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 24 and 25 May 1973, President Lachs presiding, and on 22 June 1973, Vice-President Ammoun presiding

FIRST PUBLIC SITTING (24 V 73, 10.05 a.m.)

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

Also present:

For the Government of New Zealand:

Professor R. Q. Quentin-Baxter, of the New Zealand Bar, Professor of International Law, Victoria University of Wellington, *as Agent and Counsel*;

H.E. Mr. H. V. Roberts, Ambassador of New Zealand to the Netherlands, *as Co-Agent*;

Hon. Dr. A. M. Finlay, Q.C., Attorney-General of New Zealand,

Mr. R. C. Savage, Q.C., Solicitor-General of New Zealand,

Mr. K. J. Keith, of the New Zealand Bar, Reader in International Law, Victoria University of Wellington,

Mr. C. D. Beeby, of the New Zealand Bar, Legal Adviser, New Zealand Ministry of Foreign Affairs, *as Counsel*;

Mr. H. J. Yeabsley, Director of the National Radiation Laboratory of New Zealand,

Mrs. N. C. Mullins, First Secretary, New Zealand Ministry of Foreign Affairs, *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 New Zealand on 14 May 1973, in the *Nuclear Tests* case brought by New Zealand against France.

The proceedings in this case were begun by an Application [1] by the Government of New Zealand, filed in the Registry of the Court on 9 May 1973. The Application founds the jurisdiction of the Court on Articles 36, paragraph 1, and 37 of the Statute of the Court, and on Article 17 of the General Act for the Pacific Settlement of International Disputes of 1928; and in the alternative on Article 36, paragraphs 2 and 5, of the Statute of the Court. The Applicant asks the Court to adjuge and declare that the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests. The French Government was informed forthwith by telegram [2] of the filing of the Application, and a copy thereof was sent to it by express airmail the same day.

On 14 May 1973 New Zealand filed a request [3] 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 New Zealand asks the Court to indicate.

The REGISTRAR: "The measure which New Zealand requests . . . is that France refrain from conducting any further nuclear tests that give rise to radioactive fall-out while the Court is seized of the case."

The PRESIDENT: The French Government was informed forthwith by telegram of the filing of the request for interim measures of protection, and of the precise measures requested, and a copy of the request was sent to it by express airmail [4] the same day. The Parties were subsequently informed, by communications [5] of 22 May, that the Court would hold public sittings commencing on 24 May at 10 a.m. to afford the Parties the opportunity of presenting their observations on the request by New Zealand for the indication of interim measures of protection.

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 of the jurisdiction of the Court under Article 36 of the Statute excluded "disputes concerning activities connected with the national defence", and on the conten-

[1] See pp. 3-45, *supra*.
[2] See p. 341, *infra*.
[3] See pp. 49-86, *supra*.
[4] See p. 344, *infra*.
[5] See p. 364, *infra*.
[6] See p. 347, *infra*.

tion 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 adduced also by the French Government why it considered that the Court has no jurisdiction in this 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 French Government 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 18 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, 31 May has been fixed as the time-limit [2] for the written observations of the Parties on this Application.

Since the Court in the present case includes upon the Bench no judge of New Zealand nationality, the Government of New Zealand notified the Court on 9 May 1973[3] 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 Government of New Zealand 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.

Sir Garfield Barwick made a solemn declaration as judge *ad hoc* on 21 May in the proceedings between Australia and France, a declaration required under Article 20 of the Statute of the Court. I declare this declaration applicable to the present case too and, therefore, declare Sir Garfield Barwick duly installed as judge *ad hoc* in the present case.

I declare the oral proceedings open on the request of New Zealand for the indication of interim measures of protection.

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[1] See pp. 89-94, *supra*.
[2] *I.C.J. Reports 1973*, p. 341.
[3] See p. 340, *infra*.

ARGUMENT OF DR. FINLAY

COUNSEL FOR THE GOVERNMENT OF NEW ZEALAND

Dr. FINLAY: Mr. President and Members of the Court. In this request the New Zealand Government is asking that this Court lay down and indicate interim measures of protection.

The request relates to proceedings recently instituted by New Zealand against France asking the Court to adjuge and declare that the conduct by the French Government in the South Pacific region of tests that give rise to radio-active fall-out constitutes a violation of New Zealand's rights under international law, and that those rights will be violated by any further such tests.

The reasons for the request are twofold: first, it is the very essence of the rights claimed by New Zealand that nuclear testing is in breach of international law and should forthwith be discontinued. To hold such tests while this Court is seised of the matter, and before it has delivered a final judgment, would do irreparable damage to the rights we seek to protect. There could be no possibility that the rights eroded by the holding of such tests could be fully restored in the event of a judgment in New Zealand's favour. Further tests would necessarily aggravate and might well extend the present dispute.

The second reason for the request is that the French Government has been requested to give, but has refused to give, the New Zealand Government an assurance that its programme of nuclear testing in the atmosphere at the French Atomic Test Centre at Mururoa Atoll has ended. Moreover, it has given no assurance that it will be suspended until the final judgment of this Court has been given in the present proceedings. On the contrary, there are strong reasons for believing that the pattern of French testing established in previous years will again be followed this year, and that a resumption of French nuclear testing in the Pacific region is therefore imminent.

The considerations just mentioned underline the gravity and urgency of the situation which has given rise to this, our present request. My Government is grateful to the Court for the steps which have been taken to give the request priority and to treat it as a matter of urgency and which were noted, if I may say so, in gracious language, at the opening of the Australian case [1]. It is a source of profound regret to my Government that the French Government, the Respondent in these proceedings, has not appointed an agent, nor entered an appearance before the Court. My Government has too much respect for the Government of France to believe that that Government will be content to set aside its legal obligations. It is our hope, expectation and belief that France will attend and participate in the later phases of the present proceedings. The Court would be assisted by French arguments at every stage of this case. In her absence we must, and will, make every effort to ensure that the New Zealand case is presented with accuracy, moderation and fairness.

In the last three days the Court has heard representatives of the Australian Government present a request for measures of protection similar to those which New Zealand is now seeking. I followed, as I am sure all honourable Members of the Court followed, with meticulous attention the speech of my learned friend Senator Murphy [2] on Monday, and the closely argued presentation

[1] I, p. 164.
[2] I, pp. 166-183.

developed by his Solicitor-General[1]. New Zealand's case arises out of the same set of circumstances as that of Australia, and has comparable objectives. The Court has had the benefit of the submissions made by Australia, and my colleagues and I will endeavour not to trespass upon the Court's time unnecessarily by enlarging upon issues already traversed in those submissions. At the same time, we think it to be our duty to place the facts and circumstances of the case in a broad perspective; and we shall try to give a balanced account of the legal issues which our request may be thought to raise.

For the convenience of the Court, we have set out in our written request the main features of the New Zealand case. In this opening address I shall first outline the circumstances in which, I submit, the Court may grant interim measures of protection. I shall then review the long history of the exchanges between New Zealand and France in regard to French nuclear testing in the Pacific.

The representations repeatedly made to France over a full decade will bear witness to the constancy and depth of the concern felt by the Government and people of New Zealand, and also to the patient and conciliatory spirit of the approaches we have repeatedly made to France. The correspondence between the two Governments will show that these approaches have produced not even a scintilla of assurance that French atmospheric nuclear testing in the Pacific will end—or even be postponed. The correspondence will show that French obduracy has brought about the present dispute; and that there appears to be every prospect of an early, indeed imminent, resumption of testing at Mururoa Atoll in French Polynesia.

I shall then show that New Zealand's concern has always extended to, and been shared by, the peoples of the South Pacific region. I shall refer to the steps taken to monitor and measure the effects of French atmospheric testing in New Zealand itself and in the Pacific islands, and I shall comment on the significance of the information obtained.

Next, I shall invite the Court to consider the developments in world opinion, and the actions taken by the United Nations to bring nuclear weapons testing to an end. I shall show, Mr. President, that the extent of the concern felt in New Zealand and in the South Pacific is a true reflection of the standards and values insistently proclaimed by the United Nations. In New Zealand's submission, it is the right of all members of the international community, including New Zealand, that these standards will be maintained, that is to say, that every State and every dependent territory has the right to be unassailed by nuclear explosions giving rise to radio-active fall-out, and from unjustifiable radio-active contamination of the human environment. We submit that New Zealand's rights are violated by the entry—uninvited and unwarranted—into our territory of the radio-active debris from French nuclear testing in the atmosphere, and by the harm done by this debris, and by the interference of French testing with the freedoms of the seas.

Finally, Mr. President and Members of the Court, I shall submit to you that this is a case which urgently demands interim relief.

The Solicitor-General, Mr. Savage, will consider in more detail the issues relating specifically to the laying down of measures of protection under Article 33 of the General Act for the Pacific Settlement of International Disputes, and to the indication of such measures under the Statute of the Court. Professor Quentin-Baxter, my country's Agent, will deal more fully with the questions relating to the Court's jurisdiction and will close the presentation of the New Zealand case.

[1] I, pp. 184-224.

The law relating to the making of an order for interim measures is to be found in Article 41 of the Statute, Article 66 of the Rules, the practice and jurisprudence of the Court and, in our case, Article 33 of the General Act for the Pacific Settlement of International Disputes.

In this brief overview of the law, I look first at the question of jurisdiction to grant interim measures and, secondly, at the grounds upon which they may be ordered. On both issues, the interim, provisional, preliminary character of the power is of predominant importance. The Court is not being invited to make a final decision on anything; it is not necessary for it to consider whether it has jurisdiction on the merits; it is not deciding what, at the end of the day, the rights of the Parties may be. It is only, as Article 41 so clearly and succinctly states, acting to preserve the rights of the Parties, pending the final disposition of the case. As the Court stated in its two Orders made last year in the *Fisheries Jurisdiction* cases, United Kingdom and Iceland and the Federal Republic of Germany and Iceland:

> "The decision given in the course of the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the merits themselves and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction or in respect of such merits." (*I.C.J. Reports 1972*, pp. 16 and 34.)

Coming now to the question of jurisdiction, it follows from the very nature of the proceedings and from the constant jurisprudence of the Court that, as the Court itself put it in the same two Orders, it "need not, before indicating [provisional measures] finally satisfy itself that it has jurisdiction on the merits of the case" yet, the Court continued, "it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest".

It is our submission that, in this case, there is no manifest lack of jurisdiction. As the Application indicates, my Government relies first on the General Act for the Pacific Settlement of International Disputes signed at Geneva on 26 September 1928, and secondly on the declarations made by the Governments of New Zealand and France in respect of Article 36 (2) and (5) of the Statute of the Court.

For the present it is enough for me to recall that France and New Zealand became parties to the General Act on the very same day; that it is a treaty which provides a specific means of termination; that it has never been denounced; and that its validity has not in the past been questioned.

The action of the General Assembly in 1948 and 1949 in preparing a revised text of the General Act proceeded on the basis that the continued existence of the Act was beyond doubt. Since 1946 France has more than once acknowledged that the General Act remains in force. Indeed, France referred to the Act being in force in her pleadings in the *Certain Norwegian Loans* case, France and Norway; and the French Foreign Minister, responding to a question in the National Assembly, affirmed in 1964 that France remained bound by the General Act.

It can therefore be seen that there are certain parallels between the situation in the present case and that obtaining in the *Fisheries Jurisdiction* cases. In both cases there was and is a treaty which has not been denounced and which prima facie remains in force. When the appropriate time comes, it will be my duty to establish that the General Act does indeed remain in full force and effect.

There has been submitted by the French Government, in response to the New Zealand and Australian Applications, a document which suggests not only that

the Court has no jurisdiction to entertain our Application, but also that this absence of jurisdiction is, and I emphasize the word because it is of important significance, this absence of jurisdiction is *manifest*, and that the Court's jurisdiction to indicate interim measures accordingly does not arise. I recall and adopt the proposition put forward by Australian counsel that this document was not submitted in accordance with the Rules of Court. The assertion made by France, if justified, could have been contained in one sentence, but it is not. It is contained in a three-page letter supplemented by arguments in another document of 19 pages. This circumstance is, I submit, may it please Your Excellencies, revealing and damning. The fact that it takes 22 pages to assert that a point is not debatable is itself evidence, indeed proof, of its very debatability. This fact, like the points I made about the continued force of the General Act a moment or two ago, attests at the very least that there is not—to return to the language used in the *Fisheries Jurisdiction* cases—a *manifest* absence of jurisdiction.

The second legal issue which I propose to examine, again very briefly, is the set of principles upon which interim measures are ordered. We begin with the reference, in the Statute, to preserving the rights of the parties. The jurisprudence of this Court also establishes the tests of prejudice, irreparable damage and the possibility that the rights could not be restored in the event of a favourable judgment. Thus, the Court in the *Fisheries Jurisdiction* cases affirmed that the right to indicate provisional measures:

> "... 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". (*I.C.J. Reports 1972*, pp. 16 and 34.)

The Court has on more than one occasion also acted on the basis that the parties not take action which might aggravate or extend a dispute. This final test is also binding on New Zealand and France by virtue of Article 33 (3) of the General Act, quite independently of Article 41 of the Statute.

I turn now, Mr. President and Members of the Court, to the history of French testing and the diplomatic exchanges it has engendered and it is important to our case that I develop this in some detail. The correspondence between New Zealand and France relating to the subject-matter of the present dispute is reproduced in Annex III to the Application instituting proceedings. It shows that over a period of fully ten years the New Zealand Government has sought through the normal channels of intergovernmental relationships to persuade France to refrain from conducting nuclear weapons tests giving rise to radio-active fall-out.

From the earliest days of the development of nuclear weapons, New Zealanders, along with the world community, have viewed them with the deepest apprehension. As nuclear weapons testing was intensified in the 1950s, the dangers of radio-active fall-out to the health of present and future generations were progressively realized. This was accompanied by a growing awareness that the continued development and proliferation of nuclear weapons presented a grave threat to the peace and security of the world and ultimately to the very survival of mankind.

