DISSENTING OPINION OF JUDGE SIR GARFIELD BARWICK

The Court, by its Order of 22 June 1973, separated two questions, that of its jurisdiction to hear and determine the Application, and that of the admissibility of the Application from all other questions in the case. It directed that "the written proceedings shall first be addressed" to those questions. These were therefore the only questions to which the Parties were to direct their attention. Each question related to the situation which obtained at the date the Application was lodged with the Court, namely 9 May 1973. The Applicant in obedience to the Court's Order has confined its Memorial and its oral argument to those questions. Neither Memorial nor argument has been directed to any other question.

Having read the Memorial and heard that argument, the Court has discussed those questions but, whilst the Parties await the Court's decision upon them, the Court of its own motion and without any notice to the Parties has decided the question whether the Application has ceased to have any object by reason of events which have occurred since the Application was lodged. It has taken cognizance of information as to events said to have occurred since the close of the oral proceedings and has treated it as evidence in the proceedings. It has not informed the Parties of the material which it has thus introduced into evidence. By the use of it the Court has drawn a conclusion of fact. It has also placed a particular interpretation upon the Application. Upon this conclusion of fact and this interpretation of the Application the Court has decided the question whether the Application has ceased to have any object. That question, in my opinion, is not embraced within either of the two questions on which argument has been heard. It is a separate, a different and a new question. Thus the Parties have had no opportunity of placing before the Court their submissions as to the proper conclusion to be drawn from events which have supervened on the lodging of the Application or upon the proper interpretation of the Application itself in so far as each related to the question the Court has decided or as to the propriety of deciding that question in the sense in which the Court has decided it or at all at this stage of the proceedings: for it may have been argued that that question if it arose was not of an exclusively preliminary character in the circumstances of this case. The conclusion of fact and the interpretation of the Application are clearly matters about which opinions differ. Further, the reasoning of the Judgment involves important considerations of international law. Therefore, there was ample room for argument and for the assistance of counsel. In any case the Applicant must have been entitled to make submissions as to all the matters involved in the decision of the Court.

However, without notifying the Parties of what it was considering and without hearing them, the Court, by a Judgment by which it decides to proceed no further in the case, avoids deciding either of the two matters which it directed to be, and which have been argued.

This, in my opinion, is an unjustifiable course, uncharacteristic of a court of justice. It is a procedure which in my opinion is unjust, failing to fulfil an essential obligation of the Court's judicial process. As a judge I can have no part in it, and for that reason, if for no other, I could not join in the Judgment of the Court. However I am also unable to join in that Judgment because I do not accept its reasoning or that the material on which the Court has acted warrants the Court's conclusion. With regret therefore I dissent from the Judgment.

It may be thought quite reasonable that if France is willing to give to Australia such an unqualified and binding promise as Australia finds satisfactory for its protection never again to test nuclear weapons in the atmosphere of the South Pacific, this case should be compromised and the Application withdrawn. But that is a matter entirely for the sovereign States. It is not a matter for this Court. The Rules of Court provide the means whereby the proceedings can be discontinued at the will of the Parties (see Arts. 73 and 74 of the Rules of Court). It is no part of the Court's function to place any pressure on a State to compromise its claim or itself to effect a compromise.

It may be that a layman, with no loyalty to the law might quite reasonably think that a political decision by France no longer to exercise what it claims to be its right of testing nuclear weapons in the atmosphere, when formally publicized, might be treated as the end of the matter between Australia and France. But this is a court of justice, with a loyalty to the law and its administration. It is unable to take the layman's view and must confine itself to legal principles and to their application.

The Court has decided that the Application has become "without object" and that therefore the Court is not called upon to give a decision upon it. The term "without object" in this universe of discourse when applied to an application or claim, so far as relevant to the circumstances of this case, I understand to imply that no dispute exists between the Parties which is capable of resolution by the Court by the application of legal norms available to the Court or that the relief which is sought is incapable of being granted by the Court or that in the circumstances which obtain or would obtain at the time the Court is called upon to grant the relief claimed, no order productive of effect upon the Parties or their rights could properly be made by the Court in exercising its judicial function.

To apply the expression "has become without object" to the present circumstances, means in my opinion, that this Judgment can only be valid if the dispute between France and Australia as to their respective rights has been resolved; has ceased to exist or if the Court, in the circumstances

now prevailing, cannot with propriety, within its judicial function, make any declaration or Order having effect between the Parties.

It should be observed that I have described the dispute between France and Australia as a dispute as to their respective rights. I shall at a later stage express my reasons for my opinion that that is the nature of their dispute. But it is proper to point out immediately that if the Parties were not in dispute as to their respective rights the Application would have been "without object" when lodged, and no question of its having *no longer* any object could arise. On the other hand if the Parties were in dispute as to their respective rights, it is that dispute which is relevant in any consideration of the question whether or not the Application no longer has any object.

Of course, if the Court lacked jurisdiction or if the Application as lodged was inadmissible because the Parties were never in dispute as to their legal rights, the Court would be not required to go any further in the matter. But the Court has not expressed itself on those matters. The Judgment is not founded either on a lack of jurisdiction or on the inadmissibility of the Application when lodged, though it seems to concede inferentially that the Application was admissible when lodged.

In order to make my view in this matter as clear as I am able, it will be necessary for me in the first place to discuss the only two questions on which the Court has heard argument. Thereafter I shall express my reasons for dissenting from the Court's Judgment (see p. 439 of this opinion). I shall first state my conclusions and later develop my reasons for them.

In my opinion, the Court has jurisdiction to hear a dispute between France and Australia as to their respective rights by virtue of Articles 36 (1) and 37 of the Statute of the Court and Article 17 of the General Act of Geneva of 26 September 1928. Further, I am of opinion that at the date the Application was lodged with the Court, France and Australia were, and in my opinion still are, in dispute as to their respective rights in relation to the consequences in the Australian territory and environment of the explosion by France in the South Pacific of nuclear devices.

Further, they were, and still are, in difference as to the lawfulness or unlawfulness according to customary international law of the testing of nuclear weapons in the atmosphere. Subject to the determination of the question whether the Applicant has a legal interest to maintain its Application in respect of this difference, I am of opinion that the Parties were, at the date of the Application, and still are, in dispute as to their respective rights in respect of the testing of nuclear weapons in the atmosphere.

If it be a separate question in this case, I am of opinion that the claim of the Applicant is admissible in respect of all the bases upon which it is made, with the exception of the basis relating to the unlawfulness of the testing of nuclear weapons in the atmosphere. I am of opinion that the

question whether the Applicant has a legal interest to maintain its claim in respect of that basis is not a question of an exclusively preliminary character, and that it cannot be decided at this stage of the proceedings.

The distinctions implicit in this statement of conclusions will be developed later in this opinion.

I approach the Court's Judgment therefore with the view that the Court is presently seized of an Application which to the extent indicated is admissible and which the Court is competent to hear and determine. I am of opinion that consistently under Article 38 the Court should have decided its jurisdiction and if it be a separate question the admissibility of the Application.

I am of opinion that the dispute between the Parties as to their legal rights was not resolved or caused to disappear by the communiqué and statements quoted in the Judgment and that the Parties remained at the date of the Judgment in dispute as to their legal rights. This is so, in my opinion, even if, contrary to the view I hold, the communiqué and statements amounted to an assurance by France that it would not again test nuclear weapons in the atmosphere. That assurance, if given, did not concede any rights in Australia in relation to nuclear explosions or the testing of nuclear weapons: indeed, it impliedly asserted a right in France to continue such explosions or tests. Such an assurance would of itself in my opinion be incapable of resolving a dispute as to legal rights.

I am further of opinion that the Judgment is not supportable on the material and grounds on which it is based.

I now proceed to express my reasons for the several conclusions I have expressed.

INDICATION OF INTERIM MEASURES

On 22 June 1973, the Court by a majority indicated by way of interim measures pending the Court's final decision in the proceedings that:

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

In its Order the Court recited that:

> "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 . . ."

After indicating in paragraph 14 of the Order that the Government of Australia (the Applicant) claimed to found the jurisdiction of the Court to entertain its Application upon (1) Article 17 of the General Act of Geneva of 26 September 1928, read with Articles 36 (1) and 37 of the Statute of the Court, and (2) alternatively, on Article 36 (2) of the Statute of the Court and the respective declarations of Australia and France made thereunder, this Court concluded that:

> "Whereas the material submitted to the Court leads 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 . . ."

In indicating summarily in my declaration of 22 June 1973 my reason for joining the majority in indicating interim measures, I said:

> "I have voted for the indication of interim measures and the Order of the Court as to the further procedure in the case because the very thorough discussions in which the Court has engaged over the past weeks and my own researches have convinced me that the General Act of 1928 and the French Government's declaration to the compulsory jurisdiction of the Court with reservations each provide, prima facie, a basis on which the Court might have jurisdiction to entertain and decide the claims made by Australia in its Application of 9 May 1973."

I did so to emphasize the fact that the Court had at that time examined its jurisdiction in considerable depth and that it had not acted upon any presumptions nor upon any merely cursory considerations. Consistently with the Court's jurisprudence as a result of this examination there appeared, prima facie, a basis on which the Court's jurisdiction might be founded.

For my own part I felt, at that time, that it was probable that the General Act of Geneva of 26 September 1928 (the General Act) continued at the date of the Application to be valid as a treaty in force between Australia and France and that the dispute between those States, as evidenced in the material lodged with the Application, fell within the scope of Article 17 of the General Act.

Declarations by France and Australia to the compulsory jurisdiction of the Court under Article 36 (2) of the Court's Statute with the respective

reservations, but particularly that of France of 20 May 1966, as a source of the Court's jurisdiction raised other questions which I had then no need to resolve but which did not *ex facie*, in my opinion, necessarily deny the possibility of that jurisdiction.

In order to resolve as soon as possible the questions of its jurisdiction and the admissibility of the Application, the Court decided that the written proceedings should first be addressed to those questions.

WHETHER FIRST TO DECIDE JURISDICTION OR ADMISSIBILITY

In the reported decisions of the Court, and in the recorded opinions of individual judges, and in the literature of international law, I do not find any definition of admissibility which can be universally applied. A description of admissibility of great width was suggested in the dissenting opinion of Judge Petrén in this case (*I.C.J. Reports 1973*, p. 126); in the dissenting opinion of Judge Gros, the suggestion was made that the lack of a justiciable dispute, one which could be resolved by the application of legal norms, made the Application "without object" and thus from the outset inadmissible. In his declaration made at that time, Judge Jiménez de Aréchaga pointed to the expressions in paragraph 23 of the Court's Order as indicating that the existence of a legal interest of the Applicant in respect of its claims was one aspect of admissibility.

The Applicant confined its Memorial and its oral argument in relation to the question of admissibility substantially to the question whether it had a legal interest to maintain its Application. But the Court itself gave no approval to any such particular view of admissibility. Intervention by the President during argument indicated that the Court would decide for itself the ambit of the question of admissibility, that is to say, in particular that it would not necessarily confine itself to the view seemingly adopted by counsel. I shall need later to discuss the aspect of admissibility which, if it is a question in this case separate from that of jurisdiction, is appropriate for consideration.

The question may arise at the preliminary stage of a matter whether the admissibility of an application or reference ought first to be decided before any question of jurisdiction is determined. Opinion appears to be divided as to whether or not in any case jurisdiction should first be established before the admissibility of an application is considered, see for example on the one hand the views expressed in the separate opinion of Judge Sir Percy Spender, in the dissenting opinions of President Klaestad, Judge Armand-Ugon and Judge Sir Hersch Lauterpacht in the *Interhandel* case (*Switzerland* v. *United States of America*, *I.C.J. Reports 1959*, at p. 6) and, on the other hand, the views expressed by Judge Sir Gerald Fitzmaurice in his separate opinion in the case of the *Northern Cameroons* (*Cameroon* v. *United Kingdom*, *I.C.J. Reports 1963*, p. 15). There is no universal rule clearly expressed in the decisions of the Court that the one question in every case should be determined before the other.

