INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

NUCLEAR TESTS CASE

(AUSTRALIA *v.* FRANCE)

REQUEST FOR THE INDICATION OF INTERIM
MEASURES OF PROTECTION

ORDER OF 22 JUNE 1973

1973

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE DES ESSAIS NUCLÉAIRES

(AUSTRALIE c. FRANCE)

DEMANDE EN INDICATION
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NUCLEAR TESTS CASE

(AUSTRALIA *v.* FRANCE)

REQUEST FOR THE INDICATION OF INTERIM MEASURES OF PROTECTION

ORDER

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

The International Court of Justice,

Composed as above,

After deliberation,

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

Having regard to Article 66 of the Rules of Court,

Having regard to the Application by Australia filed in the Registry of the Court on 9 May 1973, instituting proceedings against France in respect of a dispute concerning the holding of atmospheric tests of nuclear weapons by the French Government in the Pacific Ocean, and asking the

Court to adjudge and declare that the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law, and to order that the French Republic shall not carry out any further such tests,

Makes the following Order:

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

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

2. Whereas the French Government was notified by telegram the same day of the filing of the Application and request for indication of interim measures of protection, and of the precise measures requested, and copies of the Application and the request were at the same time transmitted to it by express mail;

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Article 17 of the above-mentioned General Act of 1928, read together with Articles 36, paragraph 1, and 37 of the Statute of the Court;
(ii) Alternatively, Article 36, paragraph 2, of the Statute of the Court and the respective declarations of Australia and France made thereunder;

15. Whereas, according to the letter of 16 May 1973 handed to the Registrar by the French Ambassador to the Netherlands, the French

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

16. Whereas in its oral observations the Government of Australia maintains, *inter alia*, that various matters, including certain statements of the French Government, provide indications which should lead the Court to conclude that the General Act of 1928 is still in force between the parties to that Act; that the General Act furnishes a basis for the Court's jurisdiction in the present dispute which is altogether independent of the acceptances of compulsory jurisdiction by Australia and by France under Article 36, paragraph 2, of the Statute; that France's obligations under the General Act with respect to the acceptance of the Court's jurisdiction cannot be considered as having been modified by any subsequent declaration made by her unilaterally under Article 36, paragraph 2, of the Statute; that if the reservation in paragraph 3 of the French declaration of 20 May 1966 relating to "disputes concerning activities connected with national defence" is to be regarded as one having an objective content, it is questionable whether nuclear weapon development falls within the concept of national defence; that if this reservation is to be regarded as a self-judging reservation, it is invalid, and in consequence France is bound by the terms of that declaration unqualified by the reservation in question;

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

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18. Whereas the Government of Australia, in replying to a question

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

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

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

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

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

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

(ii) The deposit of radio-active fall-out on the territory of Australia and its dispersion in Australia's airspace without Australia's consent:

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

(iii) the interference with ships and aircraft on the high seas and in the superjacent airspace, and the pollution of the high seas by radio-active fall-out, constitute infringements of the freedom of the high seas;

23. Whereas it cannot be assumed *a priori* that such claims fall completely outside the purview of the Court's jurisdiction, or that the Government of Australia may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application;

24. Whereas by the terms of Article 41 of the Statute the Court may

indicate interim measures of protection only when it considers that circumstances so require in order to preserve the rights of either party;

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

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

27. Whereas the Government of Australia also alleges that the atmospheric nuclear explosions carried out by France in the Pacific have caused wide-spread radio-active fall-out on Australian territory and elsewhere in the southern hemisphere, have given rise to measurable concentrations of radio-nuclides in foodstuffs and in man, and have resulted in additional radiation doses to persons living in that hemisphere and in Australia in particular; that any radio-active material deposited on Australian territory will be potentially dangerous to Australia and its people and any injury caused thereby would be irreparable; that the conduct of French nuclear tests in the atmosphere creates anxiety and concern among the Australian people; that any effects of the French nuclear tests upon the resources of the sea or the conditions of the environment can never be undone and would be irremediable by any payment of damages; and any infringement by France of the rights of Australia and her people to freedom of movement over the high seas and superjacent airspace cannot be undone;

28. Whereas the French Government, in a diplomatic Note dated 7 February 1973 and addressed to the Government of Australia, the text of which was annexed to the Application in the present case, called attention to Reports of the Australian National Radiation Advisory Committee

from 1967 to 1972, which all concluded that the fall-out from the French tests did not constitute a danger to the health of the Australian population; whereas in the said Note the French Government further expressed its conviction that in the absence of ascertained damage attributable to its nuclear experiments, they did not violate any rule of international law, and that, if the infraction of the law was alleged to consist in a violation of a legal norm concerning the threshold of atomic pollution which should not be crossed, it was hard to see what was the precise rule on which Australia relied;

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

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

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

*

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

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

34. Having regard to the position taken by the French Government in its letter dated 16 May 1973 that the Court was manifestly not competent in the case and to the fact that it was not represented at the hearings held between 21 May and 25 May on the question of the indication of interim measures of protection;

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

Accordingly,

THE COURT

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

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

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

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

21 September 1973 for the Memorial of the Government of Australia;
21 December 1973 for the Counter-Memorial of the French Government;

And reserves the subsequent procedure for further decision.

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

(Signed) F. AMMOUN,
Vice-President.

(Signed) S. AQUARONE,
Registrar.

Judge JIMÉNEZ DE ARÉCHAGA makes the following declaration:

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

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

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

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

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

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* *

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

Gerald Fitzmaurice in *I.C.J. Reports 1963*, pages 102-103, as follows:

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

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

Judge Sir Humphrey WALDOCK makes the following declaration:

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

Judge NAGENDRA SINGH makes the following declaration:

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

It is true that neither of the aforesaid provisions spell out the test of competence of the Court or of the admissibility of the Application and the request, which nevertheless have to be gone into by each Member of the Court in order to see that a *possible* valid base for the Court's competence exists and that the Application is, prima facie, entertainable. I am, therefore, in entire agreement with the Court in laying down a positive test regarding its own competence, prima facie established, which was enunciated in the *Fisheries Jurisdiction*[1] case and having been reiterated in this

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

case may be said to lay down not only the latest but also the settled jurisprudence of the Court on the subject.

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

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

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

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

(b) that a possible base exists, but needs further investigation to come to any definite conclusion in which event the Court is inevitably left no option but to proceed to the substance of the jurisdiction of the case to complete its process of adjudication which, in turn, is time

consuming and therefore comes into conflict with the urgency of the matter coupled with the prospect of irreparable damage to the rights of the parties. It is this situation which furnishes the "raison d'être" of interim relief.

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

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

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

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

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

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

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

(Initialled) F.A.

(Initialled) S.A.