In the United Nations, New Zealand was, in 1958, associated with a number of countries in sponsoring a resolution in the General Assembly designed to promote conditions in which a comprehensive test ban could be realised. It was

hoped that substantive measures of disarmament would follow. In 1959 we joined our voice to the appeal of African countries to France not to carry out its announced intention of beginning nuclear weapons tests in the Sahara. In 1961 we deplored the Soviet Union's breach of the moratorium observed since 1958 by three nuclear powers, a breach which led to the resumption of testing soon after by the United States and the United Kingdom. Once again mankind's hopes that these weapons of mass destruction could be brought under control, and eventually eliminated in the context of measures of general and complete disarmament, had been dashed. In 1962 New Zealand voted along with an overwhelming majority of governments to condemn all nuclear weapons tests and to demand their cessation. If against all hope a comprehensive test ban could not be achieved, world opinion was clear and insistent that atmospheric testing at least must be outlawed in order to remove the immediate threat to the health and welfare of mankind which the activities of the then four nuclear powers presented.

Against this background, it is easy to appreciate the deep disquiet of the New Zealand Government and people at reports received in 1963 that the French Government intended to construct a nuclear weapons testing site in the neighbouring islands of French Polynesia.

In a Note of 14 March 1963 addressed to the French Foreign Ministry, New Zealand sought clarification of these reports. The note referred to the existence of widespread public apprehension that fall-out from any tests conducted in French Polynesia would produce hazards to health and contaminate food supplies, both land and marine, in the neighbouring Cook Islands, then a New Zealand dependent territory, and indeed in New Zealand itself. There was also marked anxiety in Western Samoa. It was New Zealand's duty, in accordance with the Treaty of Friendship of 1962 between the two countries, to convey the sense of anxiety to the authorities in France.

There being no response to this communication, the New Zealand Embassy in Paris addressed a further Note to the Foreign Ministry on 22 May 1963 referring again to the growing disquiet occasioned by the French plans and setting out in greater detail the basis for New Zealand's objections to tests in the Pacific. The note referred to New Zealand's hope for the early conclusion of an international agreement banning atmospheric tests which would be accepted and observed by all nations. It pointed to the fact that the South Pacific was a region which had hitherto enjoyed comparative immunity from the consequences of atmospheric testing and that people were alarmed about the damage that could result if France began testing there. It strongly protested at France's plans to establish a testing site in French Polynesia and urged the French *Government to reconsider its decision.*

The Foreign Ministry replied on 25 June 1963 that the French Government's position was well known. France would associate itself with any effective and supervised disarmament measures but, as long as others possessed modern weapons, it was, it was said, France's duty to preserve its freedom of action in this area. Others, it went on, had conducted tests in the Pacific and might do so again. France would, however, pay special attention to protecting the peoples of the area and would at the appropriate moment inform New Zealand of the conditions under which her experiments would be conducted and the safety precautions to be taken. This information, it should be noted, has never involved telling us of the nature of the devices to be exploded and it does not now extend to giving advance notice to the New Zealand Government of the approximate timing of a particular series of tests.

Later that same year, the French Government itself adverted to the evidence

of mounting concern within New Zealand at the prospect of nuclear weapons tests in French Polynesia. In a Note dated 6 September 1963 the French Embassy in New Zealand referred to the systematic campaign developing in New Zealand, as it said, against these tests and suggested that this attitude, if continued, would adversely affect the friendly relations between the two countries. The Note went on to suggest that New Zealand had not objected in a specific way to test programmes carried out in the Pacific by other nuclear powers and implied that there was an element of discrimination in New Zealand's stand with respect to the French nuclear testing programme.

In its reply of 12 September 1963, the New Zealand Government refuted the allegations. On this point the Note stated:

> "The French Government cannot but be aware of the extent of public concern in New Zealand, not only about nuclear testing but about nuclear weapons generally, a concern to which the New Zealand Government cannot remain indifferent. The growth of feeling on the issue of testing must be considered in its historical perspective; the reactions of the present day are not those of ten years earlier, and fear, like the effects of radioactive fallout, is cumulative in the population. [Mr. President, I am still quoting from the New Zealand reply at that stage.] The Government indeed has sought to temper opinion on the question of French tests and to discourage extreme proposals. A similar attitude has been adopted towards suggestions which have been made in certain quarters as to possible measures of retaliation which might be taken against France in the economic field. The French Government may be assured that, as a matter of principle, the New Zealand Government does not look with favour upon direct action by particular sections of the community in matters connected with New Zealand's external relations. The Government has also endeavoured to avoid in its own public statements any over-emphasis which could further incite public opinion.
>
> This is particularly true as regards possible hazards to health..."

The Note concluded by reiterating that the New Zealand Government's concern was not related simply to possible hazards to health. It had steadily in mind the obstacles which further tests might raise to the implementation of the partial test ban treaty signed only a month before, on 5 August 1963, at Moscow, to the conclusion of an agreement for their complete cessation and indeed to progress in the field of disarmament generally.

It was also the concern of the New Zealand Government to afford the greatest possible protection to the people of New Zealand and of the Pacific territories for which it was speaking, in the event that, against their express opposition, France should proceed with nuclear tests; and on several occasions the New Zealand Government requested the fullest possible information about the safety precautions intended. It also sought the co-operation of the French authorities in arrangements for monitoring the proposed explosions. Talks were held in Paris between New Zealand and French scientists on 29 October 1965. However, the Notes I have so far quoted appeared in 1963.

On 14 April 1966 New Zealand informed the French authorities that if the tests went ahead New Zealand, in accordance with its obligations under the 1963 Moscow Treaty, would not grant authority for any visits to New Zealand territory by French military aircraft or ships, or overflights by French military aircraft, unless assured that they were in no way associated with the tests. Following the announcement by the French Government on 16 May 1966 of the establishment of a danger zone, New Zealand on 27 May solemnly reiterated its

protest at the holding of nuclear tests in the atmosphere, particularly in the South Pacific, and formally reserved the right to hold the French Government responsible for any damage or losses incurred as a result of the tests in New Zealand or the Pacific Islands for which New Zealand had special responsibility or concern. These reservations have been entered each year since, that France has conducted tests. In relation to the latter point, France replied on 10 June 1966 that the French Government could not envisage its being held responsible for damage, even partially, except after a meticulous study of the circumstances of any accident, and that in any case it could not accept responsibility if the victims of an accident had failed to comply with the customary prescriptions governing their proclaimed danger zones.

France began testing on 2 July 1966 and conducted five tests between that date and 4 October. Notes of protest were conveyed on 2 July and 20 July.

In the following year, New Zealand, in a Note dated 11 April 1967, renewed its representations to the French Government calling for an end to nuclear weapons testing in the South Pacific. The New Zealand communication went on to make the point that, in the event of an unreceptive response, early advice of an intention to test would be appreciated so that the necessary monitoring arrangements could be set in train. The Note referred to the fact that appreciable increases in levels of radiation had been recorded in various islands, including the Cook Islands, Western Samoa and Fiji, following the detonations of 11 September 1966 and 4 October 1966—that is, of course, in the previous year. This demonstrated, the Note said, the need for the greatest care in the safeguards applied in order to minimize the risk to health. It is noteworthy, incidentally, that these higher readings, commented on in the Note, coincided with one of the blow-back occurrences detected by our monitoring system, and details of such phenomena may be found in Annex VII to our request.

The French authorities replied on 25 April that France's position with regard to the cessation of nuclear tests was well known and had been set out in previous communications to the New Zealand Embassy in Paris. There was therefore no need to go over this ground. As for the increased radiation levels detected in 1966, the reply said, the New Zealand and French monitoring data were in accord that the increases had been temporary and that they did not represent a public health hazard.

France conducted three tests between 5 June and 2 July 1967.

In August 1967, at the invitation of the French authorities, the Director of the New Zealand National Radiation Laboratory visited French Polynesia to study safety precautions surrounding the tests and had talks with French officials in Paris.

On 5 June 1968, New Zealand reiterated to France its opposition to nuclear testing and in particular the continued atmospheric testing of nuclear weapons in direct opposition to the principles set out in the Moscow Treaty. The Government was convinced that such action could only hinder the attainment of further disarmament measures. It was also deeply concerned about the potential risks of contamination within the environment of the South Pacific as a result of fall-out from proposed French tests. On behalf of all the peoples for whom it was responsible, New Zealand deplored the continued use of the South Pacific area as an experimental site for nuclear explosions.

France conducted five tests between 7 July and 8 September 1968.

No tests took place in 1969. At the time, the absence of tests raised hopes in New Zealand that the programme had either been completed or discontinued; but our hopes were to be proved unfounded.

On 6 April 1970, when it was clear that France intended to resume testing at

Mururoa, New Zealand reiterated its position in the terms of its communication of 1968. There was no response.

France conducted eight tests between 15 May and 6 August 1970.

New Zealand's protest of 14 May 1971 similarly went unheeded. There were five tests between 5 June and 14 August 1971.

On 29 March 1972 New Zealand noted again that continued testing by France was in direct conflict with the principles set out in the Moscow partial test ban treaty, and drew attention to the fact that it was also in direct conflict with the wishes of the General Assembly of the United Nations most recently stated in resolution 2828 C (XXVI) of 16 December 1971. The views of member Governments of the South Pacific Forum contained in an appeal to the French Government of 5 August 1971 were also recalled. On 5 June 1972 New Zealand asked France to postpone the commencement of a test series until after the Stockholm Environmental Conference. Once more the response was silence.

France conducted three tests between 25 June and 27 July 1972. Contrary to its previous practice, the French Government made no announcement that the tests had taken place.

In December 1972 the Prime Minister of New Zealand sought once again to engage the French Government in a dialogue on the issue of nuclear testing, explaining anew and at some length the grounds for New Zealand's position in this matter. In a letter of 19 December 1972, our Prime Minister, Mr. Kirk, summed up deepening public apprehension in New Zealand as follows:

> "This public mood, so widespread that it must be heeded by a democratically elected Government, is based, I think, on three factors: anxiety about the possible physical effects of radioactive fallout, concern at this demonstrable evidence of proliferating nuclear weapons, and resentment that a European power should carry out such experiments not on its own metropolitan territory but in an overseas territory in what may seem from Paris a remote region, but which is nevertheless the region in which we and the Pacific peoples live."

Mr. Kirk concluded this letter by expressing his earnest desire to see this one element of serious contention removed from what in all other respects is an excellent relationship between New Zealand and France. This, Mr. President, may I emphasize, is my Government's continued hope today.

The French Government responded to this approach by a letter addressed by the French Ambassador on 19 February 1973 to the Prime Minister of New Zealand. After reviewing carefully the historical background to France's decision to develop nuclear weapons, this letter noted that a nuclear capacity answered a compelling requirement of France's national security. The letter also laid stress on the safety measures observed by the French authorities in conducting the tests and the minimal increases in radiation levels to which they gave rise as compared with radiation from natural and other sources, and drew the conclusion that any hazard to the ecology and to human life rested on conjecture. The Prime Minister stated in response that New Zealand regarded the continued development of nuclear weaponry as an increasing danger to world peace and that:

> "... the existing international agreements on the testing and on the proliferation of nuclear weapons, the resolutions of the General Assembly of the United Nations and of other international bodies, attest to an overwhelming weight of international opinion in support of the contention that all nuclear tests are a danger to mankind and should cease".

Mr. Kirk went on to make the point that "an activity that is inherently harmful is not made acceptable even by the most stringent precautionary measures", and that in matters of such gravity the need to eliminate avoidable risks was paramount. He noted that "the principle that any radiation is harmful is accepted by responsible scientific opinion and by national agencies in setting standards for the peaceful uses of atomic energy" and that for this reason any additional exposure to radiation without corresponding benefit was regarded by these agencies as unjustified. The tests conducted in French Polynesia exposed New Zealanders to radio-active fall-out against their choice and without benefit to them.

He further said that the New Zealand Government regarded the conduct of these tests as violating New Zealand's rights under international law. New Zealand continued, however, to look to a resolution of this issue through discussion. In response to an invitation from the French Government, the Deputy Prime Minister of New Zealand had talks in Paris with the French Foreign Minister, the Administrator-General of the Atomic Energy Commission, the Minister of the Armed Services and with the President of France himself on 25, 26 and 27 April 1973. But the French Government did not feel able to give the Deputy Prime Minister the assurance he sought, namely that the French programme of atmospheric nuclear testing in the South Pacific had come to an end. The French Government also made it plain that it did not accept the contention that its programme of atmospheric nuclear testing in the South Pacific involved a violation of international law.

Mr. President and Members of the Court, this long history of diplomatic exchanges between the Government of New Zealand and the Government of France, which is documented in Annex III to our Application, establishes, in our view, the following points:

First, the conduct by France of nuclear tests resulting in radio-active fall-out has given rise to a dispute—an unfortunate dispute—between the Government of New Zealand and the Government of France with respect to the rights of New Zealand under international law. Despite the efforts of both parties, protracted diplomatic negotiations, conducted in a spirit of conformity with the friendly relations between them and with the comity of nations, have not resulted in a settlement. The dispute therefore continues.

Second, the record of New Zealand diplomatic protest, at every stage from the first hint of nuclear testing in the Pacific by France, throughout the development of the French programme and following each series of tests that has taken place, shows beyond doubt that no case of estoppel by consent or acquiescence can be made out against New Zealand.

Third, it is a feature of the negotiations between the two countries that there has been a strong desire on both sides to prevent the issue from disturbing the long-standing friendship between New Zealand and France and inhibiting the steady and cordial development of our relations. For its part, New Zealand has not sought to exaggerate the issue or magnify the extent of alarm and disquiet among its people at the continuation of the tests. Successive Governments have endeavoured to keep the question of health hazard in proportion by the objective presentation of the facts gathered through the monitoring network and through discussions with French scientists and officials. New Zealand Governments have also discouraged extreme proposals for action against the tests and initiatives by private individuals and groups.