But granted that there can be cases in which this Court ought to decide the admissibility of a matter before ascertaining the existence or extent of its own jurisdiction, I am of the opinion that in this case the Court's jurisdiction ought first to be determined. There are two reasons for my decision in this sense. First, there is said to be a question of admissibility in this case which, even if it exists as a separate question, seems to me to be bound up with the question of jurisdiction and which, because of the suggested source of jurisdiction in Article 17 of the General Act, to my mind is scarcely capable of discussion in complete isolation from that question. Second, the Court has already indicated interim measures and emphasized the need for an early definitive resolution of its jurisdiction to hear the Application. It would not be judicially proper, in my opinion, now to avoid a decision as to the jurisdiction of the Court by prior concentration on the admissibility of the Application, treating the two concepts as mutually exclusive in relation to the present case.

THE QUESTIONS TO POSSESS AN EXCLUSIVELY PRELIMINARY CHARACTER

I should at this stage make some general observations as to the nature of the examination of jurisdiction and of admissibility which should take place in pursuance of the Court's Order of 22 June 1973. Though not so expressly stated in the Court's Order, these questions, as I understand the position, were conceived to be of a preliminary nature, to be argued and decided as such. They are to be dealt with at this stage to the extent that each possesses "an exclusively preliminary character", otherwise their consideration must be relegated to the hearing of the merits.

In amending its Rules on 10 May 1972 and in including in them Article 67 (7) as it now appears, the Court provided for the possibility of a two-stage hearing of a case, in the first stage of which questions of jurisdiction and admissibility, as well as any other preliminary question, might be decided, if those questions could be decided as matters of an exclusively preliminary character. Textually, Article 67 as a whole depends for its operation upon an objection to the jurisdiction of the Court or to the admissibility of the Application by a respondent party in accordance with the Rules of Court. There has been no objection by the Respondent to the jurisdiction of the Court or to the admissibility of the Application in this case conformable to Article 67 of the Court's Rules. Thus, technically it may be said that Article 67 (7) does not control the proceedings at this stage. But though not formally controlling this stage of the case, Article 67 (7) and its very presence in the Rules of Court must have some bearing upon the nature of the examination which is to be made of these two questions. The Article is emphatic of the proposition that if such questions as jurisdiction or admissibility are separated from the hearing of the merits, they may only be decided apart from the merits if they possess an exclusively preliminary character; that

is to say if they can be decided without trenching on the merits of the case. The Court's division of this case into stages by its Order of 22 June 1973 must therefore be accommodated to the spirit of its Rules, so that only questions may be decided at this stage which possess an exclusively preliminary character. It was apparent from the contents of the Applicant's Memorial and from the course of the oral argument, that the Applicant understood the decision of each question depended on it being of such a preliminary kind. There has been no indication of any dissent from that view.

POSITION OF ARTICLE 53

Article 53 of the Statute of the Court is in the following terms:

> "1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.
>
> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

Action pursuant to the Article may be called for by a party when the other is in default either of appearance or of defence. When the Court is required by a party to decide its claim notwithstanding such default of the other, the Court, before deciding the claim, must satisfy itself both of its own jurisdiction and of the validity of the claim both in fact and in law. Without the inclusion of this Article in the Statute of the Court, there would surely have been power in the Court, satisfied of its own jurisdiction and of the validity of the applicant State's claim, to give judgment for the applicant, notwithstanding the default of appearance or of defence by the respondent party. The Article is confirmatory of such a power and its inclusion in the Statute was doubtless prompted by the circumstance that the litigants before the Court are sovereign States, and that the presence of the Article would indicate consent to proceedings in default.

As expressed, the Article is dealing in my opinion exclusively with the stage of the proceedings at which the merits of the claim are to be considered and decided. For this reason, and because of the very nature of and of the occasion for the indication of interim measures, Article 53, in my opinion, can have no bearing on that phase of a case. The Court has so treated the Article when considering the indication of interim measures in the past, as, for example, in paragraph 15 of its Order indicating interim measures in the *Fisheries Jurisdiction (United Kingdom* v. *Iceland)* case (*I.C.J. Reports 1972*, p. 15) and in paragraph 13 of the Order of 22 June, made in this case (*I.C.J. Reports 1973*, p. 101). The Court expressed itself in these cases as to the extent to which it must be satisfied in relation to its own jurisdiction in a manner quite inconsistent with the view that Article 53 controlled the stage of the proceedings in which the

indication of interim measures was being considered. These expressions of the Court were not inconsistent in my opinion with the views expressed by Sir Hersch Lauterpacht at page 118 of the *Reports* of the *Interhandel* case (*I.C.J. Reports 1957*, p. 105); but the Court has been unwilling to accept the exacting views of Judges Winiarski and Badawi Pasha, expressed in the *Anglo-Iranian Oil Co.* case (*I.C.J. Reports 1951*, pp. 96-98), views which were endorsed by Judge Padilla Nervo in the *Fisheries Jurisdiction* case (*I.C.J. Reports 1972*, at p. 21).

Allowing the importance of the fundamental consideration that the Court is a court of limited jurisdiction founded ultimately on the consent of States, it is essential to observe that Article 41 of the Statute of the Court gives it express power to indicate interim measures if it considers that circumstances so require and that, unlike Article 53, Article 41 does not hedge round that power expressly or, as I think, impliedly, with any considerations of jurisdiction or of the merits of the case. Paragraph 2 of Article 41, in opening with the expression "pending the final decision" makes it apparent to my mind that Article 53 does not refer to or control consideration of the indication of interim measures. Consequently, I am unable, with respect, to agree with those who hold a contrary view. But although Article 41 does not refer to questions of jurisdiction or the merits, the Court will consider its jurisdiction to the extent already expressed before indicating interim measures, and an obvious lack of merit will no doubt be influential in deciding whether or not to indicate interim measures.

The Applicant has not yet called upon the Court to decide its claim. Indeed, the Court's direction of 22 June separating the two questions of jurisdiction and admissibility from the merits has precluded any such step on the part of the Applicant. Thus Article 53 has not been called into operation at this stage of the proceedings. The Court by its Order has directed consideration of its jurisdiction at this stage. If the examination by the Court of that jurisdiction results in an affirmance of its jurisdiction, that conclusion will of course satisfy part of the requirements of Article 53 when it is called into play. No doubt, having made its Order of 22 June, the Court, quite apart from the provisions of Article 53, could go no further in the case unless it was either satisfied of its jurisdiction and of the admissibility of the Application or concluded that in the circumstances of the case either of those questions failed to possess an exclusively preliminary character. In that event, that question could be decided at the stage of the merits, which Article 53 appears to contemplate. Neither Article 53 nor any other part of the Statute of the Court refers to the admissibility of the Application.

JURISDICTION

I turn then to the question of the Court's jurisdiction to hear and determine the Application. It was duly filed with the Court on 9 May

1973. This is the date by reference to which the questions of jurisdiction and of admissibility must be determined. The concluding paragraphs of the Application are as follows:

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

It is of importance that I emphasize at the outset that the Application seeks both a declaration and an Order. The request for the declaration is itself, in my opinion, clearly a matter of substantive relief and not merely a recital or reason put forward for the request for the making of the Order. Indeed, it is conceivable that in appropriate circumstances the declaration only should be made. The full significance of this fundamental observation as to the nature of the relief sought will be apparent at a later stage.

The Court duly notified France by telegram of the filing of the Application, and a copy of the Application itself was duly transmitted to the French Government in due time.

Article 38 (3) of the Rules of Court requires that when acknowledging receipt of such a notification from the Court, the party against whom the Application is made and who is so notified shall, when acknowledging receipt of the notification, or failing this as soon as possible, inform the Court of the name of its Agent.

By a letter dated 16 May 1973 France, by its Ambassador to the Netherlands, acknowledged receipt of the notification of the filing of the Application, but France did not appoint an Agent. France informed the Court that in its view, that is to say, in France's view, the Court was manifestly without jurisdiction to hear and determine the Application, and that France did not propose to participate in the proceedings before the Court. It has not done so by any formal act according to the Rules of Court. France requested that the Application be summarily struck from the Court's General List, which in June 1973 the Court refused to do, an attitude confirmed by its final Judgment.

It is fundamental that the Court alone is competent to determine whether or not it has jurisdiction in any matter. This is provided by Article 36 (6) of the Statute of the Court. No State can determine that question. In its Rules, the Court has provided machinery whereby it can hear and consider the submissions of a State which claims that it has no jurisdiction in a particular matter (see Art. 67 of the Rules of Court). France has made no use of this facility. The case has proceeded without

any objection to jurisdiction duly made according to the Rules of Court.

Attached to the Ambassador's letter of 16 May 1973 was an annex comprising some 11 pages of foolscap typescript setting out France's reasons for its conclusion that the Court was manifestly incompetent to entertain the Application. This document, which has come to be referred to in the proceedings as "the French Annex", has occupied an ambiguous position throughout but has come to be treated somewhat in the light of a submission in a pleading, which, quite clearly, it is not. As I am but judge *ad hoc*, I will not express myself as to the desirability or undesirability of the reception of such a communication as the French Annex. I observe however that a somewhat similar happening occurred in connection with the *Fisheries Jurisdiction* case (*I.C.J. Reports 1973*, p. 1), but whether or not the Court allows such "submissions" to be made outside its Rules, as a regular practice, is a matter with which naturally I cannot be concerned.

Of course, a court, in the absence of a party, will of its own motion search most anxiously for reasons which might legitimately have been put forward by the absent party in opposition to the Application. Consequently, it could not be said to be unreasonable for the Court to view the contents of the French Annex, if and when received, as indicative of some of such reasons. Those contents and that of the French *White Paper* on Nuclear Tests, published but not communicated to the Court during the hearing of the case, have in fact been fully considered.

I turn now to express my reasons for my conclusion that the General Act of Geneva of 26 September 1928 was a treaty in force between Australia and France at the date of the lodging of the Application, so as to found the jurisdiction of the Court under Article 36(1) to decide a dispute between the Parties as to their respective rights.

The Applicant seeks to found the jurisdiction of the Court on two alternative bases; it does not attempt to cumulate these bases, as was done by Belgium in the case of the *Electricity Company of Sofia and Bulgaria*, *P.C.I.J.*, *Series C*, 1938, page 64, with respect to the two bases which it put forward for the jurisdiction of the Court in that case. The Applicant does not attempt to make one basis assist or complement the other. It takes them, as in my opinion they are in the Statute of the Court, as two independent bases of jurisdiction or as may be more colourfully said, two independent avenues of approach to the Court. The Applicant's principal reliance is on the jurisdiction conferred on the Court by Article 36 (1) of its Statute, fulfilling that Article's specification of a "matter specially provided for in treaties and conventions in force", by resort to the combined operation of Article 17 of the General Act, Article 37 of the Court's Statute, and its dispute with France.

The alternative basis of jurisdiction is placed on Article 36 (2) of the Court's Statute, both France and Australia having declared under that Article to the compulsory jurisdiction of the Court, though in each case with reservations and, in particular, in the case of France, with the reservation of 20 May 1966.

