the French 1966 reservation.

Mr. President and Members of the Court, there are other passages in the dissenting opinions in the *Electricity Company of Sofia and Bulgaria* case which merit some mention as supporting the Australian position in the present case. But I think that having already dealt at length with the opinions of Judges Anzilotti and Hudson, I ought now to forego further examination of that case. Nonetheless, it is just worth noting in passing Judge Urrutia's remark towards the end of his own opinion, in which he said:

> "*The question raised in the case... involves a legal problem of great* importance to the proper understanding of the relations existing between the optional clause and the said conventions, and the Court's decision will certainly be very carefully examined by all the signatory States." (*Ibid.*, pp. 105-106.)

If we may assume that the parties to the General Act heeded Judge Urrutia's warning, their failure to withdraw from the General Act and their retention of their Optional Clause declaration suggests strongly that they were prepared to accept as a correct statement of the law the statement by the Court itself with which I began this long answer—the statement that a multiplicity of agreements is intended to open up new ways of access to the Court rather than to close old ways; and that the lack of reaction of the signatory States also shows that they were prepared to live with the consequences thus identified.

In conclusion then, Mr. President, may I attempt to summarize in four points the principal features of the *Electricity Company of Sofia and Bulgaria* case. First, we have the Judgment of the Court itself expressly upholding that earlier instruments, the Optional Clause declarations in that situation, could and did co-exist with the later instruments—the 1931 Treaty. The Court's approach may be compared with the principle of the ratchet—a cog wheel which can move in one direction only, the forward direction. Instruments creating jurisdiction are like ratchets; they move only forward, unless, as is possible, the holding mechanism is released by a specific agreement. That is not the case here.

Point two: this point relates to Judge Anzilotti's opinion. I do not question whether he was right or wrong to dissent from the Court, but starting from the position which he actually took, I would submit that in the present case he too would have found that the General Act was not over-ridden by the unilateral French declaration. For Judge Anzilotti the crucial question was the common intention of the parties. He would have been unable to find such a common intention in the unilateral French reservation of 1966; this concern with intention was also, I should add, shown by Judge Hudson.

The third point also comes from Judge Anzilotti's opinion; it is the idea of suspension. It is not directly to be applied in the present case but serves to show, to put it at the lowest, the very odd situation that could arise from the French contention. If one applies Judge Anzilotti's reasoning to this case, the French declaration would merely suspend the General Act. Yet the French declaration depends, for its contractual force—or for any contractual force that it may have—upon its co-existence with the Australian declaration. If, therefore, Australia were to withdraw its declaration today and start proceedings afresh tomorrow, this obstacle, even if it existed now, would be then removed. Insistence on such formalism would surely not be part of the tradition of this Court.

The fourth and final point comes from Judge Hudson's opinion. It is the idea of recourse to "other methods of settlement". He pointed out that the provision in the Optional Clause declaration gave the 1931 treaty over-riding force. I merely observe that a similar clause appears in the French and Australian declaration, and that if Judge Hudson's reasoning is accepted, these clauses would give priority to the General Act.

Mr. President and Members of the Court, that brings me to the end of the answer to the question put by Judge Dillard and Judge Jiménez de Aréchaga. Once again, may I express the gratitude of the Government of Australia at having been thus enabled to probe more deeply an authority which, upon a proper reading, so weightily supports the Australian case.

## QUESTIONS BY JUDGE GROS

Judge GROS: Je voudrais dire à M. l'agent du Gouvernement de l'Australie que les *réponses complètes d'aujourd'hui rendent nécessaire une rédaction* nouvelle d'une question que j'avais l'intention de poser. Je pense que pour leur faciliter la tâche je pourrais transmettre cette question par écrit[1] à M. l'agent du Gouvernement de l'Australie. J'ai une deuxième question que je vais maintenant poser:

Le conseil du Gouvernement de l'Australie a indiqué à la Cour le lundi 21 mai (p. 187, *supra*), qu'il y avait « une question sur laquelle nous réservons notre position ».

M. l'agent du Gouvernement de l'Australie peut-il indiquer quelle position est ainsi réservée; et s'il s'agit d'une réserve de position juridique qui serait un élément du différend soumis à la Cour par le Gouvernement de l'Australie, le point a-t-il été soulevé et traité comme tel dans les entretiens à Paris, en avril 1973, entre les représentants des deux gouvernements?

The PRESIDENT: As indicated by Judge Gros, he will have another question to submit to the Agent of Australia in addition to this question. Having heard the replies[2] of the Agent for Australia, I have to recall that the Agent will remain at the disposal of the Court should any further additional questions arise on which the Court may require some clarification.

*The Court rose at 13.15 p.m.*

*(Signed)* Manfred LACHS,
President.

*(Signed)* S. AQUARONE,
Registrar.

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[1] II, pp. 370-371.
[2] II, pp. 372-373.

## FIFTH PUBLIC SITTING (22 VI 73, 10.30 a.m.)

*Present:* [See sitting of 21 V 73, President Lachs and Judge Dillard absent.]

## PRONONCÉ DE L'ORDONNANCE

Le VICE-PRÉSIDENT faisant fonction de Président: La Cour se réunit ce matin pour prononcer sa décision sur la demande en indication de mesures conservatoires dont elle a été saisie par l'Australie[1] au cours de l'instance que celle-ci a introduite le 9 mai 1973 contre la France dans l'affaire des *Essais nucléaires.*

La Cour a également été saisie d'une demande en indication de mesures conservatoires par la Nouvelle-Zélande dans l'instance que celle-ci a introduite contre la France en l'affaire des *Essais nucléaires.* Les deux affaires ont été traitées séparément, la Cour ayant décidé, à ce stade, de ne pas en prononcer la jonction. La décision rendue sur la demande néo-zélandaise fera donc l'objet d'une décision distincte qui sera lue en audience publique cet après-midi.

J'ai le regret de vous informer que M. Lachs, Président de la Cour, qui a pris part aux audiences tenues en l'affaire a été ensuite empêché, pour des raisons de santé, d'assister à la partie finale du délibéré. Je regrette en outre d'avoir à annoncer que M. Dillard, qui a assisté à une partie des audiences tenues en l'affaire, a été empêché, pour des raisons de santé, de prendre part au délibéré. En conséquence, M. le Président Lachs et M. le juge Dillard n'ont pas participé à l'ordonnance.

Je donne lecture de l'ordonnance rendue par la Cour dans l'instance introduite par l'Australie contre la France.

[Le Vice-Président lit le texte de l'ordonnance à partir du paragraphe 1[2].]

Je donne la parole au Greffier pour lire le texte anglais du dispositif de l'ordonnance.

[Le Greffier lit le dispositif en anglais[3].]

M. Jiménez de Aréchaga, sir Humphrey Waldock, M. Nagendra Singh, juges, et sir Garfield Barwick, juge *ad hoc*, joignent des déclarations à l'ordonnance de la Cour; MM. Forster, Gros, Petrén et Ignacio-Pinto, juges, joignent à l'ordonnance les exposés de leurs opinions dissidentes respectives.

Une demande en indication de mesures conservatoires ayant un caractère d'urgence, l'ordonnance d'aujourd'hui a été lue d'après un texte ronéotypé. Le texte imprimé présenté de la manière habituelle sortira de presse d'ici une dizaine de jours environ.

*(Signé)* Le Vice-Président,
F. AMMOUN.

*(Signé)* Le Greffier,
S. AQUARONE.

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[1] Voir p. 43-146 ci-dessus.
[2] *C.I.J. Recueil 1973*, p. 100.
[3] *Ibid.*, p. 106.