Finally, the correspondence reveals the steadily deepening sense of outrage with which the people of New Zealand, through successive Governments, have come to view the continuing French programme of nuclear testing in the

Pacific. It shows that this sense of outrage stems from apprehension about the possible hazards to health from radio-active fall-out, determined opposition to the further development of nuclear weapons, and an increasing awareness of the implications of French nuclear testing within the region to which New Zealand belongs.

In reviewing the history of representations made by New Zealand to France, I have so far stressed the bilateral relationship between the two countries. The issues in dispute cannot, however, be accurately protrayed within this limited frame of reference. From the beginning, New Zealand attitudes took due account of scientific standards which were internationally accepted and of the wider consensus in regard to nuclear testing which was developing within the organs of the United Nations and in other international bodies. I have already noted that New Zealand's first approaches to France reflected the trend of international opinion about the dangers of a nuclear war and the need for disarmament. I shall later trace the way in which international values became crystallized during the period of New Zealand's correspondence with France and I shall also mention the significance of the world's growing concern for the human environment.

Before I do this, however, I should say something of the region of the world in which French nuclear tests are taking place. It is an area of scattered islands with small populations and limited land resources separated by vast ocean distances. In 1963 there was only one independent State among the islands north and east of New Zealand—Western Samoa, formerly a trust territory under New Zealand administration. Other Pacific territories were at varying stages of constitutional development, but already there was a sense of regional identity based on ethnic and cultural ties and upon participation in regional meetings concerned with common problems in the economic and social fields. After the Second World War the countries, including Australia, New Zealand and France, which were responsible for dependent territories in the Pacific area had set up the South Pacific Commission to cater for the needs of these territories: by 1963 the initiative in planning the Commission's programmes was passing to the representatives of the Pacific territories themselves.

Ten years later the number of independent countries had grown to four. The largest among them, Fiji, which has asked to intervene in these proceedings, has become a Member of the United Nations. The Cook Islands, though choosing not to be completely independent, had attained full self-government in free association with New Zealand. These five States, together with Australia and New Zealand, have formed a regional grouping known as the South Pacific Forum. Within the framework of the South Pacific Commission they also retain their association with the territories which have not yet attained self-government.

I give these details, Mr. President and Members of the Court, because they mark the growth of a regional consciousness. At the beginning of the period under review, the Metropolitan Powers were the custodians of the interests of the Pacific peoples. New Zealand's first representations to France, made on 14 March 1963, stressed not only public concern within New Zealand but concern for the people of the islands. France was reminded that her proposed test site is within 1,300 miles of the Cook Islands; and at the request of Western Samoa its concern was also conveyed to France.

Still today there are small dependent territories in the South Pacific for which New Zealand and other countries are responsible, but there is in addition a collective voice for peoples who have attained or are approaching independence. Some of their pronouncements are assembled in Annex IV to the request. The

request cites the successive expressions of unanimous concern at meetings of the South Pacific Forum; the concern of Pacific countries is also reflected in pronouncements made at other regional meetings. As an example, I might quote from the full text in Annex IV of a resolution adopted by a meeting of the Pacific Island Producers Association on 14 June 1972:

> "The Prime Ministers of Western Samoa, Tonga, and Fiji, the Premier of the Cook Islands and representatives of the Niuean and Gilbert and Ellice Islands Governments, meeting in Rarotonga during the seventh session of the Pacific Islands Producers Association, unanimously agreed to register a strong protest against the French Government's decision to proceed with further nuclear tests on Mururoa Atoll. These tests are a real threat not only to the peoples of the South Pacific but also to their environment. The conference deplores the French Government's attitude in persisting with these tests in spite of repeated requests by the Governments and peoples of the South Pacific region to stop them: despite its assurances about the inoffensiveness of these nuclear explosions to health and safety, and to marine life which is a vital element in the economy of South Pacific countries the French Government continues to conduct them at a point of the earth's surface far removed from the mass of its own people."

No-one who listens to this and similar statements can suppose that the concern expressed is not genuine, that it is not deeply felt by the peoples concerned or that French atmospheric testing does not represent for them a gross invasion of their rights and liberties.

Some of the rights for which New Zealand seeks protection are expressed in terms of legitimate self-interest. The people of New Zealand, the Cook Islands, Niue and the Tokelau Islands actively resent the contamination of the air they breathe and of the waters from which their food supplies are drawn. Moreover, it is worth saying in parentheses that this is one of the few areas of the world which produces vastly more food than it consumes, most of the surplus being exported, hitherto pollution-free, to be consumed in the northern hemisphere. The uncertain physical and genetic effects to which contamination exposes the people of New Zealand, the Cook Islands, Niue and the Tokelau Islands cause them acute apprehension, anxiety and concern. It is an obvious imposition that it should be necessary to maintain in New Zealand itself, and in the Pacific islands, outposts to keep watch on the fluctuating levels of an unnatural and unsought hazard. France's encroachment upon the freedom of navigation in, and above, international waters assumes an added dimension and invites challenge because it symbolizes a disregard for the rights of other peoples to go about their own affairs unhindered and unharmed.

Legitimate self-interest is not the same thing as selfishness. The former looks to community standards as the measure of individual rights. The South Pacific suffers the disadvantages of isolation: it expects to reap the benefit of clean air and clean seas. It shares the feeling of various other regions that preparations for nuclear war are unwelcome and resented in its part of the world and that they certainly offer no benefit—they certainly confer no benefit—upon the people who live in and around the South Pacific. As the documents in Annex IV to the request attest, the countries which border the Pacific—especially those of South America and South-East Asia—share the concern and indignation of the countries of the South Pacific region that nuclear testing in that region should continue.

Without over-emphasizing this aspect of the case, I would like to take a moment to discuss the disparity between the radiation protection standards,

which we proclaim for ourselves in New Zealand, and the standards that France would impose on us through her testing.

The Court adjourned from 11.15 a.m. to 11.45 a.m.

France asserts that, because the increases involved fall short of the dose limits recommended by the International Commission for Radiological Protection and used by many national agencies in setting safety standards for individuals living near a radiation installation, the tests are therefore harmless and give no legitimate cause for alarm. France chooses to ignore the principles that attach to the application of these standards, namely: (1) that they apply to controllable sources; (2) that any unnecessary exposure to ionizing radiation should be eliminated, and especially if an appreciable number of the population could be involved; and (3) that all doses should be kept as low as is readily achievable, economic and social considerations being taken into account.

It has never been suggested by the ICRP or by any other responsible agency that widespread contamination from an uncontrolled source should be considered as acceptable within these limits. Indeed, the recommendations of the ICRP are quite specific on this point and emphasize that dose limits for exposures from controllable sources are not intended for general use in the assessment of the risks of exposure from uncontrolled sources.

These principles rest on the assumption that any exposure to radiation may be harmful and that, until it has been clearly demonstrated otherwise, a linear relationship between dose and the risk of damage must be accepted. All international bodies that have any association with radiation safety, for example UNSCEAR, WHO, IAEA and the ILO have adopted the principles long held by the ICRP.

The same standards are reflected in New Zealand law and practice, which require that no person shall intentionally expose any other person to radiation from radio-active material or an irradiating apparatus, except for medical reasons or other purposes authorized by the terms of a licence. The issue of licences is carefully controlled and every person in control of a source of radiation is obliged to ensure that, except in the case of radiation therapy, the dose received by any person is the minimum practicable.

Legislative action in New Zealand in the field of radiation protection goes back to 1945. In 1950 the National Radiation Laboratory was established to administer and supervise the legal requirements and to provide the necessary advisory and scientific services for the safe handling of radiating apparatus. In 1957 the same body was charged, in response to the alarming expansion of nuclear testing programmes in the northern hemisphere, with the responsibility for monitoring environmental radio-active contamination in New Zealand.

New Zealand has adopted standards of supervision and protection the results of which speak for themselves: it has been determined by a comprehensive survey that the annual genetically significant dose to the New Zealand population from all controlled sources is 14 millirads, which compares very favourably with values of about 40 millirads for most other countries with comparable radiological services. Similarly, in respect of uncontrolled sources of radiation, our practice is equally rigorous. Before approval is granted for release of any material, it is determined that few persons would be involved. The contribution to the national population dose on this score is quite negligible. National control is thus exercised at all times; moreover, any person who considers he may be adversely affected has clear and readily available legal rights of recourse.

But fall-out from nuclear testing exposes the whole population. Even low

levels contribute markedly to the population exposure; furthermore, there is no question of internationally agreed limits or standards for such widespread exposure. On the contrary, the norm constantly recommended by the United Nations and the Specialized Agencies concerned and enshrined in the Partial Test Ban Treaty is that there should be no such exposure at all.

France invites us, by reference to her defence requirements, to accept the infringement of our national health requirements. It is a proposition repeatedly rejected by the New Zealand Government and people and by the world at large.

Can it, Mr. President, truthfully be said that our concern is exaggerated? Can it fairly be urged, in the face of UNSCEAR reports and other cogent evidence, that scientists *are* sanguine about the capacity of the world and its peoples to absorb a little more man-made radiation, and to accommodate a few more experiments, so that another group of men may learn the secrets of nuclear armaments? New Zealand and the South Pacific do not presume to insist on their own answers to these questions. They invite the Court to judge by the standards of the international community reflected in the decisions of the United Nations.

I have already alluded to the involvement of my own country in United Nations efforts to bring about a reduction of armaments and especially to halt atmospheric nuclear testing in the years before New Zealand became aware of France's intention to establish a nuclear testing site in the South Pacific. The subsequent growth of world-wide opposition to nuclear weapons development and especially to nuclear testing in the atmosphere is briefly related in pages 51 to 52, *supra*, of our request.

The Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and Under Water was signed in 1963, the very year of the French decision to establish a nuclear testing site in the Pacific region. Thereafter the General Assembly has consistently called for universal adherence to the treaty and for a cessation of nuclear weapons tests. In resolution 2828 (XXVI) of 16 December 1971, the General Assembly summed up and intensified its demands for the suspension of nuclear and thermonuclear tests, placing a special emphasis on the harmful effects of atmospheric testing.

Last year the General Assembly in resolution 2934 A (XXVII) struck an even more emphatic and urgent note. I would like especially to bring to the Court's attention the elements of this resolution which paid particular attention to the situation in the Pacific region, and which was adopted by 105 in favour, 4 against and 9 abstentions.

> "*The General Assembly*,...
>
> *Noting with regret* that all States have not yet adhered to the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, signed in Moscow on 5 August 1963,
>
> *Expressing serious concern* that testing of nuclear weapons in the atmosphere has continued in some parts of the world, including the Pacific area, in disregard of the spirit of that Treaty and of world opinion,
>
> *Noting* in this connexion the statements made by the Governments of various countries in and around the Pacific area, expressing strong opposition to those tests and urging that they be halted,
>
> 1. *Stresses anew* the urgency of bringing to a halt all atmospheric testing of nuclear weapons in the Pacific or anywhere else in the world;
>
> 2. *Urges* all States that have not yet done so to adhere without further

delay to the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water and, meanwhile, to refrain from testing in the environments covered by that Treaty."

The New Zealand request at pages 54 to 56, *supra*, reviews the effects upon the environment of atmospheric nuclear testing. The United Nations Conference on the Human Environment held at Stockholm in June 1972 was the culmination of all previous efforts in this field. It provided compelling evidence of a heightened sense of international responsibility for environmental policies. Principle 21 of the Declaration adopted by the Conference, which acknowledges the sovereign right of States to exploit their own resources, stresses the consequence of this. It is:

"... 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".

Mr. President and Members of the Court, my Government believes that the rights for which we are today seeking protection include not only the rights in respect of our own territory and of international sea and air space, but also rights of a more general character belonging to all members of the international community. These are the rights to inhabit a world in which nuclear testing in the atmosphere does not take place and the rights to the preservation of the environment from unjustified artificial radio-active contamination. I shall be ready to make further submissions in support of this view at the appropriate stage in these proceedings which New Zealand has instituted against France.

For the present my remaining task is simply to show the Court that there is an urgent need for the interim measures of protection sought in the New Zealand request—that is that France refrain from conducting any further nuclear tests that give rise to radio-active fall-out while the Court is seized of the case.

In opening, I have explained the reasons why my Government has concluded that the rights it claims can be protected only by the exercise of this Court's discretion to lay down and indicate such measures. In closing, I should like to demonstrate why, in our submission, these measures are called for with the least possible delay.

On 2 May 1973, this very month, the French Government announced that it did not intend to cancel or modify its programme of nuclear weapons testing. From official pronouncements it is clear that some further tests are envisaged with the likelihood of deploying a thermonuclear warhead by 1976. The French Government has also reserved its options on the development of yet another generation of nuclear weapons after 1976 which would require further tests, though the compass of any such programme is not known. The practice of notification through the diplomatic channel of an intention to test appears to have been dispensed with and there is reason to believe that the only warning now contemplated by the French authorities is an urgent message activating the danger zone within a few days of the commencement of this year's series. In previous years, tests have begun at the earliest on 15 May and at the latest on 7 July, this period of the year being the least hazardous from the point of view of meteorological conditions—though even then blow-back conditions are always possible.

At this date of 24 May we are living in the knowledge that at any moment a further series of French nuclear tests may begin.

Within New Zealand the imminence of such tests has assumed the importance of a dominating public issue. People are frustrated by the seeming indifference

of France to standards proclaimed by the United Nations which command their loyalty and reflect the anxieties of the whole region. There is an increasing tendency for individuals and for trade unions and for other groups to find other avenues of protest in order to demonstrate their feeling that they have a moral duty to oppose further French nuclear tests. These acts of protest include voyages by small boats into or near the likely danger zone, the threat of boycotts intended to affect French economic interests and even actions aimed at French institutions and property which tend to the disruption of law and order. Such actions are not supported by the New Zealand Government, but in a democratic society there are limits to the restrictions which can be placed on individual activities.