As I have reached a firm view as to the existence of the Court's jurisdiction in this case under Article 36 (1) and as each basis of jurisdiction is put forward in the alternative, I find it unnecessary to express my conclusions as to the alternative basis of jurisdiction under Article 36 (2), which for me on that footing becomes irrelevant. I will need to deal however with the suggestion that a declaration to the optional clause in Article 36 (2) is inconsistent with a continuance of the obligations under the General Act and indeed superseded it. I will also need to deal with the further alternative suggestion that the reservation of 20 May 1966 by France to its declaration to the compulsory jurisdiction of the Court, qualifies to the extent of the terms of that reservation, its obligations, if any existed, under the General Act. I may properly say, however, that I would not be prepared to accept the whole of the Applicant's submission as to the meaning and operation of the French reservation of 20 May 1966 to its declaration to the compulsory jurisdiction of the Court.

It is trite that the jurisdiction of the Court depends fundamentally on the consent of States: but that consent may be given generally by a treaty as well as *ad hoc*. Whether it is given by a multilateral treaty or by a compromissory clause in a bilateral treaty the consent to jurisdiction is irrevocable and invariable except as provided by the treaty, so long as the treaty remains in force in accordance with the law of treaties. Consent thus given endures as provided by the treaty and does not need reaffirmation at any time in order to be effective. Where a treaty stipulates the manner in which its obligations are to be terminated or varied they can only be terminated or varied in accordance with those provisions during the life of the treaty. Thus the consent given by entry into the treaty is insusceptible of withdrawal or variation by any unilateral act of either party except in conformity with the terms of the treaty itself. But there is the possibility of the due termination of the treaty by any of the circumstances, such as supervening impossibility of performance, fundamental change of circumstance, or entry into a later treaty between the same parties, which are referred to in the Vienna Convention on the Law of Treaties, as well as by termination by mutual consent or in conformity with the provisions of the treaties.

The General Act it would seem is properly classified as a multilateral treaty but by acession bilateral obligations were created. By Article 44 of the Act it was to come into force on the ninetieth day following the accession of not less than two States. Until then, to use an expression

found in the *travaux préparatoires* it was "a convention *in spe*" (*Records of Ninth Ordinary Session of the Assembly, Minutes of First Committee*, p. 70). In fact, conformably to this Article, the Act came into force on 16 August 1929. It was a great treaty, representing a most significant step forward in the cause of the pacific settlement of disputes. It had an initial term of five years, and was automatically renewed each five years dating from its original entry into force, unless denounced at least six months before the expiry of the current period of five years (Art. 45 (1)). Denunciation might be partial and consist of a notification of reservations not previously made (Art. 45 (5)). Denunciation was to be effected by a written notification to the Secretary-General of the League of Nations who was to inform all accessionaries to the Act (Art. 45 (3)). The Act covered conciliation of disputes of every kind which it had not been possible to settle by diplomacy (Chap. I), the judicial settlement of all disputes with respect to legal rights (Chap. II), and arbitration in a dispute not being a dispute as to legal rights (Chap. III). Accession could be to the whole Act or only to parts thereof, for example to Chapters I and II along with appropriate portions of the general provisions in Chapter IV or to Chapter I only with the appropriate portions of Chapter IV (Art. 38). The principle of reciprocity of obligations was introduced by the concluding words of Article 38.

France and Australia acceded to the whole of the General Act on 21 May 1931. Each attached conditions to its accession, and to these conditions I shall need later to make a brief reference. As at the date of the Application neither France nor Australia had denounced the General Act. France lodged with the Secretary-General of the United Nations on 10 January 1974 a notification designed as a denunciation in conformity with Article 45 of the General Act, but this notification is of no consequence in connection with the present question. Article 45 (5) of the Act provides that all proceedings pending at the expiry of the current period of the Act are to be duly completed notwithstanding denunciation. Further, the Court's general jurisprudence would not allow its jurisdiction to be terminated by the denunciation of the Treaty subsequent to the commencement of the proceedings before the Court (see *Nottebohm* case *(Liechtenstein* v. *Guatemala)*, *I.C.J. Reports 1953*, p. 110 at p. 122).

Article 17 in Chapter II of the General Act provides:

> "All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.
>
> It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice."

Both France and Australia became Members of the United Nations at its inception, thus each was bound by the Court's Statute (see Art. 93 of the Charter). Therefore each was bound by Article 37 of the Statute of the Court which effectively substituted this Court for the Permanent Court of International Justice wherever a treaty in force provided for reference of a matter to the Permanent Court of International Justice. Clearly Article 17 did provide for the reference to the Court of all disputes with regard to which the parties are in conflict as to their respective rights. Thus the provisions of Article 17 must be read as between France and Australia as if they referred to the International Court of Justice and not to the Permanent Court of International Justice.

Whatever doubts might theretofore have been entertained as to the complete efficacy of Article 37 to effect such a substitution of this Court for the Permanent Court of International Justice as between Members of the United Nations were set at rest by the Judgment of this Court in the *Barcelona Traction, Light and Power Company, Limited* case (*Belgium* v. *Spain, I.C.J. Reports 1964*, pp. 39 and 40). So unless the treaty obligations in Chapter II, which includes Article 17, of the General Act have been terminated or displaced in accordance with the law of treaties, the consent of France to the Court's jurisdiction to entertain and resolve a dispute between France and Australia as to their respective rights, subject to the effect of any reservations which may have been duly made under Article 39 of the General Act, would appear to be clear.

I have already mentioned that neither of the Parties had denounced the Act as of the date of the Application. The argument in the French Annex, to the contents of which I will need later to refer, is mainly that the General Act, by reason of matters to which the Annex calls attention, had lost its validity, but that if it had not, France's consent to the jurisdiction of the Court, given through Article 17 of the General Act, was withdrawn or qualified to the extent of the terms of its reservation of 20 May 1966 made to its declaration to the compulsory jurisdiction of the Court under Article 36 (2) of the Statute of the Court. It is therefore appropriate at this point to make some reference to the circumstances in which a treaty may be terminated.

The Vienna Convention on the Law of Treaties may in general be considered to reflect customary international law in respect of treaties. Thus, although France has not ratified this Convention, its provisions in Part V as to the invalidity, termination or suspension of treaties may be resorted to in considering the question whether the General Act was otherwise terminated before the commencement of these proceedings.

Taking seriatim those grounds of termination dealt with in Section 3 of Part V of the Convention which could possibly be relevant, there has been no consent by France and Australia to the termination of their obligations vis-à-vis one another under the General Act. I shall later point out in connection with the suggestion that the General Act lapsed by "desuetude" that there is no basis whatever in the material before the

Court on which it could be held that the General Act had been terminated by mutual consent of these Parties as at the date of the Application (Art. 54 of the Convention). No subsequent treaty between France and Australia relating to the same subject-matter as that of the General Act has been concluded (Art. 59 of the Convention). Neither of these parties acceded to the amended General Act of 1949 to which I shall be making reference in due course. No material breach of the General Act by Australia has been invoked as a ground for terminating the General Act as between France and Australia. It will be necessary for me at a later stage to deal briefly with a suggestion that a purported reservation not made in due time by Australia in 1939 terminated the General Act as between France and Australia (Art. 60 of the Convention). There has been no supervening impossibility of performance of the General Act resulting from the permanent disappearance of an object indispensable for the execution of the Act, nor had any such ground of termination been invoked by France prior to the lodging of the Application (Art. 61 of the Convention). The effect of the demise of the League of Nations was not the disappearance of an object indispensable to the execution of the General Act, as I shall indicate in a subsequent part of this opinion. There has been no fundamental change of any circumstances which constituted an essential basis of the Treaty, and no such change has radically transformed the obligations under the Act (Art. 62 of the Convention). No obligation of the General Act is in conflict with any *jus cogens* (Art. 64 of the Convention). Article 65 of the Vienna Convention indicates that if any of these grounds of termination are to be relied upon, notification is necessary. In this case there has been no such notification.

On these considerations it would indeed be difficult not to conclude that the General Act was a treaty in force between France and Australia at the date of the Application and that the Parties had consented through the operation of Article 17 of the General Act and Article 37 of the Statute of the Court to the jurisdiction of this Court to resolve any dispute between them as to their respective rights.

But the French Annex confidently asserts the unavailability of the General Act as a source of this Court's jurisdiction to hear and determine the Application: it is said that the Act lacks present validity. It will therefore be necessary for me to examine the arguments put forward in the French Annex for this conclusion.

However, before turning to do so it is proper to point out that no jurist and no writer on international law has suggested that the General Act ceased to be in force at any time anterior to the lodging of the Application. Indeed, many distinguished writers expressed themselves to the contrary. Professor O'Connell, in a footnote on page 1071 in the second volume of the second edition of his work on international law, says as to the General Act: "It is so connected with the machinery of the League of Nations that its status is unclear." The Professor was alone in making this observation: it suffices to say that the Professor's cogent

advocacy on behalf of the Applicant in the present case seems to indicate that such a note will not appear in any further edition of his work.

No mention or discussion of the General Act in the Judgments of this Court has cast any doubt on its continued operation. Indeed, Judge Basdevant in the *Certain Norwegian Loans* case (*France* v. *Norway*, *I.C.J. Reports 1957*, at p. 74), refers to the General Act as a treaty or convention then in force between France and Norway. He points out that the Act was mentioned in the observations of the French Government and was explicitly invoked by the Agent of the French Government during the hearing. The distinguished judge said: "At no time has any doubt been raised as to the fact that this Act is binding as between France and Norway." No judge in that case dissented from that view. Indeed, the Court in its Judgment does not say anything which would suggest that the Court doubted the continued validity of the General Act. In its Judgment the Court said:

> "The French Government also referred . . . to the General Act of Geneva of September 26th, 1928, to which both France and Norway *are* parties, as showing that the two Governments have agreed to submit their disputes to arbitration or judicial settlement in certain circumstances which it is unnecessary here to relate." (Emphasis added.)

France, for evident good reason (i.e., the applicability of Article 31 of the General Act in that case), did not seek to base the Court's jurisdiction in that case on the General Act, and as it had not done so the Court did not seek a basis for its jurisdiction in the General Act. The pertinent passage in the Judgment of the Court occurs at pages 24 and 25 of the *Reports*, where it is said:

> "The French Government also referred to the Franco-Norwegian Arbitration Convention of 1904 and to the General Act of Geneva of September 26th, 1928, to which both France and Norway are parties, as showing that the two Governments have agreed to submit their disputes to arbitration or judicial settlement in certain circumstances which it is unnecessary here to relate.
>
> These engagements were referred to in the Observations and Submissions of the French Government on the Preliminary Objections and subsequently and more explicitly in the oral presentations of the French Agent. Neither of these references, however, can be regarded as sufficient to justify the view that the Application of the French Government was, so far as the question of jurisdiction is concerned, based upon the Convention or the General Act. If the French Government had intended to proceed upon that basis it would expressly have so stated.

> As already shown, the Application of the French Government is based clearly and precisely on the Norwegian and French Declarations under Article 36, paragraph 2, of the Statute. In these circumstances the Court would not be justified in seeking a basis for its jurisdiction different from that which the French Government itself set out in its Application and by reference to which the case has been presented by both Parties to the Court."

In paragraph 3A of the French Annex it is said that the Court in the case of *Certain Norwegian Loans* "had to settle" this point, that is to say the availability at that time of the General Act as between Norway and France. It is however quite plain from the Court's Judgment in that case that it did not have to settle the point but that it accepted that the General Act was a treaty in force at that time between Norway and France. It is not, as the French Annex suggests, "difficult to believe that the Court would have so summarily excluded this ground of its competence if it had provided a manifest basis for taking jurisdiction". The passage which I have quoted from the Court's Judgment clearly expresses the reason for which the Court did not seek to place its jurisdiction upon the General Act.