As I come, Mr. President, to the end of my submissions, I refer again to the way in which the people of New Zealand view nuclear testing in the Pacific region. The question they are asking can be simply stated. It is this—how much is enough? There can be no doubt that there is already a consensus that radioactive fall-out is the source of profound anxiety based on its possible physical effects. We shall at a later stage have more to say about the nature of the judgment which the world community makes on nuclear testing.

It is settled in principle and practice that no artificial radiation should be generated without countervailing and compensating benefit to mankind. That controlled irradiation can produce benefit goes without saying, and for that reason we are prepared to tolerate a certain amount of it, subject to the strictest safeguards. The genie must, however, be kept in the bottle. Once he escapes his potentiality for mischief now and in the future is incalculable. To allow him to roam about our own house would be bad enough, but we would have no-one to blame but ourselves if that were to occur. To let him loose on the world would be pernicious and inexcusable. In saying that, I have used the conditional tense. Unhappily I am entitled, and indeed compelled, to use also the present indicative and say it *is* pernicious and inexcusable to create radio-active fall-out and cause it to contaminate the world and its atmosphere. The world itself has said so repeatedly through the voice of the United Nations.

To the question, then, that I pose, how much is enough, there can be but one answer. Any more is too much, unless it is plainly and unequivocally for the benefit of all mankind. The admitted objective of French testing is the perfection of a thermonuclear explosive device. Is anyone bold enough to describe that as benefiting humanity?

How much is enough? No answer other than, any more is too much, will satisfy the acknowledged requirement that the rights of the Parties to the dispute *must be preserved. Nothing short, Mr. President, of an Order requiring France* to cease and desist will preserve the rights of this Party to the dispute and meet the requirements of natural justice.

My Government submits that the concordance of international opinion, witnessed over and over again in the decisions of the General Assembly and other United Nations bodies, is also the law. We place great confidence in this Court, not only as the arbiter of the dispute between two Governments but also as an agency to act swiftly and authoritatively in prescribing measures to protect New Zealand's rights against any further encroachment. We respectfully urge the Court to give full weight to the reality and immediacy of the concern with which the people of New Zealand and of other countries of the region are awaiting its answer.

ARGUMENT OF MR. SAVAGE

COUNSEL FOR THE GOVERNMENT OF NEW ZEALAND

Mr. SAVAGE: Mr. President and Members of the Court. It will be my task to show, by reference to the jurisprudence of the Court, that the present case is one in which it is wholly proper for the Court to grant the interim relief requested and, moreover, that there are compelling reasons for it to do so.

I begin by reviewing, relatively briefly, the criteria which the Court has applied in the exercise of its discretion under Article 41 of the Statute, to indicate interim measures of protection.

Article 41 of the Statute says that the Court "shall have the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". In exercising the discretion conferred on it by the very broad language of the Article, the Court has developed a number of tests or criteria.

In the first Order made by the President of the Permanent Court in 1927 in the *Sino-Belgian Treaty* case, the purpose of Article 41 was characterized in the following terms:

> "... the object of the measures of interim protection contemplated by the Statute of the Court is to preserve the respective rights of the Parties pending the decision of the Court; ..." (*P.C.I.J., Series A, No. 8*, p. 6).

Similar observations, paralleling very closely the language of Article 41, are to be found in the *Polish Agrarian Reform* case and the four cases in which the present Court has considered requests for interim measures, that is the *Anglo-Iranian Oil Co.* case, the *Interhandel* case and the *Fisheries Jurisdiction* cases.

In the *Sino-Belgian Treaty* case the President of the Court appeared at one point in his Order to interpret Article 41 in a much narrower sense. The Order suggests that the interim relief should be limited to cases where the infraction of the rights in issue could not be made good simply by the payment of an indemnity or by compensation or by restitution in some material form. It is submitted that it is more than doubtful whether that narrow test for the exercise of the discretion provided by Article 41 ever carried very much weight. Because in the very case in which it was so stated, some at least of the rights which were protected by the Order could have been made good by compensation. In any event, that test has been plainly overtaken by subsequent cases. In both the *Anglo-Iranian Oil Co.* case, and the *Fisheries Jurisdiction* cases, the rights protected by the interim measures indicated by the Court could have been restored by compensation.

A related but broader test derives from the *South-Eastern Greenland* case in which the Permanent Court stated in its Order that the object of interim measures was to preserve the respective rights of the parties: "in so far, that is, as the damage threatening these rights would be irreparable in fact or in law" (*P.C.I.J., Series A/B, No. 48*, p. 284).

Subsequent decisions, including in particular, the *Electricity Company of Sofia and Bulgaria* case, have sometimes been thought to cast doubt on this test enunciated in the *South-Eastern Greenland* case. In 1972, however, the present Court in the *Fisheries Jurisdiction* cases applied a comparable test when it said that the right of the Court to indicate measures of protection under Article 41 presupposed that "irreparable prejudice should not be caused to rights which

are the subject of dispute in judicial proceedings" (*I.C.J. Reports 1972*, pp. 16 and 34).

And the joint declaration made by Vice-President Ammoun, by Judge Forster and by Judge Jiménez de Aréchaga, stressed the significance of this element in the Court's discretion.

In the same case, the Court referred to another matter to be taken into account when it said this:

> "... 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" *(ibid.)*.

There are then at least three tests or matters which are relevant to the present case and which the Court has shown by earlier decisions that it takes into account when it has had to make a decision under Article 41 of its Statute. *First*, it has enquired, as indeed it is directly enjoined to do by the terms of Article 41, whether interim measures are necessary to preserve the rights forming the subject of the dispute. *Second*, it has considered whether in the absence of an indication of interim measures there would be irreparable prejudice or damage to those rights. *Third*, it has taken into account the fact that particular actions likely to be taken by one of the parties would affect the possibility of the full restoration of the rights claimed by the other party in the event of a judgment in its favour.

There may well be scope for differences of view as to the relative weight which the Court has in the past, and should in the future, give to each of these matters. In the present case it is the submission of the New Zealand Government that this is of no significance. The application of all or any of them points plainly to an indication by the Court that France should refrain from conducting nuclear tests that give rise to radio-active fall-out while the Court is seized of the matter.

Before I consider the application of these matters to the facts of the present case, it is necessary to refer to a general principle which the Court has invoked when it has come to consider interim relief applications. This is a principle which is fully established in the Court's jurisprudence relating to Article 41 and which, in the present case, has in addition a separate and independent basis or origin. I refer to the principle that there should be no aggravation or extension of the dispute that is before the Court pending its determination.

This general principle was most clearly stated by the Permanent Court in the *Electricity Company of Sofia and Bulgaria* case. In the Order that it made in that case, the Permanent Court, after citing Article 41 said this:

> "Whereas the above-quoted provision of the Statute applies the principle universally accepted by international tribunals and likewise laid down in many conventions to which Bulgaria has been a party—to the effect 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 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.)

And the Court then went on to frame the interim measures which it indicated in terms of the principle.

It is worthy of note, in my submission, that the passage I have quoted, from the Order in that case, referred to the principle that there should be no aggravation or extension of a dispute as being one "universally accepted by inter-

national tribunals". It also regarded as relevant the fact that the principle was to be found in many conventions to which Bulgaria had been a party. In fact by 1939, when the case was decided, the principle had been incorporated in a considerable number of multilateral and bilateral treaties, which included the 1924 Geneva Protocol, the 1925 Locarno Arbitration Convention and the 1928 General Act for the Pacific Settlement of International Disputes, to which I shall be referring at more length later in the submissions.

The same principle was incorporated in the Orders made by the Court in the *Anglo-Iranian Oil Co.* case and the *Fisheries Jurisdiction* cases. The last two cases also stated the principle in a different way. In its Order in those cases the Court linked the principle that disputes should not be aggravated or extended with another matter to which I have already referred, namely that irreparable prejudice should not be caused to rights which are the subject of the dispute in judicial proceedings and it did so in such a way as to make it clear that it conceived both these principles flowed directly from Article 41. The Court said:

> "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." (*I.C.J. Reports 1972*, pp. 16 and 34.)

Now some commentators have suggested that in considering whether interim measures are required in order to prevent the aggravation or extension of a dispute before it the Court has gone outside the strict terms of Article 41. The better view, in my submission, and the one which the Court itself appeared to endorse in the passage that I have just quoted from the *Fisheries Jurisdiction* cases, is that there is a direct and logical link between the preservation of rights of which the Article speaks and the prevention of actions which might aggravate or extend the dispute concerning those rights. In the great majority of cases, action by one party, it is submitted, which aggravates or extends a dispute will tend to have a prejudicial effect on the rights of the other party.

There is, then, in my submission, ample authority for the view that, acting under Article 41, the Court can and should indicate interim measures of protection if that is necessary to prevent the aggravation and extension of a dispute.

Quite apart from that proposition, the possibility of the aggravation of the dispute between New Zealand and France would still remain a relevant and important matter in the present case. This is so because there exists a specific undertaking given by France to abstain from any action whatever that might aggravate or extend the dispute. That undertaking is contained in Article 33 of the General Act for the Pacific Settlement of International Disputes, which confers on the Court a power to grant interim measures of protection which is complementary to the power with which it is endowed by Article 41 of the Statute. I read Article 33—it is as follows:

> "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."

Paragraph 2 has no application and I, therefore, do not read it.

> "3. 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."

Acting under Article 41 of its Statute, the Court has applied the general principle that the parties to a dispute must refrain from actions which would extend or aggravate the dispute. Article 33 (3) of the General Act sets out precisely the same principle in the form of a specific and unqualified undertaking by the parties to the General Act, which include both France and New Zealand.

Before I leave this part of my submissions, I should, for the sake of completeness, direct the Court's attention to one aspect of the *South-Eastern Greenland* case. In this case, which involved a dispute between Norway and Denmark concerning sovereignty over South-Eastern Greenland, Norway sought interim relief. Counsel for Norway stated that the object of the Norwegian request was to prevent regrettable events and unfortunate incidents. Counsel for Denmark asserted that this was not a proper ground for the indication of interim measures by the Court. Article 41, in the Danish submission, was directed only to the preservation of rights of one or other party. Denmark also contended that there was no real possibility of the occurrence of the incidents which Norway sought to prevent.

The Permanent Court declined the Norwegian request and its Order, which was an unusually lengthy one, made it plain that there were several factors which led to its decision. The Court's Order referred to the arguments advanced by Norway, but it neither accepted nor rejected the argument that it was possible to indicate interim measures under Article 41 for the sole purpose of preventing regrettable events and unfortunate incidents. It is, I submit, worth quoting the relevant passage from the Order:

> "Whereas, with reference to the Norwegian request, the Court has ruled that 'the object of the measures of interim protection contemplated by the Statute of the Court is to preserve the respective rights of the Parties pending the decision of the Court', in so far, that is, as the damage threatening these rights would be irreparable in fact or in law;
>
> Whereas, however, it has been argued that, under Article 41 of the Statute, the Court is also competent to indicate interim measures of protection for the sole purpose of preventing regrettable events and unfortunate incidents;
>
> Whereas, in the present case, there is no occasion for the Court to take a final stand upon this controversy as to interpretation, seeing that, from either point of view, it arrives at the same result;" (*P.C.I.J., Series A/B, No. 48*, p. 284).

Having made this point, the Permanent Court went on to put forward a number of reasons for its decision to decline the Norwegian request. That request was not based on the plea that the action which the Norwegian Government asked the Court to prevent would prejudice some recognized or alleged Norwegian right. The incidents which Norway sought to prevent could not in any degree affect the existence or the value of the sovereign rights claimed by Norway over the particular territory in dispute. Even adopting the broader interpretation of Article 41 of the Statute, which was urged by Norway, there seemed to be no occasion to fear that the incidents contemplated by Norway

would actually occur, and the fact that both Norway and Denmark had, in declarations by their Governments, bound themselves to avoid incidents was, for the Court, "eminently reassuring".

Thus the Court, it is submitted, may accept that it is not easy to draw any firm conclusions from the consideration of the Permanent Court in the *South-Eastern Greenland* case of the principles relating to the aggravation of a dispute. But the tentative conclusion which may perhaps be drawn is that the Permanent Court believed that the responsibility for the prevention of any regrettable incidents lay principally with the parties to the dispute. To put it another way: the Order made by the Court in that case tended to support the view that there must be some relationship between the incidents sought to be avoided and a right forming the subject of the dispute between the Parties. Even this conclusion, however, is reconcilable only with difficulty with the subsequent and perhaps definitive statement in the *Electricity Company of Sofia and Bulgaria* case that the power to indicate interim measures may be used to ensure that disputes are not aggravated or extended.

That concludes my survey of the criteria which the Court has applied to past requests under Article 41 of the Statute, and I now draw the Court's attention to the basis on which it should, it is submitted, grant the interim relief requested by New Zealand.

As in every case, Article 41 of the Statute is available, but also as between France and New Zealand there is Article 33 of the General Act, which I have already quoted. If that provision departed in any substantial degree from the terms of Article 41, or from the jurisprudence of the Court in relation to that Article, there might be some difficulty in asking the Court to invoke it as a basis for interim measures. But, in our submission, that is not the case. Article 33 of the General Act is based on Article 41 of the Statute. It is consistent both with the terms of the Article and the relevant jurisprudence, and it expressly recognizes that the Court must act in accordance with its Statute.

There can, I submit, be no doubt that it would be entirely proper for the Court to base itself on Article 33. It would also, I submit, be appropriate, for the Article is intended plainly to constitute a comprehensive régime governing the matter of interim relief in any case that is before the Court involving two parties to the General Act.