The Act was also treated as being in force in the arbitration proceedings and in the proceedings in this Court in connection with the *Temple of Preah Vihear* case *Cambodia* v. *Thailand* (see for example, *I.C.J. Reports 1961*, at pp. 19 and 23). The availability of the General Act in that case was disputed by Thailand and the Court found no occasion to pass upon that matter.

The General Act is included in numerous official and unofficial treaty lists as a treaty in force, and is spoken of by a number of governments who are parties to it as remaining in force. In 1964 the Foreign Minister of France, explaining in a written reply to a Deputy in the National Assembly why France did not join the European Treaty for the Pacific Settlement of Disputes, pointed to the existence of, amongst other instruments, the General Act to which France was a party, though the Minister mistakenly referred to it as the revised General Act.

However, these matters are really peripheral in the present case. The central and compelling circumstance is that neither France nor Australia had denounced the Treaty in accordance with its provisions at the date of the Application, nor had any other event occurred which according to the law of treaties had brought the General Act, as between them to an end.

The various arguments put forward in the French Annex denying the Court's competence to entertain the Application now need consideration. It is said that the General Act disappeared with the demise of the League of Nations because "the Act of Geneva was an integral part of the League of Nations system in so far as the pacific settlement of international disputes had necessarily in that system to accompany collective security and

disarmament". If by the expression "an integral part of the League of Nations system" it is intended to convey that the General Act constitutionally or organically formed part of the Covenant of the League, or of any of its organs, the statement quite clearly is incorrect. Textually the General Act is not made to depend upon the Covenant, and the references to some of the functionaries of the League are not organic in any sense or respects, but merely provide for the performance of acts of an incidentally administrative kind. Contemporaneous expressions of those concerned with the creation of the General Act leave no doubt whatever in my mind that the General Act was not conceived as, nor intended to be, an integral or any part of the League's system, whatever might precisely be included in the use of the word "system" in this connection. See, for example, *Records of the Ninth Ordinary Session of the Assembly, Minutes of the First Committee (Constitutional and Legal Questions)*, pages 68-69 (Tenth Meeting) and pages 71 and 74 (Eleventh Meeting). At page 71 the relationship of the Act to the League, or, as it was expressed, "the constitutional role that that Act was going to fill under the League of Nations" was discussed. It was pointed out by a member of the subcommittee responsible for the draft that the Act "had been regarded as being of use in connection with the general work of the League, but it had no administrative or constitutional relation with it". Alteration to this draft was made to ensure that the Act was not "an internal arrangement within the League". It was said:

> "Today the States were not proposing to create an organ of the League: the League was merely going to give those which desired them facilities for completing and extending their obligations in regard to arbitration."

If the expression "an integral part" means that the continued existence of the League was an express condition of the continued validity of the Act, again it seems to me it would be plainly incorrect. Nothing in the text suggests such a situation. The use of the expression "ideological integration" in the Annex seems to suggest that, because the desire to maintain peace through the Covenant and through collective security, disarmament and pacific settlement of international disputes was the ideological mainspring of the creation of the General Act, all the manifestations of that philosophy, however expressed, must stand or fall together.

It is true that the General Act was promoted by the League, that its preparation in point of time was related to endeavours in the fields of collective security and disarmament. It is true that it was hoped that the cause of peace would be advanced by continuing action in each of the various fields. But in my view, quite clearly the General Act was conceived as a model treaty outside the Covenant of the League, available to non-

members of the League and, by accession of at least two States, self-operating.

It is perhaps worth observing at this point that the Statute of the Permanent Court of International Justice, not an organ of the League, at that time provided its own system of pacific settlement of legal disputes by means of the optional compulsory jurisdiction in Article 36 (2) of the Statute of the Permanent Court. No doubt, like the Covenant itself, the inception of the General Act owed much to the pervading desire in the period after the conclusion of World War I to prevent, if at all possible, the repetition of that event. Though conceived at, or about the same period, and though all stemmed from the over-riding desire to secure international peace, these various means, the activities of the Council of the League, disarmament, collective security and the pacific settlement of disputes, were in truth separate paths thought to be leading to the same end, and thus in that sense complementary; but the General Act was not dependent upon the existence or continuance of any of the others.

Emphasis is laid in the French Annex on the use of the organs of the League by some of the Articles of the General Act.

It seems to me that what the Court said in the *Barcelona Traction, Light and Power Company, Limited* case *(Belgium* v. *Spain)* in relation to the Hispano-Belgian Treaty of 1927, a treaty comparable to the General Act, is quite applicable to the relationship of the reference to the functionaries of the League in the General Act to its validity:

> "An obligation of recourse to judicial settlement will, it is true, normally find its expression in terms of recourse to a particular forum. But it does not follow that this is the essence of the obligation. It was this fallacy which underlay the contention advanced during the hearings, that the alleged lapse of Article 17 (4) was due to the disappearance of the 'object' of that clause, namely the Permanent Court. But that Court was never the substantive 'object' of the clause. The substantive object was compulsory adjudication, and the Permanent Court was merely a means for achieving that object. It was not the primary purpose to specify one tribunal rather than another, but to create an obligation of compulsory adjudication. Such an obligation naturally entailed that a forum would be indicated; but this was consequential.
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> If the obligation exists independently of the particular forum (a fact implicitly recognized in the course of the proceedings, inasmuch as the alleged extinction was related to Article 17 (4) rather than to Articles 2 or 17 (1)), then if it subsequently happens that the forum goes out of existence, and no provision is made by the parties, or otherwise, for remedying the deficiency, it will follow that the clause containing the obligation will for the time being become (and per-

haps remain indefinitely) inoperative, i.e., without possibility of effective application. But if the obligation remains substantively in existence, though not functionally capable of being implemented, it can always be rendered operative once more, if for instance the parties agree on another tribunal, or if another is supplied by the automatic operation of some other instrument by which both parties are bound. The Statute is such an instrument, and its Article 37 has precisely that effect." (*I.C.J. Reports 1964*, p. 38.)

I make this quotation at length at this time because we are here concerned with the question as to the continued operation of Chapter II of the General Act. In that chapter the only reference to the League or to any of its functionaries is the reference to the Permanent Court of International Justice, itself not an organ of the League. But there are references in other chapters of the General Act to functionaries of the League. These, in my opinion, are merely in respect of incidentally administrative functions and not in any sense basic to the validity of the General Act itself. In Chapter I of the General Act the only references to the League or its functionaries are to be found in Articles 6 and 9. Reference to the Acting President of the League in Article 6 is in the alternative. Paragraph 2 of that Article provides further means of appointment of commissions. The place of meeting of commissions was in the hands of the parties, it not being obligatory or indispensable to sit at the seat of the League. Thus Articles 6 and 9 did not render Chapter I inoperative with the demise of the League. It should also be observed that though accession had been to Chapters I and II, Article 20 removed disputes as to legal rights from the operation of Chapter I.

So far as Chapter IV is concerned, the reference to the Permanent Court of International Justice in Articles 31, 33, 34 *(b)*, 37 and 41 would be taken up as between France and Australia by means of Article 37 of the Statute of the Court; as far as the Registrar of the Permanent Court is concerned, by United Nations resolution 24 (I) of 12 February 1946 and the resolution of the League of Nations of 18 April 1946. Articles 43 and 44 of the General Act have been fulfilled and denunciation under Article 45 could always be effected by a direct communication between parties or by the use of the Secretary-General of the United Nations relying on the resolutions to which I have just referred, as France and the United Kingdom found no difficulty in doing in their communications to the Secretary-General in this year.

It can, however, properly be said that for lack of the personnel of the League, Chapter III of the General Act, relating to arbitration, may not have been capable of being fully operated after the demise of the League.

But this inability to operate a part of the General Act did not render even that part, in my opinion, invalid.

The General Act itself indicates that specific parts or a combination of its parts of the Act were intended to be severable, and to be capable of validity and operation independently of other parts, or combinations of parts. States acceding to the General Act were not required to accede to the Act was a whole but might accede only to parts thereof (see Art. 38).

I can find no warrant whatever for the view that in acceding to the General Act the States doing so conditioned their accession on the continued existence of the League, or of any of its organs or functionaries, however much for convenience in carrying out their major agreement as to pacific settlement of disputes it may have been found convenient to utilize the functionaries or organs of the League for incidental purposes.

In the language of the Court in the *Barcelona Traction, Light and Power Company, Limited* case (*I.C.J. Reports 1964*, p. 38), "the end" sought by the Parties so far as Chapter II of the General Act was concerned was "obligatory judicial settlement"—all else was but means of effecting that major purpose.

Chapter II thus is in no way dependent on the continued availability of the Permanent Court of International Justice or of the Secretary or any other functionary of the League. As between Members of the United Nations, the resolutions of the United Nations and the League of Nations, to which I have previously referred, render the Secretary-General of the United Nations available.

I now turn to the suggestion that in some way the resolution of the General Assembly of 28 April 1949, 268A (III), instructing the Secretary-General to prepare a revised text of the General Act, including the amendments indicated in the resolution, and to hold that text open to accession by States under the title "Revised General Act for the Pacific Settlement of International Disputes", acknowledged the disappearance of the General Act as at that date or caused that Act at that time to cease to be valid.

It is important, I think, to indicate what effect in truth the disappearance of the League had on the General Act. In the first place, the General Act then became a closed treaty in the sense that it had been open for accession only by Members of the League and by such non-member States to whom the Council of the League had communicated a copy of the Act. Accepting the view that a State which had been a Member of the League would have been able to accede to the General Act after the demise of the League, nonetheless the General Act could properly then be called a closed treaty. There were many States who were either then, or could likely become, Members of the United Nations which could not qualify for accession to the General Act. In this way it lacked that possible universality, though not exclusivity, which had been one of its merits at the time of its creation. Also, some of the 20-odd States who

were parties to the General Act were not members of the United Nations and thus did not have the benefit of Article 37 of the Court's Statute. Further, as I have already pointed out, Chapter III (Arbitration) was not capable of being fully operated for want of the functionaries of the League. Bearing in mind the severability of the parts of the General Act to which I have already referred, the precise terms of Chapters I, II and IV of the General Act and the effect of Article 37 of the Court's Statute, as its operative extent was fully disclosed by the decision of the Court in the *Barcelona Traction, Light and Power Company, Limited* case *(supra)*, the demise of the League thus left the provisions for the judicial settlement of legal disputes fully operative between those who had acceded to the General Act and who were Members of the United Nations, but settlement of disputes by arbitration under its terms may not have been any longer available to those States.

This state of affairs is adequately and properly described in the recitals to the General Assembly's resolution of 28 April 1949:

> "The efficacy of the General Act of 26 September 1928 for the Pacific Settlement of International Disputes is impaired by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared."

This recital treats the settlement by conciliation, legal process and arbitration in the one description without differentiation. The choice of the word "efficacy" which is in contrast to "validity" and of the word "impaired" is accurate in the description of the effect of the demise of the League of Nations on the General Act. The language of this recital is closely akin to the language of this Court in the passage from the *Barcelona Traction, Light and Power Company, Limited* case *(supra)* which I have quoted earlier in this opinion.

It was to enable the substantive provisions of the General Act to be operated to their full efficacy that the Revised General Act was proposed. The General Assembly could not have destroyed the General Act: it had no authority so to do. That was a matter exclusively for the parties to the treaty. In any case the General Assembly was hardly likely to do so, there being more than 20 parties to the General Act and no certainty as to the extent of the accession to a new treaty. The problem before the Assembly, I think, was twofold. First of all, it wanted to have a General Act in the substantive terms of the 1928 Act, all the parts of which would be capable of being fully operated. Secondly, it wanted to enable an enlargement of accession to it. It desired to restore its possible universality whilst not making it an exclusive means of the settlement of disputes (see Art. 29). The enlargement of the area of accession to a multilateral treaty has given difficulty; and it has only been found possible to do so otherwise than by acts of parties in the case of a narrow group of treaties of a non-political kind. But by producing a new treaty, with its own accession clause, the Assembly was able to open a General Act to all

Members of the United Nations or to such other States not members of the United Nations to whom a copy of the General Act should be communicated. Also those who had acceded to the General Act were enabled, if they so desired, to widen their obligations by acceding to the Revised Act and to obtain access to a fully operable provision as to arbitration. On the other hand, they could be content with the reduced efficacy (which relates only to Part III) but continuing validity of the Act of 1928.

The Revised Act was a new and independent treaty, though for drafting purposes it referentially incorporated the provisions of the Act of 1928 with the stated amendments. These amendments included an express provision for the substitution of the International Court of Justice for the Permanent Court of International Justice. This is indicative of the fact that there may have been some doubt in the minds of some at the time as to the full efficacy of Article 37 of the Court's Statute, and that the Assembly was conscious that all the signatories to the General Act were not members of the United Nations, having the benefit of Article 37.

In my view, the resolution of the General Assembly of 28 April 1949 affirms the validity of the General Act of 1928 and casts no doubt upon it, though it recognizes that portion of it may not be fully operable. It recognized that the General Act of 1928 remained available to the parties to it in so far as it might still be operative. These words, of course, when applied to an analysis of the General Act of 1928, clearly covered Chapter II as being an area in respect of which the General Act remained fully operative, in the case of Members of the United Nations, having regard to Article 37 of the Court's Statute and the resolutions of the League of Nations and the United Nations in 1946.

The question was raised as to why so few of those who had acceded to the General Act acceded to the Revised General Act. This consideration does not, of course, bear on the validity of the General Act: but as a matter of interest it may well be pursued. Two factors seem to me adequately to explain the circumstances without in any way casting doubt on the validity of the General Act. As I have pointed out, the General Act of 1928, after the demise of the League, became a closed treaty, that is to say, each State which had acceded to the Act then knew with certainty towards whom it was bound. The remote possibility that a former Member of the League might still accede to the General Act does not really qualify that statement. To accede to the Revised General Act opened up the possibility of obligations to a vastly increased and increasing number of States under the new General Act. This feature of a treaty such as the General Act was observed before in the *travaux préparatoires* (see p. 67 of the Minutes to which I have already referred).

The second factor was that each State party to the General Act and not acceding to the new Act was to an extent freed of the demands of the arbitration procedure. It is one thing to be bound to litigate legal disputes before the Court: quite another to be bound to arbitrate other disputes on the relatively loose basis of arbitration under the General Act, *aequo et bono*.

The mood of the international community in 1949 was vastly different to the mood of the community in the immediately post-World War I period in relation to the pacific settlement of disputes. More hope was probably seen in the United Nations itself and the existence of the optional clause with its very flexible provisions as to reservations. The latter was no doubt seen by some as preferable to the more rigid formulae of a treaty such as the General Act.

I therefore conclude that so far from casting doubt on the continued validity of the General Act of 1928, the resolution of the General Assembly of 28 April 1949 confirmed the continuing validity of the General Act. The resolution did not, as the French Annex asserts, "allow for the eventuality of the Act's operating if the parties agreed to make use of it". It did not call for a reaffirmation of the treaty. The resolution makes it quite clear, to my mind, that it made no impact on the General Act of 1928, but by providing a new treaty it did afford a widened opportunity to a wider group of States to become bound by the same substantive obligations as formed the core of the General Act of 1928.

Some point is made in the Annex of the Australian reservations to its accession to the General Act. Of the reservations made by Australia upon its accession to the General Act the French Annex selects first that reservation which relates to the "non-application or suspension" of Chapter II of the General Act with respect to any dispute which has been submitted to, or is under consideration by, the Council of the League of Nations. It is said that with the disappearance of the League this reservation introduces such uncertainty into the extent of Australia's obligations under the Act as to give an advantage to Australia not enjoyed by other accessionaries to the Act. But in the first place it seems to me that the disappearance of the possibility that there should be a matter under the consideration of the Council of the League could have no effect, either upon validity of the Australian accession or upon the extent of the obligations of any other accessionary. The operation of the reservation is reciprocal and the disappearance of the Council of the League simply meant that there could be no case for resort to this reservation. The making of the reservation rather emphasized the independence of the General Act from the activities of the League. Only such a reservation would involve the one in the other: and then only to the extent of the subject-matter of the reservation.

The other reservation made by Australia upon which the French Annex fastens is the exclusion of disputants, parties to the General Act,

who are not members of the League of Nations. This is said to have acquired quite an ambiguous value because no country can be said now to be a Member of the League of Nations, but it is clear from the decision of this Court in the *South West Africa* cases *(Preliminary Objections, Judgment, I.C.J. Reports 1962)* that the description "Member of the League of Nations" is adequate to describe a State which has been a Member of the League. Again the very making of these reservations by some accessionaries to the General Act emphasizes its independence of the League of Nations and of its "system". There can be no uncertainty in the matter because the Court exists and by its decision can remove any dubiety which might possibly exist, although I see none.

I find no substance in the suggestion that "unacceptable advantages" would result for Australia from a continuance in force of the General Act, and in any case would not be willing to agree that any such result would affect the validity of the General Act.

It is then said that Australia had patently violated the General Act by attempting in 1939 to modify its reservations otherwise than in accordance with Article 45. This objection is based on the fact that on 7 September 1939 Australia notified the Secretary-General of the League of Nations that "it will not regard its accession to the General Act as covering or relating to any dispute arising out of events occurring during the present crisis. Please inform all States Parties to the Act". This notification could not be immediately operative because it was made at an inappropriate time; the current period of the duration of the General Act expired in August 1940. Thus the Australian notification would not operate instanter. It had effect if at all only at the end of the five-year period next occurring after the date of the notification. What was thought to be the irregularity of giving this notification at the time it was given was observed upon by some States party to the General Act, but none, including France, made it the occasion to attempt to terminate the Act. However, nothing turns on the circumstance that there was no immediate operation of the notification and I cannot find any relevance to the problem with which the Court is now faced of the fact that Australia took the course it did in 1939.

It is next said that the conduct of the two States since the demise of the League is indicative of the lapse of the General Act. Neither have resorted to it. In the first place it is not shown that any occasion arose, as between France and Australia, for resort to the provisions of the General Act until the present dispute arose. Thus it is not the case of States having reason to resort to the provisions of the treaty and bypassing or ignoring its provisions by mutual consent or in circumstances from which a termination by mutual consent could be inferred. A treaty such as the General Act does not require affirmation or use to maintain its validity. It is denunciation which is the operative factor. Also it is not true to say that there has been utter silence on the part of States accessionary to the General Act, in the period since the demise of the League. I have already remarked for instance on the references to the Act by the representative of

France. Nor upon the material produced could it be said that France and Australia at any time, by inactivity, tacitly agreed to terminate the General Act as between themselves.

I turn now to a different matter put forward in the Annex. The French Annex suggests either that the reservation of 20 May 1966 to the declaration by France to the optional compulsory clause (Art. 36 (2)) operated as itself a reservation under the General Act or that though not such a reservation it superseded and nullified France's obligations under the General Act. These seem to be propositions alternative to the major statement in the Annex which was that the General Act because of non-use and, as it was said, desuetude was precluded from being allowed to prevail over the expression of France's will in the reservation of 20 May 1966.

I need not say more as to the argument as to desuetude than that there is in my opinion no principle that a treaty may become invalid by "desuetude" though it may be that the conduct of the parties in relation to a treaty, including their inactivity in circumstances where one would expect activity, may serve to found the conclusion that by the common consent of the parties the treaty has been brought to an end. But as I have said there is nothing whatever in the information before the Court in this case which in my opinion could found a conclusion that France and Australia mutually agreed tacitly to abandon the treaty. The French Annex concedes that lapse of time will not itself terminate a treaty, for the Annex says: "the antiquity of a text was clearly not regarded in itself as an obstacle to its (i.e., the treaty) being relied on . . ." Also I have indicated the extent to which the treaty had in fact been called in aid by other parties including France and to the fact that there is no evidence of an occasion when the treaty could have been used between France and Australia and was not used.

I would now say something as to the effect claimed by France for the reservation of 20 May 1966. At the outset, it is to my mind clear that the system of optional declaration to the compulsory jurisdiction of the Permanent Court of International Justice, and latterly to the jurisdiction of this Court, was, and was always conceived to be, a completely independent system or avenue of approach to the Court for the settlement of legal disputes to that which may be provided by treaty—bilateral or multilateral. The jurisdiction under Article 36 (1), which included treaty obligations to accept the Court's jurisdiction, and that under Article 36 (2) are separate and independent. The General Act was in fact promoted by the League of Nations at a time when Article 36 (2) of the Statute of the Permanent Court was in operation. Thus the system of optional declaration to the compulsory jurisdiction is regarded as quite separate from, and independent of, the provisions of the General Act of 1928.

There are notable differences between the two methods of securing pacific settlement of legal disputes: and it must always be remembered

that the General Act was not confined to the settlement of legal disputes by the Court. The General Act had a term or rather, recurrent terms, of years. In default of denunciation the treaty renewed automatically: it was tacitly renewed. Reservations might only be made on accession. If further reservations are subsequently notified, they may be treated as a denunciation or may be accepted by other States parties to the Act. Thus they become consensually based. Permissible reservations are exhaustively categorized and closely circumscribed in content. Reservations might be abandoned in whole or in part. The scope of the reservations, if in dispute, is to be determined by the Court (see Arts. 39, 40 and 41 of the General Act).

In high contrast a declaration to Article 36 (2) of the Statute of the Court (the text and the enumeration of the Article was the same in the Statute of the Permanent Court of International Justice) need not be made for any term of years. No limitation is placed by the Statute on the nature and extent of the reservations which can be made, though the jurisprudence of the Court would seem to require them to be objective and not subjective in content. Reservations might be made at any time and be operative immediately even before their notification to States which had declared to the jurisdiction under the Article (cf. *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 125). Further, though by declaration to the compulsory jurisdiction under the Article, States might be brought into contractual relationships with each other, such declarations do not create a treaty. Each declarant State becomes bound to accept the jurisdiction of the Court if invoked by another declarant State in a matter within the scope of Article 36 (2) and not excluded by reservation.

The jurisdiction under Article 36 (2) could only be invoked by a Member of the United Nations, whereas the General Act had been open to States which were not members of the League of Nations.

In the light of these notable differences between the two methods of providing for judicial settlement of international legal disputes, I can see many objections to the proposition that a declaration with reservations to the optional clause could vary the treaty obligations of States which were parties to the General Act. Bearing in mind the readiness with which reservations to the declaration to the compulsory jurisdiction of the Court under Article 36 (2) could be added, terminated or varied, acceptance of the proposition that such a reservation could vary or bring to an end the obligations in a treaty would mean that there would be little value as between Members of the United Nations in a treaty which could be varied or terminated at the will of one of the parties by the simple device of adding a destructive reservation operating instanter to its declaration to the compulsory jurisdiction of the Court. This would be a

cataclysmic inroad on the accepted view of the law of treaties which does not permit a unilateral termination or variation of a treaty except in accordance with its terms. Termination by occurrences which affect the mutual consent of the parties to the treaty, which include those on which a treaty is conceived by the mutual will of the parties to have been intended to come to an end, emphasizes the essentially consensual basis of termination or variation.