At this point I refer once again to the *South-Eastern Greenland* case. Each of the Parties to the dispute before the Court in that case, that is Norway and Denmark, were also parties to the General Act. The Court took note of the fact and of the existence and terms of Article 33 of the General Act. The penultimate paragraph of the Order that was made by the Court, which refused the request for interim measures, read as follows:

> "Whereas, moreover, both Parties are bound by the 'General Act for Conciliation, Judicial Settlement and Arbitration' signed at Geneva on September 26th, 1928; as by the terms of paragraph 3 of Article 33 of the said Act 'the Parties undertake' in particular 'to abstain from measures likely to aggravate or extend the dispute'; as the interpretation and application of that clause are subject to the compulsory jurisdiction of the Court; and as, in consequence, in the event of any infringement of these alleged rights, a legal remedy would be available, even independently of the acceptance by the Parties of the optional clause referred to in Article 36, paragraph 2, of the Statute."

I have already pointed out that there were a number of compelling reasons for the particular decision made by the Court in that case. In these circumstances

it is difficult to imagine that much weight was attached by the Court to the matter referred to in the paragraph I have just quoted. Nevertheless, there are interesting implications in that paragraph to which I briefly refer the Court.

The Permanent Court plainly could not have meant that because the two sides to the dispute were parties to the General Act they were precluded from seeking interim relief. As had been pointed out by a leading authority on interim measures, Dr. Dumbauld:

> "Where Article 33 of the General Act applies, however, the legal remedy other than interim measures under Article 41 of the Statute may itself consist precisely in appropriate relief *pendente lite* which the Court is empowered by Article 33 of the Act to award." (39 *American Journal of International Law*, 1945, pp. 391, 394, note 18.)

Article 33 of the General Act only comes into play when a case is pending before either an arbitral tribunal or the World Court. It is inconceivable that this provision, which is intended to facilitate the granting of interim relief, should have exactly the opposite effect.

In its request for interim protection in the *South-Eastern Greenland* case, Norway had not pleaded the General Act, nor had it pleaded the General Act as a basis for the Court to take jurisdiction in the case. It is possible that the Permanent Court meant to imply by the passage quoted from the Order that Norway ought to have pleaded that provision if it wished to obtain any interim relief. That too, it is submitted, appears to be a very doubtful proposition, but even if it could be sustained it would have no application to the present case because New Zealand has pleaded Article 33 of the General Act as an alternative basis for the interim protection which it seeks, and now specifically asks the Court to grant it that relief on the basis of that provision.

A more acceptable explanation of this part of the Court's Order in the *South-Eastern Greenland* case is that the Court, while declining to grant interim measures, was reminding Denmark and Norway, in the context of their reassuring declarations that had been made by their Governments, of the obligations under Article 33 (3) of the General Act to refrain from aggravating or extending the dispute.

Whatever the force of the Court's observations in the *South-Eastern Greenland* case, they cannot, in my submission, affect the right of New Zealand to ask the Court to grant it interim protection in this case, and to do so on the basis of the comprehensive régime of interim relief set forth in Article 33 of the General Act.

I turn now, Mr. President, to apply the principles of law which I have outlined and discussed to the circumstances of the present case. It would, in my submission, be hard to imagine circumstances in which the various tests proclaimed by the Court for the grant of interim relief are more clearly and exactly met than this case.

New Zealand asserts, on substantial grounds, that further tests by France, that give rise to radio-active nuclear fall-out, will involve a violation by France of New Zealand's rights and, in some instances, of the rights of the international community. The rights in question are listed in paragraph 28 of the Application and in paragraph 2 of the request. France has given to New Zealand, as indeed it has indirectly given to this Court, the clearest indication that her present intention is to continue with the programme of atmospheric nuclear testing. All the attempts made by New Zealand and by the international community as a whole, to sway her from that purpose have, as yet, come to nothing. In the absence of a grant by the Court of interim relief there is no protection for the

rights that we claim. Each further French nuclear test will do violence to those rights; they will be irreparably prejudiced, and there is no possibility of their full restoration in the event of there ultimately being a judgment in New Zealand's favour.

I illustrate this by reference to the rights in the order in which they are listed in the New Zealand documentation before the Court.

1. Each further French nuclear test will infringe the right of every member of the international community, including New Zealand, that no nuclear tests that give rise to fall-out be conducted. Plainly the damage done to this right cannot be made good by a future judgment of the Court. An indelible mark will have been left on the community standards and norms which are reflected in the urgent appeals made again and again in the last ten years by the General Assembly of the United Nations.

2. Each French nuclear test will involve some degree of contamination of the local, regional and global environment and of its resources. Many of these effects cannot be undone or made good. Once again the standards of the international community, crystallized in the Stockholm Declaration on the Human Environment, will have been irretrievably set aside.

3. Each further French nuclear test will almost certainly involve the entry into the air space of New Zealand, the Cook Islands, Niue and the Tokelau Islands, and the deposit upon their territory and in their waters of radio-active material. Our territorial sovereignty will have been irreparably violated. There are no physical or legal means of removing the fall-out.

4. The increase in levels of radiation in New Zealand, the Cook Islands, Niue and the Tokelaus resulting from each further French nuclear test will have undetermined but irreparable consequences for the health of present and future generations. The fact of a further test having taken place will have the certain consequences of harming the lives of people in the area by causing them renewed apprehension, anxiety and concern. That too cannot be undone: as New Zealand had occasion to remind France as long ago as September 1963, fear, like the effects of radio-active fall-out, is cumulative in the population.

5. Any further French test will involve the infringement of well-established high seas rights and freedoms. To the extent that marine resources are affected by any French test, the prejudice to high seas fishing rights, which all nations may exercise, will be beyond repair.

Finally, it is a regrettable but inescapable fact that any further nuclear testing by France will aggravate and may extend the dispute between New Zealand and France. We are not dealing here with a regrettable event or an unfortunate incident of the kind that the Court has on a previous occasion considered. A further explosion at Mururoa will constitute a blunt denial of ten years of protest and of every legal right for which we seek protection. There is nothing which could more effectively deepen the rift between New Zealand and France on this one issue. There is nothing which could make more difficult the earnest endeavours of the New Zealand Government to ensure that this one area of discord is contained and does not disturb the otherwise excellent relations between France and New Zealand.

It is strongly submitted, Mr. President, that the matters which I have just urged ought to satisfy the Court that the circumstances are such that it should grant interim relief in the terms sought by New Zealand, namely that France refrain from conducting any further nuclear tests that give rise to radio-active fall-out while the Court is seized of the case. It is further submitted that interim relief in any other form would not give New Zealand the protection it needs and, to which, it submits, it is entitled.

In the ordinary way this would have concluded my submission, but in the regrettable absence of France, I have a duty to the Court to refer to points which might well have been raised by France had she been present. I refer to two of them, both relating to our submission that the Court can and should grant New Zealand interim relief under Article 33 of the General Act.

The first point concerns the fact that Article 33 (1) of the General Act refers to the Permanent Court of International Justice and to Article 41 of its Statute. Article 37 of the Statute of the present Court is plainly relevant and will have the effect of substituting "the International Court of Justice" for "the Permanent Court of International Justice" in Article 33. This, it is submitted, is confirmed by the decision of the Court in the *Barcelona Traction* case. In that case the jurisdiction of the Court was sought under a bilateral treaty between Belgium and Spain. That treaty contained a provision—Article 22—which was comparable in its general intent to Article 33 of the General Act. In its Judgment the Court, in considering the effect of Article 37 on its jurisdiction under the treaty between Belgium and Spain, said:

> "Accordingly, 'International Court of Justice' must now be read for 'Permanent Court of International Justice' in Articles 2 and 17 of the Treaty. The same applies in respect of Article 23, under which the Court is made competent to determine any disputed question of interpretation or application arising in regard to the Treaty; *and similar substitutions in Articles 21 and 22 would follow consequentially*." (*I.C.J. Reports 1964*, p. 39, emphasis added.)

If, on this basis, it is appropriate to read the reference in Article 33 (1) to the Permanent Court of International Justice as a reference to the International Court of Justice, it must necessarily also be appropriate to construe the reference to Article 41 of the Statute of the old Court as a reference to Article 41 of the Statute of the present Court, the more so because the two provisions are cast in virtually identical terms. It would make no sense to leave the provisions in a form which referred to the present Court but to the old Statute.

The other point which France, if represented here, might have made may be postulated as follows. Any decision taken by the Court on a request for interim measures is without prejudice to its final decision as to whether or not it has jurisdiction to consider the dispute at all. It will only be at a later stage in the case that the Court will be called upon to determine the validity of any contention that the General Act is no longer in force between New Zealand and France, and hence it cannot serve as a basis for the Court to accept jurisdiction in respect of the dispute now referred to it by New Zealand. It follows, so France might argue, that the Court cannot, at this stage, grant interim relief on the basis of Article 33 of the General Act.

It certainly cannot be disputed that the rule that no final decision on jurisdiction can be taken now is well established in the doctrine of the Court: but that, of course, is not the end of the matter. Whatever may be the apparent logic of the kind of argument that I have outlined, it cannot be sustained, it is submitted, upon an examination of the terms and the object and purpose of Article 33 of the General Act. If that provision could be set aside as a basis for granting interim relief by a mere assertion—an assertion by a State which undoubtedly became a party to the General Act, which has not denounced it, and which has not questioned its validity until after the commencement of proceedings—I repeat, if it could be set aside by a mere assertion in those circumstances that the General Act as a whole is not in force between the Parties to the dispute, then

Article 33 would lose most, if not all, of its point. Its principal purpose, it is submitted, is to ensure that adequate and effective interim relief can be granted at a preliminary stage of the judicial or arbitral consideration of a dispute and before the final decisions on either jurisdiction or the merits have been taken.

This amounts, of course, to urging that Article 33 and any comparable provision ancillary to the main framework of a treaty for the peaceful settlement of disputes has a sufficient degree of independence from the other provisions of the treaty to enable it to be acted upon despite the fact that the treaty in question is under challenge by one of the Parties to the dispute, and the validity of that challenge has not been determined. At the very least, a provision of this kind must, it is submitted, be effective as a basis for the action by the Court in a case such as the present one where there is no suggestion that the treaty was not initially in force between the two Parties to the dispute, and it has not been formally denounced; and where there is a safeguard that, as a preliminary to the granting of interim relief, the Court must satisfy itself that there is no manifest lack of jurisdiction to deal with the dispute on the basis of other provisions in the treaty.

Strong support for the view that provisions of this kind, which are ancillary to the main framework of the treaties, have a special character is to be found in the Judgment of the Court in the case dealing with the *Appeal relating to the Jurisdiction of the ICAO Council*. That case concerned an appeal by India against decisions of the Council of ICAO. The Council had assumed jurisdiction in respect of complaints by Pakistan under Article 84 of the Chicago Convention and under Article II of the related 1944 Transit Agreement. Both these Articles made provision for appeal to the Court. In the course of its Judgment, the Court had to deal with an argument put forward by Pakistan to the effect that India was precluded from asserting that the Court had jurisdiction because she herself had maintained, on the merits of the dispute before the ICAO Council, that the two treaties alleged by India to serve as the basis for the Court's jurisdiction were not in force between India and Pakistan. That contention, if correct, so Pakistan argued, would involve a finding that the jurisdiction clauses were inoperative and that the treaties themselves did not come within Article 36 (1) of the Court's Statute, with the result that the Court would have no jurisdiction in respect of the disputes referred to it under those treaties. The Court rejected this argument advanced by Pakistan on a number of grounds, the second of which, is relevant to the submission made earlier, and this is what the Court said:

> "Nor in any case could a merely unilateral suspension *per se* render jurisdictional clauses inoperative, since one of their purposes might be, precisely, to enable the validity of the suspension to be tested. If a mere allegation, as yet unestablished, that a treaty was no longer operative could be used to defeat its jurisdictional clauses, all such clauses would become potentially a dead letter, even in cases like the present, where one of the very questions at issue on the merits, and as yet undecided, is whether or not the treaty is operative—i.e., whether it has been validly terminated or suspended. The result would be that means of defeating jurisdictional clauses would never be wanting." (*I.C.J. Reports 1972*, pp. 53-54.)

Further on in its Judgment, in dealing with the Indian contention that the treaties were at material times suspended or not operative and hence could not have been infringed, the Court made some further observations which are pertinent to the present case:

> "India has not of course claimed that, in consequence, such a matter can never be tested by any form of judicial recourse. This contention, if it were put forward, would be equivalent to saying that questions that prima facie may involve a given treaty, and if so would be within the scope of its jurisdictional clause, could be removed therefrom at a stroke by a unilateral declaration that the treaty was no longer operative. The acceptance of such a proposition would be tantamount to opening the way to a wholesale nullification of the practical value of jurisdictional clauses by allowing a party first to purport to terminate, or suspend the operation of a treaty, and then to declare that the treaty being now terminated or suspended, its jurisdictional clauses were in consequence void, and could not be invoked for the purpose of contesting the validity of the termination or suspension, —whereas of course, it may be precisely one of the objects of such a clause to enable that matter to be adjudicated upon. Such a result, destructive of the whole object of adjudicability, would be unacceptable." (*I.C.J. Reports 1972*, pp. 64 and 65.)

And it is submitted that precisely similar considerations must apply to a provision such as Article 33 of the General Act which, like the jurisdictional clause under consideration in the *Appeal relating to the Jurisdiction of the ICAO Council* case, is ancillary to the main framework of the treaty. If Article 33 of the General Act can be set aside by a mere allegation that the General Act is no longer operative, its whole object will be destroyed and it becomes virtually a dead letter.

It is thus our submission that there is nothing to prevent the Court in this case from granting interim relief under Article 33 of the General Act and that, for the reasons already indicated, there are substantial reasons for it doing so.

The Court rose at 13.05 p.m.

SECOND PUBLIC SITTING (25 V 73, 10 a.m.)

Present: [See sitting of 24 V 73, Judge Dillard absent.]

ARGUMENT OF PROFESSOR QUENTIN-BAXTER

AGENT FOR THE GOVERNMENT OF NEW ZEALAND

The PRESIDENT: The sitting is open. Judge Dillard, for reasons of health, is not with us this morning, but we expect him to be back on the Bench very soon.