Also, when the differences in the provisions of Article 36 and those of the General Act relating to the making of reservations are closely observed, it will be seen that, whilst given the same description "reservation", those for which the General Act provides appear to be of a different order to those which are permissible under the Article. The purpose of providing for reservations, it seems to me, is different in each case.

Reservations for which a treaty provides are essentially based on consent either because within the treaty provisions as permissible reservations, as for example, in Article 39 of the General Act or because they are accepted by the other party to the treaty—see generally Part 2, section 2, of the Vienna Convention on the Law of Treaties. In the case of the General Act, the reservation falling within one of the classifications of Article 39, not made on accession, sought to be added by way of partial denunciation under Article 45 (4), can only be effective with respect to any accessionary to the General Act, if accepted by that State. It cannot in any case operate until at least six months from its notification (see Art. 45 (2)).

Again, in high contrast, a reservation to a declaration under the optional clause, is a unilateral act, can be made at any time, operate instanter, even before notification to other declarants to the optional clause and is not limited by the Statute as to its subject-matter, for the reason no doubt that the whole process under the article is voluntary. The State may abstain altogether or accept the jurisdiction to any extent and for any time. This "flexibility" of the system of optional compulsory jurisdiction may in due course increasingly bring that system into disfavour as compared with a more certain and secure régime of a treaty. But be that as it may, the brief comparison I have made, which is not intended to be exhaustive, emphasizes the irrelevance to the treaty of reservations made to a declaration under the optional clause.

I should also point out that the reservation of 20 May 1966 did not in any way conform to the requirements of the General Act. It is worth observing that Article 17 of the General Act requires submission to the Court of all disputes *subject to any reservation which may be made under Article 39*. The reservation of 20 May 1966 was not made under that Article: it was not made at a time when reservations could be made. It purported to operate immediately. It was not intended to be notified

to members bound by the General Act. I doubt whether it is a reservation of a kind within any of the categories listed in Article 39 (2) of the General Act. It clearly could not fall within paragraphs *(a)* or *(b)* of that sub-clause, and it does not seem to me that it could fall within paragraph *(c)*. Because of the complete independence of the two means of providing for the resolution of international legal disputes, I can see no reason whatever on which a reservation to a declaration to the optional compulsory jurisdiction under Article 36 (2) could be held to operate to vary the treaty obligations of such a treaty as the General Act.

Apparently realizing the unacceptable consequences of the proposition that the obligations of a treaty might be supplanted by a reservation to a declaration to the optional clause, the French Annex seeks to limit its proposition to the General Act which, it claims, is:

> "... not a convention containing a clause conferring jurisdiction on the Court in respect of disputes concerning the application of its provisions, but a text the exclusive object of which is the peaceful settlement of disputes, and in particular judicial settlement".

This statement seems to have overlooked the provisions of Article 41 of the General Act and, in any case, I am unable to see any basis upon which the position as to the effect of a reservation to a declaration to the optional clause can be limited as proposed.

It is also said that the declaration to compulsory jurisdiction under Article 36 (2) was an act in the nature of an agreement relating to the same matter as that of the General Act. As I have already pointed out, a declaration to compulsory jurisdiction is not an agreement though it can raise a consensual bond. In any case, the subject-matter of the General Act and that of declaration to the optional clause, are not identical.

There is a suggestion in the French Annex that because States bound by the General Act who have also declared to the optional compulsory jurisdiction of the Court from time to time have kept the text of their respective reservations under the Act and under the optional clause conformable to each other, a departure from this "parallelism" either indicates a disuse of the General Act or requires the absence of a comparable reservation to the General Act to be notionally supplied. But the suggested parallelism did not exist in fact, as the Australian Memorial clearly indicates (see paras. 259-277). Further, there can be no validity in the proposition that because France did not make a partial denunciation of the General Act in the terms of its reservation to its declaration under the optional clause, it should, by reason of former parallelism, be taken to have done so.

In sum, I am unable to accept the proposition that the reservation in the declaration of 20 May 1966 by France had any effect on the obligation of France under the General Act of 1928. Its consent to the Court's

jurisdiction by accession to the General Act was untouched by the later expression of its will in relation to the optional clause. The reservation by France under Article 36 (2) is no more relevant to the jurisdiction of the Court under Article 36 (1) than was such a reservation in the *Appeal Relating to the Jurisdiction of the ICAO Council, India* v. *Pakistan* (*I.C.J. Reports 1972*, p. 46). There an attempt to qualify the jurisdiction derived from a treaty, by the terms of a reservation to a declaration under the optional clause, was made. The attempt failed. The Court founded its jurisdiction exclusively on the treaty provision and regarded the reservation to the declaration of the optional clause as irrelevant. See the Judgment of the Court, pages 53 and 60 of the *Reports*.

There may well have been an explanation why there was no attempt either on the part of France or earlier on the part of the United Kingdom to denounce the General Act when contemplating nuclear testing in the atmosphere of the South Pacific, whilst at the same time making what was considered an appropriate reservation to the declaration to the optional clause. I remarked earlier that the General Act had become a closed treaty. The identity of those to whom France and the United Kingdom were thereby bound was known. No doubt as of 1966 the then attitudes of those States to nuclear testing in the atmosphere of the South Pacific were known or at least thought to be known. On the other hand, there were States declarant to the optional clause from whom opposition to nuclear testing in the atmosphere at all, and particularly in the Pacific, might well have been expected. However there is not really any need for any speculation as to why denunciation was not attempted by France in 1966. It suffices from the point of view of international law that it did not do so.

Article 36 (1) of the Court's Statute erects the jurisdiction of the Court in respect of all matters specially provided for in treaties and conventions in force. I have so far reached the conclusion that the General Act of 1928 was a treaty or convention in force between France and Australia as at the date of the Application. I have already quoted Article 17 of the General Act, in Chapter II, dealing with judicial settlement. The second paragraph of the Article incorporates the text of Article 36 (2) of the Statute of the Permanent Court of International Justice in so far as it deals with the subject-matters of jurisdiction. Thus all "legal disputes concerning: *(a)* the interpretation of a treaty; *(b)* any question of international law; *(c)* the existence of any fact which, if established, would constitute a breach of international obligation; ..." are included in the scope of Article 17.

The question, then, in respect of Article 36 (1) is: what are the matters specially provided for in the General Act which are referred to the Court? They are, in my view, so far as presently relevant, each dispute with regard to which the parties are in conflict as to their respective rights, and

legal disputes concerning any question of international law or the existence of any fact, which, if established, would constitute a breach of an international obligation, subject, in any event, to, and, as I think, only to, any reservations which may have been made under Article 39 of the General Act.

It seems to me that there are two possible views as to the elements of the Court's jurisdiction derived under Article 36 (1) of the Court's Statute and drawn through the General Act, Article 17 and Article 37 of the Court's Statute.

On the one hand, it may be said that the jurisdiction is complete if the General Act is a treaty or convention in force between France and Australia at the date of the Application. The subject-matter of the Court's jurisdiction so established would then be described as matters referred to the Court by the General Act of 1928, that is to say, disputes between States bound by the Act as to their respective legal rights, etc. Such disputes are in that view treated as the general kind of matters which the Court has authority to resolve by its judicial processes because of the continued existence of the General Act. On that view, the question whether the dispute in fact existing now between France and Australia at the date of the Application is of that kind, becomes a matter of admissibility.

On the other hand, the view may be taken that the necessary elements of the Court's jurisdiction are not satisfied merely by the establishment of the General Act as a treaty or convention in force between France and Australia, but require the establishment of the existence of a dispute between them as to their respective rights, etc.: that is to say the matter referred by the General Act is not a genus of dispute but specific disputes as to the rights of two States vis-à-vis one another. The States in that view are taken as consenting to the jurisdiction to hear those particular disputes. To use the language used in the case of *Ambatielos (Merits), Greece* v. *United Kingdom* (*I.C.J. Reports 1953*, p. 29), the dispute must fall under "the category of differences" in respect of which there is consent to the Court's jurisdiction. On this analysis, no separate question of admissibility arises; it is all one question of jurisdiction, the existence in fact and in law of the dispute between the two States as to their respective rights being a *sine qua non* of jurisdiction in the Court. It is that dispute which the Court has jurisdiction to decide.

This is the view of the matter which I prefer. But the Court's Order of 22 June 1973 was made, apparently, on the assumption that a distinct question of admissibility arose, or at any rate could be said to arise. Accordingly, notwithstanding the opinion I have just expressed, I am prepared for the purposes of this opinion to treat the question whether the dispute between France and Australia is a dispute as to their respective rights as a question of admissibility. However, I would emphasize

that, whether regarded as a necessary element of the Court's jurisdiction or as a matter of admissibility, the question, to my mind, is the same, and the substantial consequence of an answer to it will be the same whichever view is taken as between the two views I have suggested of the necessary elements of the Court's jurisdiction. That question is whether the Parties are in dispute as to their respective rights, the word "right" connoting legal right.

There is therefore, in my opinion, jurisdiction to hear and determine a dispute between parties bound by the General Act as to their legal rights. As indicated I shall deal with the question of admissibility as if it were a separate question.

ADMISSIBILITY

A distinction has been drawn in the jurisprudence of the Court between its jurisdiction in a matter and the admissibility of the reference or application made to it. The Rules of Court maintain the separateness of the two concepts (see Art. 67) but the Statute of the Court makes no reference to admissibility. In particular the default provision, Article 53, does not do so. This might be significant in a case such as the present where there has been no preliminary objection to admissibility setting out the grounds upon which it is said the Application is not admissible. The result of a strict application of Article 53 in such a case, if there has been no special Order such as the Court's Order of 22 June 1973, may be that any question of admissibility where the respondent does not appear is caught up in the consideration either of jurisdiction or of the merits of the Application. However, the Court being in control of its own procedure can, as it has done in this case, direct argument on admissibility as a separate consideration, but no doubt only to the extent to which that question can properly be said in the circumstances to be of an exclusively preliminary character.

It may be said that the jurisdiction of the Court relates to the capacity of the Court to hear and determine matters of a particular nature, e.g., those listed in Article 36 (2) of the Statute of the Court, whereas admissibility relates to the competence, receivability, of the reference or application itself which is made to the Court.

It might be said that jurisdiction in the present case includes the right of the Court to enter upon the enquiry whether or not a dispute of the relevant kind exists and a jurisdiction, if the dispute exists, to grant the Applicant's claim for its resolution by declaration and Order. If such a dispute exists, the claim is admissible.

An examination as to admissibility is itself an exercise of jurisdiction even though a finding as to admissibility may be a foundation for the exercise of further jurisdiction in resolving the claim. The overlapping

nature of the two concepts of jurisdiction and admissibility is apparent, particularly where, as here, the existence of a relevant dispute may be seen as a prerequisite to the right to adjudicate derived from Article 17 of the General Act.

I observed earlier that there is no universally applicable definition of the requirements of admissibility. The claim may be incompetent, that is to say inadmissible, because its subject-matter does not fall within the description of matters which the Court is competent to hear and decide; or because the relief which the reference or application seeks is not within the Court's power to consider or to give; or because the applicant is not an appropriate State to make the reference or application, as it is said that the applicant lacks standing in the matter; or the applicant may lack any legal interest in the subject-matter of the application or it may have applied too soon or otherwise at the wrong time, or, lastly, all preconditions to the making or granting of such a reference or application may not have been performed, e.g., local remedies may not have been exhausted. Indeed it is possible that there may arise other circumstances in which the reference or application may be inadmissible or not receivable. Thus admissibility has various manifestations.

Of course all these elements of the competence of the reference or application will not necessarily be relevant in every case. Which form of admissibility arises in any given case may depend a great deal on the source of the relevant jurisdiction of the Court on which reliance is placed and on the terms in which its jurisdiction is expressed. This, in my opinion, is the situation in this case.

Is There a Dispute Between the Parties as to Their Respective Rights?

The Court labours under the disability that it has no formal objection to admissibility, particularizing the respect in which it is said that the Application in inadmissible. The Annex to the Ambassador's letter of 16 May 1973 in challenging the existence of jurisdiction in the Court under Article 36 (1) of the Statute, bases its objection on the lapse or qualification of the General Act and not on the absence of a dispute falling within Article 17 of the General Act. Further, there was no express reference to the admissibility of the Application.

It is, however, possible to construct out of the *White Book* an argument that the Application was "without object" in the sense that there were no legal norms by resort to which the dispute in fact existing between the Parties could be resolved, which is to say, though it is not expressly said, that there was no dispute between the Parties as to their respective rights (see the terms of Art. 17 of the General Act). This, it seems to me, was suggested in the *White Book* in relation to the claim that the testing of nuclear weapons had become unlawful by the customary international law. It was not, and in my opinion could not be, said that there were no legal norms by reference to which the claim for the infringement of ter-

ritorial and decisional sovereignty could be determined—though important and difficult legal considerations arise in that connection, as was observed upon in the French Annex by its reference to a threshold of radio-active intrusion which should not be exceeded. In relation to the claim for breach of the freedom of the high seas and superincumbent air space, the French *White Paper* refers to international practice as justifying what was proposed to be done in relation to the area surrounding its atmospheric testing: but this contention is not related to admissibility.

An element of admissibility is the possession by the applicant State of a legal interest in the subject-matter of its Application. As it is, in my opinion, the existence of a dispute as to the respective legal rights of the Parties which must be the subject-matter of the Application in this case to satisfy Article 17, I think that upon the establishment of such a dispute each of the disputants to such a dispute must be held to have a legal interest in the resolution of the dispute. For my part, the matter of admissibility would end at the point at which it was decided that there was a dispute between France and Australia as to their respective legal rights, that is to say, that a dispute existed as to the right claimed by Australia as its right or of an obligation of France towards Australia which Australia claimed to be infringed. There is importance in the presence of the word *their* in the formula; it is to be a dispute as to *their* respective rights. That possessive pronoun embraces in my opinion the need for a legal interest in the subject-matter.

Thus, in my opinion, the question to be resolved at this stage of the case is whether the Parties were, at the date of the Application, in dispute as to their respective rights.

That these Parties are in dispute is in my opinion beyond question. It is clear that there were political or merely diplomatic approaches by the Applicant for a time; and there are political aspects of the subject-matter of the correspondence which evidences their dispute. But so to conclude does not deny that the Parties may be in dispute nonetheless about their respective rights. That question will be determined by what in substance they are in difference about.

The source material upon which these questions are to be resolved is the correspondence between France and Australia set out at Annexes 2 to 14 inclusive of the Application instituting the present proceedings, as explained and amplified in the submissions to the Court. The contents of and the omissions from the French Annex, which raises arguments of law in opposition to the legal propositions in the Australian Notes, ought also to be considered in this connection. Nowhere is it suggested in the Annex that the dispute between France and Australia is no more than a political difference, a clash of interest incapable of resolution by judicial process, perhaps a not unimportant circumstance.

I have found it important in reading the Notes exchanged between

France and Australia to differentiate the conciliatory language designed to secure, if possible French abandonment of the proposal, and the language employed when claims of right are made. The dispute between the Governments up to the stage of the change of language might possibly be characterized as chiefly political, the desired end being sought to be attained by diplomacy alone, but the language does not certainly remain so. The changed tone of the Australian Note is visible in the Note of 3 January 1973, where it is said:

> "The Australian Government, which has hitherto adopted a position of considerable restraint in this matter, wishes to make quite clear its position with respect to proposed atmospheric nuclear tests to be conducted in the Pacific by the French Government. In the opinion of the Australian Government, the conducting of such tests would not only be undesirable but would be unlawful—particularly in so far as it involves modification of the physical conditions of and over Australian territory; pollution of the atmosphere and of the resources of the seas; interference with freedom of navigation both on the high seas and in the airspace above; and infraction of legal norms concerning atmospheric testing of nuclear weapons."

Having followed this statement with a request that the French Government refrain from further testing, the Australian Note proceeds:

> "The Australian Government is bound to say, however, that in the absence of full assurances on this matter, which affects the welfare and peace of mind not only of Australia but of the whole Pacific community, the only course open to it will be the pursuit of appropriate international legal remedies."

The Applicant thus raised claims of legal right.

In its Note in reply, the French Government first of all applied itself to a justification of its decision to carry out nuclear tests, and then proceeded:

> "Furthermore, the French Government, which has studied with the closest attention the problems raised in the Australian Note, has the conviction that its nuclear experiments have not violated any rule of international law. It hopes to make this plain in connection with the 'infractions' of this law alleged by the Australian Government in its Note above cited.
>
> The first of these are said to concern the pollution and physical modifications which the experiments in question are supposed to involve for Australian territory, the sea, the airspace above.
>
> In the first place, the French Government understands that the

> Australian Government is not submitting that it has suffered damage, already ascertained, which is attributable to the French experiments.
>
> If it is not to be inferred from damage that has occurred, then the 'infraction' of law might consist in the violation by France of an international legal norm concerning the threshold of atomic pollution which should not be crossed.
>
> But the French Government finds it hard to see what is the precise rule on whose existence Australia relies. Perhaps Australia could enlighten it on this point.
>
> In reality, it seems to the French Government that this complaint of the violation of international law on account of atomic pollution amounts to a claim that atmospheric nuclear experiments are automatically unlawful. This, in its view, is not the case. But here again the French Government would appreciate having its attention drawn to any points lending colour to the opposite opinion.
>
> Finally, the French Government wishes to answer the assertion that its experiments would unlawfully hamper the freedom of navigation on the high seas and in the airspace above.
>
> In this respect it will be sufficient for the French Government to observe that it is nowadays usual for areas of the high seas to be declared dangerous to navigation on account of explosions taking place there, including the firing of rockets. So far as nuclear experiments are concerned, the Australian Government will not be unaware that it was possible for such a danger-zone encroaching on the high seas to be lawfully established at the time of previous experiments."

This note disputes those claims of legal right.

The Australian Note of 13 February 1973 contains the following passages:

> "The Australian Government assures the French Government that the present situation, caused by an activity which the French Government has undertaken and continues to undertake and which the Australian Government and people consider not only illegitimate but also gravely prejudicial to the future conditions of life of Australia and the other peoples of the Pacific . . ."

and again:

> "It is recalled that, in its Note dated 3 January 1973, the Australian Government stated its opinion that the conducting of atmospheric nuclear tests in the Pacific by the French Government would not only be undesirable but would be unlawful. In your Ambassador's Note dated 7 February 1973 it is stated that the French Government, having studied most carefully the problems raised in the Australian Note, is convinced that its nuclear tests have violated no rule of international law. The Australian Government regrets that it cannot agree

> with the point of view of the French Government, being on the contrary convinced that the conducting of the tests violates rules of international law. It is clear that in this regard there exists between our two Governments a substantial legal dispute."

Was this conclusion of the Australian Government thus expressed warranted, and if it was does it satisfy the question as to whether there was a dispute of the required kind, the Application being in substance for a settlement of that dispute by means of a declaration by the Court that the rights which were claimed do exist and that they have been infringed?

It is quite evident from the correspondence that at the outset the hope of the Australian Government was that France might be deterred from making or from continuing its nuclear test experiments in the South Pacific by the pressure of international opinion and by the importance of maintaining the undiminished goodwill and the economic co-operation of Australia. In the period of this portion of the correspondence, and I set that period as between 6 September 1963 and 29 March 1972, the emphasis is upon the implications of the partial Nuclear Test Ban Treaty of 1963, the general international opinion in opposition to nuclear atmospheric tests and the importance of harmonious relations between Australia and France as matters of persuasion.

But in January 1973, when it is apparent that none of these endeavours have been or are likely to be successful, and it is firmly known that a further series of tests will be undertaken by France in the mid-year, that is to say, in the winter of the southern hemisphere, the passages occur which I have quoted from the Note of 3 January 1973 and the response of the French Government of 7 February 1973 which respectively raise and deny the Applicant's claim that its legal rights will be infringed by further testing of nuclear devices in the South Pacific.

Four Bases of Claim

It is apparent from the passages which I have quoted that the various bases of illegality which the Applicant has put before the Court in support of its present Application were then nominated. They can be extracted and listed as follows:

(1) unlawfulness in the modification of the physical conditions of the Australian territory and environment;
(2) unlawfulness in the pollution of the Australian atmosphere and of the resources of its adjacent seas;
(3) unlawfulness in the interference with freedom of navigation on sea and in air; and
(4) breach of legal norms concerning atmospheric testing of nuclear weapons.

None of these were conceded by France and indeed they were disputed.

It might be observed at this point that there is a radical distinction to be made between the claims that violation of territorial and decisional sovereignty by the intrusion and deposition of radio-active nuclides and of pollution of the sea and its resources thereby is unlawful according to international law, and the claim that the testing of nuclear weapons has become unlawful according to the customary international law, which is expressed in the Australian Note of 3 January 1973 as "legal norms concerning atmospheric testing of nuclear weapons".

In the first instance, it is the intrusion of the ionized particles of matter into the air, sea and land of Australia which is said to be in breach of its rights sustained by international law. It is not fundamentally significant in this claim that the atomic explosions from which the ionized particles have come into the Australian environment were explosions for the purpose of developing nuclear weapons, though in fact that is what happened.

But in the second instance the customary law is claimed now to include a prohibition on the testing of nuclear weapons. The particular purpose of the detonations by France is thus of the essence of the suggested prohibition. Though, as I will mention later, the Applicant points to the resultant fall-out in Australia, these consequences are not of the essence of the unlawfulness claimed: it is the testing itself which is claimed to be unlawful.

It might be noticed that the objection to the testing of nuclear weapons in international discussions is placed on a twofold basis: there is the danger to the health of this and succeeding generations of the human race from the dissemination of radio-active fall-out, but there is also the antipathy of the international community to the enlargement of the destructive quality of nuclear armaments and to the proliferation of their possession. Thus, it is not only nuclear explosions as such which are the suggested objects of the prohibition, but the testing of nuclear weapons as an adjunct to the increase in the extent of nuclear weaponry.

The order in which these four bases of claim were argued and the emphasis respectively placed upon them has tended to obscure the significance of the Applicant's claim for the infringement of its territorial and decisional sovereignty. Because of this presentation and its emotional overtones it might be thought that the last of the above-enumerated bases of claim which, I may say, has its own peculiar difficulties, was the heartland of the Australian claim. But as I understand the matter, the contrary is really the case. It is the infraction of territorial sovereignty by the intrusion and deposition of nuclides which is the major basis of the claim.

A dispute about respective rights may be a dispute between the Parties as to whether a right exists at all, or it may be a dispute as to the extent

of an admitted right, or it may be a dispute as to the existence of a breach of an admitted right, or of course it may combine all these things, or some of them, in the one dispute. The claim on the one hand and the denial on the other that a right exists or as to its extent or as to its breach constitute, in my opinion, a dispute as to rights. If such a dispute between the Parties is as to their respective rights it will in my opinion satisfy the terms of Article 17 of the General Act which, in my opinion, is the touchstone of jurisdiction in this case or, if the contrary view of jurisdiction is accepted, the touchstone of admissibility.