Professor QUENTIN-BAXTER: Mr. President and Members of the Court. As the Attorney-General indicated at the outset, I will, in this final part of the oral presentation of New Zealand's request for interim measures, consider the question of jurisdiction.

It is, of course, established beyond doubt that the Court must satisfy itself that it has jurisdiction, based on the consent of the parties, before it renders a judgment on the merits of a contentious case. The jurisprudence of the Court, as well as considerations of principle and convenience, do, however, establish that a different jurisdictional test applies to interim measures. The Court expressly recognized this difference in the Judgment in which it held that it was without jurisdiction to deal with the *Anglo-Iranian Oil Co.* case on the merits, and noted that accordingly the provisional measures which it had indicated the previous year lapsed, and I quote from *I.C.J. Reports 1952*, at pages 102 and 103:

> "While the Court derived its power to indicate these provisional measures from the special provisions ... in Article 41 of the Statute, it must now derive its jurisdiction to deal with the merits of the case from the general rules laid down in Article 36 of the Statute. These general rules, which are entirely different from the special provisions of Article 41, are based on the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties."

In six cases in which jurisdiction was still in doubt, this Court or the Permanent Court was asked to indicate interim measures. In four cases it did so indicate, without going fully into the question of jurisdiction. In the remaining two it rejected the request for reasons not related to jurisdiction but, again, without casting doubt on the essentially tentative nature of its examination of jurisdiction. I will now consider each of these cases, giving particular emphasis to the passages in the Orders in which the Court addressed itself to the jurisdiction issue.

The first case—the very first in which a request for interim measures arose—is the *Sino-Belgian Treaty* case, a case in which, under the Rules then in force, the President made the Order. The Order recited the fact that both Belgium and China were bound by the Statute of the Court, and that both had, in accordance with Article 36, paragraph 2, of the Statute, recognized the Court's jurisdiction as compulsory. It then went on to give the provisional indication "pending the final decision of the Court... by which decision the Court will either declare itself to have no jurisdiction or give judgment on the merits" (*P.C.I.J., Series A, No. 8*, p. 7).

The Court in the next case, the *Prince von Pless Administration (P.C.I.J.,*

Series A/B, No. 54), refused to make an Order, on the ground that since the Polish Government, the Respondent in the proceedings, had annulled and suspended certain actions, the request "had ceased to have any object". Although the Court had in fact already delivered a Judgment on preliminary objections, it had joined a jurisdictional question to the merits and, accordingly, its jurisdiction was not yet established. The order referred to that question in this way:

> "... the present Order must in no way prejudge either the question of the Court's jurisdiction to adjudicate upon the German Government's Application instituting proceedings... or that of the admissibility of that Application" (*P.C.I.J., Series A/B, No. 54*, p. 153).

The first of the four requests to the present Court—all of which preceded objections to jurisdiction and judgments on those objections—was that made in the *Anglo-Iranian Oil Co.* case. The Court summarized the grounds on which the Iranian Government had stated that it rejected the request. It then referred to the nature of the complaint made by the Applicant, and recited that the complaint was:

> "... one of an alleged violation of international law... it cannot be accepted *a priori* that a claim based on such a complaint... falls completely outside the scope of international jurisdiction;
>
> Whereas the considerations stated in the preceding paragraph suffice to empower the Court to entertain the Request for interim measures of protection;".

The Court went on and reaffirmed that:

> "... the indication of such measures 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 arguments against such jurisdiction" (*I.C.J. Reports 1951*, pp. 92 and 93).

The Court rejected the request for interim measures in the *Interhandel* case on the ground that the need for them had not been established. On the question of jurisdiction, which had been vigorously disputed by the Respondent, the Court reiterated that:

> "... the decision given under this procedure 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 arguments against such jurisdiction" (*I.C.J. Reports 1957*, p. 111).

The Court had already noted that both the Applicant and the Respondent had accepted the compulsory jurisdiction of the Court on the basis of Article 36, paragraph 2, of the Statute, and that by its subject-matter the dispute submitted to the Court fell within the purview of that paragraph. It also referred to the detail of the Respondent's argument on jurisdiction. I will return to this passage when I am considering the question whether the declarations made by New Zealand and France, accepting the compulsory jurisdiction of the Court, provide a base for the granting of interim measures.

The two basic principles acted on in the cases I have mentioned were endorsed in the two most recent Orders dealing with requests for interim measures: those relating to the *Fisheries Jurisdiction* cases (*United Kingdom v. Iceland* and *Federal Republic of Germany* v. *Iceland*), and I will quote several short passages from the *I.C.J. Reports 1972*. The Court repeated that: "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." Then, at pages 15 and 33, the Court went on to make explicit what had to date been implicit: "it ought not to act under Article 41 of the Statute if the absence of jurisdiction on the merits is manifest." The Court then went on to apply the principle to the jurisdictional provisions in the agreements between the Parties on which the Applicants were depending. It affirmed (at pp. 16 and 34) that each provision "in an instrument emanating from both Parties to the dispute appears, prima facie, to afford a possible basis on which the jurisdiction of the Court might be founded".

And, secondly, the Court reaffirmed that:

> "... the decision given in the course of the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the merits themselves and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction or in respect of such merits" *(ibid.)*.

There are, in short, well-established jurisdictional tests in interim measures cases. Nevertheless, individual judges of the Court, in separate opinions, have sometimes stated the first of the two principles, that there ought not to be a manifest absence of jurisdiction, in a rather different way and, for the sake of establishing beyond doubt that in our case the jurisdictional element is satisfied, I propose briefly to mention the most stringently drawn test. It was stated by Judges Winiarski and Badawi in the *Anglo-Iranian Oil Co.* case. They stated their test in various ways, and I shall read three short extracts:

> "... the Court has power to indicate such measures only if it holds, should it be only provisionally, that it is competent to hear the case on its merits.
>
> . . . . . .
>
> ... the Court ought not to indicate interim measures of protection unless its competence, in the event of this being challenged, appears to the Court nevertheless reasonably probable. Its opinion on this point should be reached after a summary consideration;
>
> . . . . . .
>
> ... if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exist serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated." (*I.C.J. Reports 1951*, pp. 96-97.)

The view of these two judges was endorsed by Judge Padilla Nervo, the sole dissentient, in the *Fisheries Jurisdiction* cases—references are in *I.C.J. Reports 1972*, at pages 21, 22, 38 and 39. We would submit that the view of these judges—which is not stated with complete consistency—cannot be reconciled with the broad stream of authority which, as we have already seen, requires a less stringent examination of jurisdiction. It is, for instance, incompatible with the statement of the Court in the two *Fisheries Jurisdiction* cases. But it will be our submission that even this more rigorous standard is satisfied in the present case.

The Court's approach to jurisdictional issues when considering requests for interim measures is completely consistent with the nature of the power. It is a power to be exercised expeditiously, even urgently; it is a power to be exercised provisionally, not definitively; it is a power designed to assist the Court and the Parties by maintaining the status quo until the Court can deal with the case finally; and it is a power designed not to hamper the Court when it comes to reach its decisions on jurisdiction and on the merits. This urgent, provisional,

conservatory, non pre-judging character would be jeopardized by anything approaching a full examination of jurisdiction—or of the merits—at this stage.

Mr. President, I now propose to examine, in a preliminary way, the two heads of jurisdiction invoked in the Application instituting the proceedings. It will be my aim to establish that this is not a case where there is a manifest lack of jurisdiction. As the General Act has been so little invoked, I intend to spend rather more time on it than might be usual in this type of proceeding. For that reason I shall not spend a great deal of time on our second ground of jurisdiction, the Statute of the Court. It is an issue which is much discussed in the literature and on which the Court has had the advantage of hearing counsel for Australia during the present week. I should like, therefore, to deal with it only briefly.

In dealing with the jurisdiction under the Statute, the particular questions we face are these: should the Court, in determining whether it has the power to grant interim measures in a case in which its jurisdiction is based on such declarations, examine the applicability of any reservations to the case? If the answer is yes, how extensive should that examination be? We would submit, Mr. President, that the answer to the first question is no: the Court should *not* examine the applicability of the reservations. Our principal authority for this proposition is the *Interhandel* case, but support is also to be found in the *Anglo-Iranian Oil Co.* case. In the *Interhandel* case the Court noted that both Switzerland and the United States had, by declarations, accepted the compulsory jurisdiction of the Court on the basis of Article 36, paragraph 2, of the Statute. It then continued:

> "Whereas by its subject-matter the present dispute falls within the purview of that paragraph;
>
> Whereas the Government of the United States of America has invoked, against the request for the indication of interim measures of protection, the reservation by which it excluded from its Declaration matters essentially within its domestic jurisdiction as determined by the United States and whereas the Government accordingly 'respectfully declines... to submit the matter of the sale or disposition of such shares to the jurisdiction of the Court';
>
> Whereas at the hearing the Co-Agent of the Swiss Government challenged this reservation, on a number of grounds, and stated that, in its examination of a request for the indication of interim measures of protection, the Court would not wish to adjudicate 'upon so complex and delicate a question as the validity of the American reservation';
>
> Whereas the procedure applicable to requests for the indication of interim measures of protection is dealt with in the Rules of Court by provisions which are laid down in Article 61 and which appear, along with other procedures, in the section entitled: 'Occasional Rules';
>
> Whereas the examination of the contention of the Government of the United States requires the application of a different procedure, the procedure laid down in Article 62 of the Rules of Court, and whereas, if this contention is maintained, it will fall to be dealt with by the Court in due course in accordance with that procedure;
>
> Whereas the request for the indication of interim measures of protection must accordingly be examined in conformity with the procedure laid down in Article 61;
>
> Whereas, finally, the decision given under this procedure 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 arguments against such jurisdiction." (*I.C.J. Reports 1957*, pp. 110-111.)

It follows from this case, we submit, that when Article 36, paragraph 2, of the Court's Statute has been invoked, the Court should only consider, in a preliminary way, whether the claim falls outside the scope of that paragraph. If, as the Court says in the *Interhandel* case, the case falls within the purview of that paragraph or if, as it says in the *Anglo-Iranian Oil Co.* case, it does not, *a priori*, fall completely outside the scope of international jurisdiction, then the Court is empowered to entertain the request.

It follows, in our respectful submission, that in our case the Court is so empowered. This case concerns rights under international law of the world community, including New Zealand, and rights of New Zealand alone, rights which it is claimed France is violating. These are rights which fall within the purview of Article 36, paragraph 2, in respect of which both New Zealand and France have made declarations.

If, contrary to my first proposition, the answer to the initial question is yes, that is that the Court should look at the applicability of reservations to determine perhaps whether they manifestly oust the Court's jurisdiction, I would like to make two points. The first is that the reservation principally in issue in the *Interhandel* case—the allegedly self-judging reservation attached to the United States declaration—is prima facie of much wider scope than that in issue here; so the French reservation does not, expressly at least, reserve to France the power to determine its applicability in a particular case. If the Court did not consider it appropriate to investigate the significance of the United States reservation in the *Interhandel* case, it would have, in our submission, less occasion to do so here.

The second point is that the validity, interpretation and effect in the present situation of the French reservation are issues which, as the Court well knows, can be the subject of debate; it cannot, we submit, be baldly asserted that there is a manifest absence of jurisdiction under Article 36, paragraph 2, of the Statute.

I turn now, Mr. President and Members of the Court, to the General Act. Article 17 of the General Act provides that:

> "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."

The General Act provides that it is open to accession in respect of all its chapters—relating to conciliation, judicial settlement, arbitration and general provisions—as a whole and in respect of combinations of those chapters. On 21 May 1931 New Zealand and France, together with three other States, acceded to the whole of the General Act, subject to certain reservations which I will refer to later and which are set out in Annexes V and VI to the Application. The instruments were deposited by the British Foreign Secretary and the French Foreign Minister during a meeting of the Council of the League. In February 1939, in accordance with the terms of Article 45, paragraph 4, the two countries each made reservations, and these are also set out in Annexes V and VI to the Application, to exclude disputes arising out of events occurring during any war in which the reserving country might be involved. Neither France nor New Zealand has taken any other action under that Article either to add to its

reservations or to denounce the Act. It will be seen that such action can be taken only at five-yearly intervals and by the giving of six months' notice, that is, by the giving before 16 February of a notice which would be effective from 16 August in the years 1934, 1939 and in each quinquennial year, 1969, 1974, and so on. Before leaving that reservation and denunciation provision I would remind the Court of the well-established principle, reflected for instance in the Vienna Convention on the Law of Treaties, that if a treaty provides a particular method of termination that method is to be followed unless all the parties to the treaty otherwise agree. In our respectful submission this principle is the more clearly applicable when the method laid down in a treaty is a restrictive one, permitting action only every five years and then only by the giving of six months' notice.

Article 17 of the General Act, which I quoted a moment ago, conferred jurisdiction on the Permanent Court of International Justice. This reference to the Permanent Court is now, as between parties to the Statute of the International Court of Justice and in particular as between the original parties to the Statute, to be read as a reference to the International Court. I have, of course, in mind Article 37 of the Statute, which reads:

> "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

The question might nevertheless be raised, both with reference to the specific wording of Article 37 and, more generally, whether the Act was, on 24 October 1945 when the Charter of the United Nations and the Statute of this Court entered into force for New Zealand and France, and subsequently, a treaty or convention in force. I shall look first to the narrower question of the position in reference to Article 37. It is relevant to note that the League of Nations and the Permanent Court were still in existence when the Charter and Statute entered into force and remained so for some months. Accordingly, in so far as any doubts about the continued force of the General Act relate to its being an integral part of the League system, a proposition which I shall examine later, those doubts do not bear on the transfer of jurisdiction conferred by Chapter II (Judicial Settlement) of the General Act, under Article 37, from the Permanent Court to the International Court as at 24 October 1945; that transfer was effected before the League of Nations system lapsed. Moreover, as we shall see later, certain of those general provisions of the Act that relate to the Judicial Settlement chapter are also appropriately updated, either by Article 37 or, in the case of the depositary functions, by General Assembly resolution 24 (I) and the parallel League of Nations action.

It is our submission then that the General Act, and in particular Chapter II dealing with Judicial Settlement was, within the meaning of Article 37 of the Statute, a treaty or convention in force, on 24 October 1945 when New Zealand and France became parties to the Statute and that Article 37 accordingly conferred on this Court the jurisdiction provided for in Article 17 of the General Act, and also the powers set out in certain other provisions, including Article 33.

I now return to the more general question of the continued force of the General Act. I have already recalled that it became binding on New Zealand and on France in 1931 and that neither has taken action to denounce the General Act in accordance with its provisions, nor, since 1939, to limit the scope of their accession by wider reservations.

As I mentioned a moment ago, it might be claimed that the General Act was an integral part of the League of Nations system and that it could not survive the ending of that system. It is true, as was indeed recognized by the General Assembly in 1949, that, because some provisions of the Act conferred functions on various League of Nations organs, the demise of the League had a certain effect upon the efficacy of the General Act. But before we consider the General Assembly action, we should, I would submit, Mr. President, briefly examine those functions and consider the effect that the ending of the League system would have upon them. They can be conveniently grouped.

The first group—two provisions raise the possibility that the Acting President of the Council of the League and the President of the Permanent Court might be asked to appoint members of conciliation commissions and arbitral tribunals respectively (Art. 6, paras. 1 and 23). These procedures are however residual only and become effective only if the parties are unable to choose their members in the first instance.

The second group—the Council of the League had power to invite non-members of the League to accede to the Act (Art. 43). This power will obviously have lapsed. It may, however, be noted that the General Assembly in 1963 decided that *it* was the appropriate organ of the United Nations to exercise the power of invitation in respect of technical and non-political League treaties. I refer to General Assembly resolution 1903 (XVIII). Although this resolution does not extend to the General Act, it illustrates a point which is relevant to my argument. The Assembly's action obviously proceeded on the basis that treaties had remained in force notwithstanding the temporary lapse of the invitation power. This continuity is also confirmed by the fact that States have acceded to several of these treaties since 1946.

The third group of provisions—the Secretary-General of the League was given two groups of functions of an administrative kind. First, unless otherwise agreed, a conciliation commission was to meet at the seat of the League or at some other place chosen by the President and it could request the assistance of the Secretary-General (Art. 9). Secondly, the Secretary-General was given the regular range of depositary functions: he was to receive instruments of accession and declarations extending the scope of the accession and abandoning part or all of the reservations; to receive denunciations; to maintain lists of parties; to inform League Members and States invited to accede of the instruments received; to deliver certified copies to the same Members and States and to register the Act under the Covenant when it entered into force. The first set of provisions, dealing with administrative assistance, is hardly central to the conciliation system and, in any event, their broad intent could still be complied with. General Assembly resolution 24 (I), to which I have already referred, and related League of Nations decisions, authorized the Secretary-General of the United Nations to exercise depositary functions in respect of League of Nations treaties and it is the consistent, undisputed practice to act upon the provision made in this resolution. It is submitted that the procedure is applicable to the case of the General Act.

The fourth and last group—this group of provisions all contain references to the Permanent Court. The important ones, Articles 17, 19 and 20 in Chapter II and Articles 33, 34 *(c)*, 36 and 41 in Chapter IV, are all to be read, so far as parties to the Statute of the Court are concerned, as referring to the International Court of Justice. This follows from Article 37 of the Statute. The remaining references are of minor significance and they might well be interpreted as referring to the International Court of Justice. But even if they are not so interpreted, the resulting infelicities will be small and in some cases cured

by other treaty provisions. Thus, Article 37 of the Act imposes an obligation on the Registrar of the Permanent Court to advise States parties to a convention of the fact that the convention is in question in a case before the Court. That Obligation is laid on the Registrar of this Court by Article 63 of the present Statute.

In our submission, these references to the functions conferred on League organs show that the involvement of those organs in the General Act was very limited and of minor administrative significance. The involvement of the Permanent Court was, of course, of major significance and in that connection we have already seen that specific provision was made for the continuity of the bulk of the Court's jurisdiction. This continuity is the more readily comprehended because it can be put against a broader background of the continuity of the principal judicial organ of the international community, as reflected for instance in Article 92 of the Charter.

The very limited involvement of the League is further emphasized when one goes beyond the narrow range of the provisions relating to League organs and looks to the General Act as a whole. Indeed, as the New Zealand representative said in the General Assembly when the revision of the Act was being considered —and here, Mr. President, my reference is to the *Official Records* of the General Assembly III/I, the 27th Meeting of the *ad hoc* Political Committee, page 320— the Act was to be seen as establishing extra-Covenant procedures; procedures outside the Covenant; it was because such procedures and, by implication, extra-Charter procedures, were doubted, that he suggested an investigation of their historical efficacy and proposed that consideration of the item be deferred. The same concern had already been shown in the New Zealand reservations to its accession to the Act deposited in 1931.

I would like to go on to look briefly at the general character of the Act. Chapter I lays down a procedure for bilateral conciliation. Conciliation commissions are to be appointed either permanently or specially to deal with a particular dispute. If the parties were unable to agree on the jointly appointed members of the Commission, the Acting President of the League Council could be requested by the parties to make the appointment, but if that procedure failed, a further non-League method of appointment was provided for. The Commission is to act on the application of one or both of the parties, to hear them, to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement. It is able to suggest to the parties the terms of settlement which seem suitable to it. If this process does not lead to a settlement, the dispute, if it is not one which could be dealt with by the Court under Chapter II, can be brought under Chapter III before an arbitral tribunal. Again, as we have noted, the President of the Permanent Court could be involved in appointing the non-national members of the tribunal, but only if two other methods of appointment had failed. The tribunal, in so far as it is not given different directions, is to follow the procedures laid down in the 1907 Hague Convention for the Pacific Settlement of International Disputes and the sources of law stated in the Statute of the Permanent Court.

The essence of these two Chapters is their bilateral, non-universal character. Disputes are to be resolved, they say, by procedures and institutions created by the two parties, and the rest of the world is seen as having no interest, except to the extent that a particular State may be immediately involved in a dispute. By contrast, the Members of the League, in undertaking to submit to the Council any dispute likely to lead to a rupture if it was not submitted to arbitration or judicial settlement by the Permanent Court, recognized the interest of the

organized world community in such disputes. This universal concern was also seen in the sanctioning system. Bilateral procedures were not necessarily in violation of the League system but they could not be seen as an integral part of it. Long established, they could operate and did operate independently of the League's system.

The extra-Covenant nature of the Act also appears from a summary comparison of it with its ill-starred predecessor, the Geneva Protocol for the Pacific Settlement of Disputes of 1924. That was an attempt, as its preamble said, to facilitate "the complete application of the system provided in the Covenant of the League of Nations for the pacific settlement of disputes". To use the language of the time, it was an attempt to fill the gaps in the Covenant. The parties accordingly would have agreed among themselves on a great number of amendments to the Covenant which would have strengthened the League's peaceful settlement powers, limited the right to go to war, tightened the Covenant's sanction provisions, and foreshadowed a disarmament conference convened by the Council. But this protocol which would have been inextricably entwined with the Covenant, never entered into force and attention was turned to the very different and rather more modest methods of resolving disputes which were to be laid down in the General Act and in hundreds of similar bilateral conventions.

I now turn, Mr. President, to consider the significance of the action of the General Assembly in 1948 and 1949 in establishing a revised General Act. Was this action required by the lapse of the Act, either as a result of the ending of the League or for more general reasons? It is the submission of New Zealand that it was not and I will now, again as briefly as I am able given the nature of the present proceedings, indicate why.

We can best begin by referring to the relevant passages of the General Assembly resolution 268 A (III) of 28 April 1949, which is entitled "Restoration of the General Act of 26 September 1928 to its Original Efficacy". Some of the preambles read:

> "*The General Assembly*
>
> . . . . . .
>
> *Whereas* the efficacy of the General Act of 26 September 1928 for the pacific settlement of international disputes is impaired by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared,
>
> *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 States, parties to the Act as established on 26 September 1928, as should claim to invoke it [and here I stress the words that might be felt to tell against our case] *in so far as it might still be operative*,
>
> *Instructs* the Secretary-General to prepare a revised text of the General Act including the amendments mentioned hereafter, and to hold it open to accession by States under the title 'Revised General Act for the Pacific Settlement of International Disputes'."

The resolution then set out the amendments.

This resolution differs in only two relevant respects from the proposal originally put to the Interim Committee of the General Assembly by the Belgian representatives—the reference to the draft resolution is in document A/AC18/

18/Add.1 of 10 May 1948; the two respects were these: first, the revised version does not express any approval of the Act and, secondly, it provides for the establishment of an entirely separate treaty rather than for amendments to the 1928 instrument. The first change tends to emphasize the mechanical nature of the exercise: defunct organs are being replaced by existing ones. The second change I will reserve for later comment.

The preambular paragraphs might, if read selectively without regard to context, suggest doubt about the continued force of the General Act: they talk of restoring it to its original efficacy, and of the parties to the original Act having the right to invoke it in so far as it might still be operative.

The resolution itself provides part of the context but before looking at it, the origins of the proposal may be reviewed. As I noted, the Belgian delegation initiated the proposal. At the outset it used the phrase "restoring to the General Act its original efficacy" in the following way, and I quote here from the record —the document reference is A/AC.18/18/Add.1:

> "The Belgian proposal aims at restoring to the General Act . . . its original efficacy, *impaired* by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared" (emphasis added).

It accordingly later proposed a draft resolution which was the basis of resolution 268 A (III), the reference to which I have already given.

That the Belgian delegation saw its task not as that of reviving the efficacy of the Act but rather as that of removing the impairments resulting from the ending of the League system was made clear beyond doubt by many speeches of Belgian representatives in the Interim Committee, the *Ad Hoc* Political Committee, and the General Assembly itself. Thus Joseph Nisot in foreshadowing the specific proposal in the Interim Committee stated that—and I here quote from the Summary Record, A/AC.18/SR.11, pp. 4-5, 2 March 1948:

> "The General Act was still in force, but its effectiveness was decreased owing to the disappearance of certain essential parts of the machine, i.e. the Secretary-General, the Council of the League and the Permanent Court of International Justice. The aim of the Belgian proposal was the transfer to the organs of the United Nations, including the International Court of Justice, of the functions which the Act accorded to the organs of the League of Nations and the Permanent Court. The proposal was practical and simple; it could be carried out without delay by a protocol consisting of a few articles; and it would result in the complete re-establishment of one of the most important . . . treaties which existed up to the present in the field of the peaceful settlement of international disputes."

The same position was adopted in a preliminary report of a subcommittee, of which the French representative was chairman, to the Interim Committee (A/AC.18/48, para. 36, 19 March 1948; also Annex A of that document). It was also shown in a history and analysis of the General Act prepared for the Committee by the Secretariat (A/AC.18/56, para. 26, 4 May 1948). This view was also taken by the Interim Committee of the General Assembly as a whole. Thus its report to the General Assembly included the view of the Belgian representative that—and I quote now from the Report of the Committee (A/605, para. 46; *GA, OR*, III, Suppl. No. 10, pp. 22, 28-29):

> "... his proposal did not suppress or modify the General Act, as established in 1928, but left it intact as also, therefore, whatever rights the parties to that act might still derive from it. The Belgian proposal would achieve its

object through a revised General Act, binding only on States willing to accede thereto. There would thereby be created an entirely new and independent contractual relationship for the implementation of certain of the ends contemplated in Articles 11 (paragraph 1), and 13 (paragraph 1 *(a)*), of the Charter. Thanks to a few alterations, the new General Act would, for the benefit of those States acceding thereto, restore the original effectiveness of the machinery provided in the Act of 1928, an Act which, though still theoretically in existence, has become largely inapplicable.

It was noted, for example, that the provisions of the Act relating to the Permanent Court of International Justice had lost much of their effectiveness in respect of parties which are not Members of the United Nations or parties to the Statute of the International Court of Justice."

The same idea appears several times in the speeches of Belgian representatives in the *Ad Hoc* Political Committee and in the General Assembly. Here, Mr. President, I would like to make several very short references just to show that the tenor is the same as the passages I have read. The first of these short references is from the Statement of the Belgian representative in the Twenty-eighth Meeting of the *Ad Hoc* Political Committee, Third Session of the General Assembly, at page 323: the original Act "was still valid"; and three references from the same source from the Belgian representative in the Plenary Meeting of the General Assembly, its 198th Meeting, at page 176: "the rights of the Parties to that Act remained intact"; at page 177: "it would remain in force unchanged" after the second Act was drawn up. However, the action proposed by Belgium was necessary because—and page 176—the "effectiveness [of the Act] had diminished since some of its machinery had disappeared".

Mr. President, I have concentrated on the views expressed by the Belgian delegation because that delegation initiated the proposal and was responsible for the wording of the resolution adopted by the General Assembly and because few other delegations addressed themselves to the legal issue of continuity. It is true that some expressed vigorous criticism, but this criticism—like that of New Zealand to which I have already referred—was based on political and not legal attitudes to the procedures of the Act. Thus the United Kingdom noted its doubts about certain of the provisions of the Act—and accordingly objected to any wording in a resolution which would imply approval of it—but at the same time it acknowledged that it was a party to the Act. This also is reported in the Report of the Interim Committee, document A/605, in paragraph 46.

The intention of the General Assembly to leave unaffected the original General Act is also shown in another way. Resolution 24 (I) provided that the General Assembly would examine any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League by instruments of a political character. The question therefore arose whether the General Assembly should be advised to adopt the proposed resolution on the revised General Act only at the request of a specified number of parties to the Act of 1928. The question was answered in the negative by the representative of Belgium. The consent of the parties to the original Act was, he said, unnecessary, because that Act was left unaffected and the parties' rights intact. I refer again to the same paragraph of the Report of the Interim Committee.

I return to the text of the resolution which can now be examined in context. The references in the preambular paragraphs to the Act being impaired, "diminuée" in the French text, and to the restoration to the Act of its original efficacy clearly proceed on the basis that the Act remains in force but that the

detailed impairment needs to be repaired. The background also provides a clear interpretation of the preambular paragraph, which states that the amendments "will not affect the rights of such States, parties to the Act as established on 26 September 1928, as should claim to invoke it in so far as it might still be operative".

The first part of the quotation is of course a straightforward application of the *pacta tertiis* rule. Its last clause, "in so far as it might still be operative", recognizes that as between parties to the original Act some provisions will be inoperative because of the disappearance of the League and the Permanent Court. It does not suggest that the whole Act might be inoperative.

A final point remains to be made about this resolution which expressly revises the provisions of the General Act relating to the Permanent Court. This might be said to suggest that the General Assembly was uncertain whether the General Act was, in terms of Article 37 of the Statute, still "a treaty or convention in force", and that the Assembly was therefore not able to rely upon Article 37 to effect the transfer of jurisdiction. Some support is to be found for this view in the dissenting opinion of Judge *ad hoc* Armand-Ugon, in the *Barcelona Traction* case.

There are, however, other and sufficient reasons for the course which the Assembly followed. First, Article 37 could not have any effect on States which were not parties to the Statute—at least four and possibly five States parties to the 1928 Act fell into this category—a fact which was clearly stated in a passage of the report of the Interim Committee which I quoted earlier.

Secondly, as we have seen, Article 37 might not be apt to modify, even for parties to the Statute, some of the references to the Permanent Court in the General Act, for example the references in Article 34 *(b)* and Article 37, paragraph 1. Finally, it would have looked odd to replace the references to League organs while retaining the references to the Permanent Court.

Mr. President, some evidence of the continuity of the General Act is also to be found in State practice. It is true that this evidence is limited; but the same might be said of earlier periods in the life of the General Act, when no-one entertained the smallest doubt that the Act was in force. Such evidence as there is of State practice in more recent years is, in our submission, wholly consistent with the Act's continuity.

First, France referred to the General Act in the observations on the Norwegian preliminary objections to jurisdiction in the *Certain Norwegian Loans* case. Norway's refusal to arbitrate was, said France, a violation of international obligations between France and Norway on which the Court was naturally competent to rule. The violations were of four instruments one of which was the General Act—I refer to the *I.C.J. Pleadings*, Volume I, at page 172. At the oral stage the French Agent, in appealing to the Norwegian Agent to agree to jurisdiction, said that he once again recalled, in the name of his Government, Norway's formal obligations under a bilateral treaty of arbitration and under the General Act, Article 17 of which he quoted in part. The Act was not, however, cited in the Application which based jurisdiction only on the declarations made under Article 36, paragraph 2, or in any other statement. In the view of the Court neither of the references could:

> "... 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 these circumstances the Court would not be justified in seeking a basis for its jurisdiction different from that which the French Government itself set out in its Application and by reference to which the case has been presented by both Parties to the Court." (*I.C.J. Reports 1957*, p. 25.)

Of the five judges who wrote separate or dissenting opinions in this case, only Judge Basdevant referred to this issue. He stated that "At no time has any doubt been raised as to the fact that this Act is binding as between France and Norway" (*ibid.*, p. 74). As I have shown, the Judgment of the Court is in no way inconsistent with that view.

Secondly, on 11 December 1964, in a statement to which my colleague, the Attorney-General, has already referred, in explaining in the French National Assembly why the French Government did not then envisage becoming party to the European Convention on Pacific Settlement, the Foreign Minister pointed out that France was already bound by numerous peaceful settlement obligations—the Hague Conventions of 1899 and 1907, the Statutes of the Permanent Court and International Court, the General Act of 1928 as revised in 1949—this reference to the revision is of course an error—as well as many bilateral arbitration treaties. I am referring to the *Journal officiel de la République Française*, National Assembly, 11 December 1964, at page 6064.

Thirdly, the Act has figured in relations between France and Cambodia, on the one hand, and Thailand, on the other. Thailand was never a party to the Act, in either its original or revised form, but in 1937 it concluded a Treaty of Friendship, Commerce and Navigation with France. Article 21 of this Treaty reads: "In accordance with the principle embodied in the Covenant of the League of Nations the High Contracting Parties agree to apply the provisions of the General Act."

Pursuant to this provision, France and Thailand undertook, in an agreement signed on 17 November 1946, to set up a Commission of Conciliation "composed of two representatives of the parties and three neutrals in conformity with the General Act... which regulates the constitution and working of the Commission". The agreement went on to specify the functions of the Commission—and my reference is to the *I.C.J. Pleadings* in the *Temple of Preah Vihear* case at pages 140 and 141—the functions of the Commission, which was later established and convened. There appears to be nothing in the conduct of either party to suggest that they believed themselves to be reviving the procedures of a lapsed treaty.

Fourthly and finally in this category, Cambodia in bringing proceedings in 1959 against Thailand in the *Temple of Preah Vihear* case, depended on the General Act, and later, on the provision in the 1937 treaty from which I have just quoted. It claimed to have succeeded upon independence to France's rights and obligations under the treaty and the General Act. The Court did not reach the questions involved in the reference to the General Act, as it held that an alternative source of jurisdiction existed.

Mr. President and Members of the Court, it is perhaps finally of interest, in referring to the attitude of States towards the General Act, to note that bilateral treaties of peaceful settlement of the same era, and with much the same content, have been invoked in at least five cases since 1946, including the *Barcelona Traction* case. It was apparently not thought that they were obsolescent relics, which fell with the League.

In the face of all the evidence which points to the continued validity of the

General Act, it may be asked why the Act has been so little used. In my submission, this question invites a straightforward answer. The General Act was born of a desire to increase the use of orderly processes and institutions to settle differences between States. Unfortunately, the willingness of States to resort to such processes and institutions when the practical need arises has never matched their enthusiasm for the principle of third-party settlement. Moreover, many multilateral treaties—including most notably the Statutes of the Permanent Court and of this Court—have provided means of commitment to judicial settlement for States willing to use them.

As we have seen, some States, including New Zealand, have at times entertained doubts about one aspect of the General Act: that is, the fact that it constitutes a system of obligation outside the framework of the League of Nations and of the United Nations. These doubts have existed as long as there has been a General Act. They are not an indication that the General Act has lapsed, though they may be a reason for its infrequent use. Other reasons are the growth of specialized multilateral institutions and procedures to deal with differences between States in a vast number of technical fields and the inclination of States in their bilateral relationship to rely on relatively simple machinery for resolving disputes. It is noteworthy that although two to three hundred bilateral agreements follow the same pattern as the General Act, there are only a few reported occasions on which such an agreement has been invoked. As with these bilateral agreements, so with the General Act itself, infrequent use is not a sign that a treaty has ceased to be in force.

I was speaking a minute ago about State practice which, in our submission, is wholly consistent with the continued force of the General Act. I must now advert to an argument which draws upon another facet of State practice in an attempt to show that the General Act has lost its force. It is said that until about 1940 there was a marked parallelism between the scope of each State's acceptances under the optional clause of the Statute and under the General Act. The argument proceeds that after this time States ceased to modify their acceptances of the General Act when they took such action under the optional clause. It is said that this indicates a view that the General Act has ceased to be in force. I would like to make three comments on that proposition.

The first is that an examination of the declarations and accessions shows that in no case did the two instruments deposited by a country exactly coincide. They all differed in their reservations, in the time-limits to which they were subject, or in both. Even those pairs of instruments which were not subject to any reservations had different periods of validity, different terminal dates, or both. While it is true that some of the declarations made in the last 25 or 30 years have diverged further from the accessions to the General Act, in many cases they have not. Indeed, in some cases, for instance that of New Zealand, the position has remained unchanged for over 30 years.

The second point is that the General Act was the result of an attempt to make more extensive, for the parties to it, the obligations of peaceful settlement of disputes. Conciliation and arbitration were made compulsory in certain situations; the Court's jurisdiction was made compulsory; the power to terminate that obligation was for most States considerably restricted; the power to make reservations was limited; and in other ways the régime of the General Act was made more onerous than that of the Statute. If, then, more extensive obligations were going to be accepted vis-à-vis other States, which were also willing to accept them, might not the parties also be expected to append less restrictive reservations? And, in fact, some did, and continue, as a result, to be subject, in their relations with the other parties, to more extensive obligations than those

arising under the optional clause. The third comment is that, as a matter of law and intention, the two sets of rights and obligations—those arising under the optional clause and those established by the General Act—must be seen as independent and cumulative sources of obligation. The Permanent Court faced such a situation in the *Electricity Company of Sofia and Bulgaria* case, in which Belgium based its Application on a bilateral treaty of conciliation, arbitration and judicial settlement, a treaty which in content is much like the General Act, and on the declarations made by the two States under the optional clause. The Court declared its opinion as follows:

> "... 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.
>
> 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, whereas it might be submitted to it under the declarations of Belgium and Bulgaria accepting as compulsory the jurisdiction of the Court... the Treaty cannot be adduced to prevent those declarations from exercising their effects and disputes from being thus submitted to the Court." (*P.C.I.J., Series A/B, No. 77*, p. 76.)

The considerations mentioned under the preceding point support the same interpretation in regard to the relationship which concerns us. But even more important is an objective consideration of the law. The General Act is a multilateral treaty, unlike the treaty in issue in the *Electricity Company of Sofia and Bulgaria* case, and as such it cannot be amended, impliedly—if that were the parties' intention, which we deny—by the declaration of only two parties to it, or, more accurately, by a declaration of only one of these parties.

Mr. President, New Zealand accepts, of course, that it will not be enough to show that the Act is in force between New Zealand and France. It will also have to show at the appropriate stage that the legal dispute falls within the area of jurisdiction conferred by the Act and the accessions. The Court may, for instance, have to interpret and apply reservations attached to the accessions. The competence of the Court and not of the Parties in this area is undoubted. We would submit at this stage, however, that the reservations cannot be the foundation of any serious argument that the Court manifestly lacks jurisdiction. At the most, there might be some ambiguity in the interpretation and application of one or more of the reservations, but if there is such an ambiguity it can be dealt with by the Court only when the issue of jurisdiction is fully before it.

We would accordingly submit, Mr. President, that so far as the General Act is concerned, there is no manifest lack of jurisdiction to deal with this matter. Indeed, we would go further and submit that even if the test stated by Judges Winiarski and Badawi in the *Anglo-Iranian Oil Co.* case, a test which appears to be much more stringent than that approved by the Court, even if this test were to be applied the Court would be competent to make the Order requested. To

use the words of these two Judges, the Court's jurisdiction on the merits is reasonably probable; there exist weighty arguments in favour of it.

I should like to conclude with a more general remark. It is true, as has become abundantly clear today, that jurisdictional issues can be very technical and complicated. But they also have a broader significance, resulting in large part from the fact that States, as a political act, determine in the first instance whether the Court has jurisdiction and the extent of that jurisdiction; they also determine, again by reference to considerations which are not solely juridical, whether to invoke the jurisdiction they have conferred, and to use this particular method for the peaceful settlement of disputes.

But once those actions have been taken—once jurisdiction has been conferred and invoked—then it is, of course, the Court which decides, according to the law, whether it has jurisdiction and whether the Applicant should be awarded the relief, both interim and final, which it seeks. In that respect, Mr. President, we took particular note of your reference at the outset of these proceedings to Article 36, paragraph 6, of the Statute, the provisions of which are central to any ordered system of adjudication.

That, Sir, completes the presentation of our case. We are, of course, willing to answer any questions the Court may have and, if it is the Court's wish, I shall make our final submission.

Mr. President and Members of the Court, New Zealand's final submission is that the Court, acting under Article 33 of the General Act of the Pacific Settlement of International Disputes or, alternatively, under Article 41 of its Statute, should lay down or indicate that France, while the Court is seized of the case, refrain from conducting any further nuclear tests that give rise to radio-active fall-out.

QUESTION BY JUDGE SIR HUMPHREY WALDOCK

Sir Humphrey WALDOCK: *The Revised General Act, as I understand it, is* a new and independent Act having its own régime and its own parties. It does not contain clauses designed to bring the 1928 Act itself into relation with the system of the Charter. I appreciate that the New Zealand Government maintains that this has been done, so far as concerns the Court, by Article 37 of the Statute and, so far as concerns the depositary, by General Assembly resolution 24 of its First Session. I should, however, be grateful if the Agent would assist me by explaining the position of his Government regarding the status today of the provisions of the 1928 Act and of New Zealand's instruments of accession to that Act, which relate to the Council of the League.

The PRESIDENT: There is no need for the Agent to reply to the question today. You may wish to reflect upon the reply to be given and you may present it in writing or at a special sitting of the Court [1].

This part of the hearing is then concluded and I hope the Agent will stand at the disposal of the Court should some further questions or other issues arise which the Court will wish to be clarified or expect some replies from the Agent.

The Court rose at 11.35 a.m.

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[1] See pp. 371, 374-376, *infra*.

THIRD PUBLIC SITTING (22 VI 73, 4 p.m.)

Present: [See sitting of 24 V 73, President Lachs and Judge Dillard absent.]

Le VICE-PRÉSIDENT faisant fonction de Président: La Cour se réunit cet après-midi pour prononcer sa décision sur la demande en indication de mesures conservatoires dont elle a été saisie par la Nouvelle-Zélande [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 l'Australie, dans l'instance que celle-ci a introduite le 9 mai 1973 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. L'ordonnance prise par la Cour sur la demande australienne a été lue ce matin en audience publique.

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 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 de la Cour.

[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.

Le Vice-Président,
(Signé) F. AMMOUN.

Le Greffier,
(Signé) S. AQUARONE.

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[1] Voir p. 340, ci-dessus.
[2] *C.I.J. Recueil 1973*, p. 136.
[3] *Ibid.*, p. 142.