If the dispute is not a dispute as to the existence of a legal right, it will not satisfy Article 17 and it may be said to be a dispute "without object" because, if it is not a dispute as to a legal right, the Court will not be able to resolve it by the application of legal norms: the dispute will not be justiciable.

But such a situation does not arise merely because of the novelty of the claim of right or because the claimed right is not already substantiated by decisions of the Court, or by the opinions of learned writers, or because to determine its validity considerable research and consideration must be undertaken.

In his separate opinion in the case of the *Northern Cameroons (supra)*, Sir Gerald Fitzmaurice adopted as a definition of a dispute which was necessary to found the capacity of this Court to make a judicial Order the definition which was given by Judge Morelli in his dissenting opinion in the *South West Africa* case (*Jurisdiction, I.C.J. Reports 1962*, between pp. 566 and 588), Sir Gerald, adding an element thereto drawn from the argument of the Respondent in the case of the *Northern Cameroons* (see pp. 109-110 of *I.C.J. Reports 1963*).

Sir Gerald thought that there was no dispute in that case (though the Court, including Judge Morelli, considered there was) because the Court could not in that case make any effective judicial Order about the matter in respect of which the Parties to the case were in difference. On page 111 of the *Reports* of the case, Sir Gerald said:

> "In short, a decision of the Court neither would, nor could, affect the legal rights, obligations, interests or relations of the Parties in any way; and this situation both derives from, and evidences, the non-existence of any dispute between the Parties to which a judgment of the Court could attach itself in any concrete, or even potentially realizable, form. The conclusion must be that there may be a disagreement, contention or controversy, but that there is not, properly speaking, and as a matter of law, any dispute.
>
> To state the point in another way, the impossibility for a decision of the Court in favour of the Applicant State to have any effective legal application in the present case (and therefore the incompa-

tibility with the judicial function of the Court that would be involved by the Court entertaining the case) is the reverse of a coin, the obverse of which is the absence of any genuine dispute.

Since, with reference to a judicial decision sought as the outcome of a dispute said to exist between the Parties, the dispute must essentially relate to what that decision ought to be, it follows that if the decision (whatever it might be) must plainly be without any possibility of effective legal application at all, the dispute becomes void of all content, and is reduced to an empty shell."

The nub of these remarks was that, because the trusteeship agreement had come to an end, the Court could not by a decision confer or impose any right or obligation on either Party in respect of that agreement: and it was only this interpretation or application of that agreement which the Application sought. The qualification of a dispute which Sir Gerald imported into his definition is present, in my opinion, in the very formulation of the nature of the dispute which is relevant under Article 17, that is to say, a dispute as to the respective rights of the Parties. If the dispute is of that kind, it seems to me that the Court must be able both to resolve it by the application of legal norms because legal rights of the Parties are in question and to make at least a declaration as to the existence or non-existence of the disputed right or obligation.

It is essential, in my opinion, to observe that the existence of a dispute as to legal rights does not depend upon the validity of the disputed claim that a right exists or that it was of a particular nature or of a particular extent. In order to establish the existence of a dispute it is not necessary to show that the claimed right itself exists. For example, a party who lost a contested case in a court of law on the ground that in truth he did not have the right which he claimed to have had against the other party, was nonetheless at the outset in dispute with that other party as to their respective rights, that is to say, the right on the one hand and the commensurate obligation on the other. The solution of the dispute by the court did not establish that the parties had not been in dispute as to their rights, though it did determine that what the plaintiff party claimed to be his right was not validly so claimed. To determine the validity of the disputed claim is to determine the merits of the application.

It is conceivable that a person may claim a right which, being denied, gives the appearance of a dispute, but because the claim is beyond all question and on its face baseless, it may possibly be said that truly there is no dispute because there was in truth quite obviously nothing to dispute about, or it may be said that the disputed claim is patently absurd or frivolous. But these things, in my opinion, cannot be said as to any of the bases of claim which are put forward in the Application and which were present in the correspondence which antedated it.

Consideration of Bases of Claim

I turn now to consider whether the several bases of claim which I have listed above are claims as to legal rights possessed by Australia, in other words, whether these bases of claim being disputed are capable of resolution by the application of legal norms and whether the Applicant has a legal interest to maintain its claim in respect of those rights.

In considering these questions, it must be recalled that if they are to be decided at this stage, they must be questions of an exclusively preliminary character. If, to resolve either of them, it is necessary to go into the merits, then that question is not of that character.

It is not disputed in the case that the deposition of radio-active particles of matter (nuclides) on Australian territory and their intrusion into the Australian environment of sea and air occurs in a short space of time after a nuclear explosion takes place in the French Pacific territory of Mururoa, due to the inherent nature and consequences of such explosions and the prevailing movements of air in the southern hemisphere. Thus it may be taken that that deposition and intrusion is caused, and that it is known that it will be caused, by those explosions.

First and Second Bases

I can take bases 1 and 2 together. Each relates to the integrity of territory and the territorial environment. The Applicant's claim is that the deposition and intrusion of the nuclides is an infringement of its right to territorial and, as it says, decisional sovereignty. It is part of this claim that the mere deposition and intrusion of this particular and potentially harmful physical matter is a breach of Australia's undoubted sovereign right to territorial integrity, a right clearly protected by international law.

France, for its part, as I understand the French Annex, asserts that the right to territorial integrity in relevant respects is only a right not to be subjected to actual and demonstrable damage by matter intruded into its territory and environment. Hence the reference to a threshold of nuclear pollution. Put another way, it is claimed that France's right to do as she will on her own territory in exercise of her own sovereign rights is only qualified by the obligation not thereby to cause injury to another State; that means, as I understand the French point of view, not to do actual damage presently provable to the Australian territory or environment of air and sea. In such a formulation it would seem that France claims that although the nuclides were inherently dangerous, their deposition and intrusion into the Australian territory and environment did not relevantly cause damage to Australia or people within its territory. Damage in that

view would not have been caused unless some presently demonstrable injury had been caused to land or persons by the nuclear fall-out.

Such a proposition is understandable, but it is a proposition of law. It is disputed by Australia and is itself an argument disputing the Australian claim as to the state of the relevant law. So far as the question of French responsibility to Australia may depend upon whether or not damage has been done by the involuntary reception in Australia of the radio-active fall-out, it should be said that the question whether damage has in fact been done has not yet been fully examined. Obviously such a question forms part of the merits. Again, if there is no actual damage presently provable, the question remains whether the nuclides would in future probably or only possibly cause injury to persons within Australian territory; and in either case, there is a question of whether the degree of probability or possibility, bearing in mind the nature of the injuries which the nuclides are capable of causing, is sufficient to satisfy the concept of damage if the view of the law put forward by the French Annex were accepted. The resolution of such questions, which in my opinion are legal questions, partakes of the merits of the case.

The French *White Book* appears to me to attribute to the Applicant and to New Zealand in its case, a proposition that:

> ". . . they have the right to decline to incur the risks to which nuclear atmospheric tests would expose them, and which are not compensated for by advantages considered by them to be adequate, and that a State disregarding this attitude infringes their sovereignty and thus violates international law".

I do not apprehend that the Applicant did put forward that view of the law; and as phrased by the French *White Book*, it is a proposition of law. My understanding of the Applicant's argument was that the Applicant claimed that in the exercise of its sovereignty over its territory it had to consider, in this technological age, whether it would allow radio-active material to be introduced into and used in the country. It claims that it alone should decide that matter. As some uses of such material can confer benefit on some persons, it was said that Australia had established for itself a rule that it would not allow the introduction into, or the use of radio-active material in Australia unless a benefit, compensating for any harmful results which could come from such introduction or use, could be seen. In assessing the benefit and the detriment, account had to be taken of the level of radio-activity, natural and artificial, which existed at any time in the environment. It was said, as I followed the argument, that the involuntary receipt into the territorv and environment of radio-

active matter infringed Australian sovereignty and compromised its capacity to decide for itself what level of radio-activity it would permit in the territory under its sovereignty. As the introduction was involuntary, no opportunity was afforded of considering whether the introduction of the radio-active matter had any compensating benefits. This was the infringement of what the Applicant called its decisional sovereignty. But if I be wrong in my understanding of the Australian position in this respect, and the French view is the correct one, the Parties are in dispute about a further aspect of international law affecting their relations with one another.

Thus France and Australia are, in my opinion, in difference as to what is the relevant international law regulating their rights and obligations in relation to the consequences on Australian territory or in its environment of nuclear explosions taking place on French territory. To borrow an expresion from municipal law, one, but not the only, aspect of the dispute is whether actual and demonstrable damage is of the "gist" of the right to territorial integrity or is the intrusion of radio-active nuclides into the environment *per se* a breach of that right.

In resolving the question whether damage is of the essence of the right to territorial integrity in relation to the intrusion of physical matter into territory, there may arise what is a large question as to the classification of substances which may not be introduced with impunity by one State on to and into the territory and environment of another. Is there a possible limitation or qualification of the right to territorial and environmental integrity which springs from the nature of the activity which generates the substance which is deposited or intruded into the State's territory and environment? There are doubtless uses of territory by a State which are of such a nature that the consequences for another State and its territory and environment of such a use must be accepted by that other State. It may very well be that a line is to be drawn between depositions and intrusions which are lawful and must be borne and those which are unlawful; on the other hand it may be that because of the unique nature of nuclides and the internationally unnecessary and internationally unprofitable activity which gives rise to their dissemination, no more need be decided than the question whether the intrusion of such nuclides so derived is unlawful.

It is important, in my opinion, to bear in mind throughout that we are here dealing with the emission and deposit of radio-active substances which are in themselves inherently dangerous. There may be differences of opinion as to how dangerous they may prove to be, but no dissent from the view that they are intrinsically harmful and that their harmful effect is neither capable of being prevented nor, indeed, capable of being ascertained with any degree of certainty. I mention these possibilities merely as indicating the scope of the legal considerations which the dispute of the Parties in relation to territorial sovereignty evokes.

In my opinion, it cannot be claimed, and I do not read the French

Annex as claiming, that this difference between France and Australia as to whether or not there has been an infringement of Australian sovereignty is other than a legal dispute, a dispute as to the law and as to the legal rights of the Parties. It is a dispute which can be resolved according to legal norms and by judicial process. Clearly the Applicant has a legal interest to maintain the validity of its claim in this respect.

Third Basis of Claim

The third basis of the claim is that Australia's rights of navigation and fishing on the high seas and of oceanic flight will be infringed by the action of the French Government not limited to the mere publication of NOTAMS and AVROMARS in connection with its nuclear tests in the atmosphere of the South Pacific. Here there is, in my opinion, a claim of right. The claim also involves an assertion that a situation will exist which would be a breach of that right. It seems also to be claimed that pollution of the high seas, with resultant effects on fish and fishing, constitutes an infringement of the Applicant's rights in the sea.

France disputes that what it proposes to do would infringe Australia's rights in the high seas and super-incumbent air, bearing in mind established international practice. Thus the question arises as to the extent of the right of the unimpeded use of the high seas and super-incumbent air, and of the nature and effect of international practice in the closure of areas of danger during the use of the sea and air for the discharge of weapons or for dangerous experimentation.

Again, in my opinion, there is, in connection with the third basis of claim, a dispute as to the existence and infringement of rights according to international law: there is a dispute as to the respective rights of the Parties. On that footing, the interest of the Applicant to sustain the Application is, in my opinion, apparent.

Fourth Basis of Claim

The claim in relation to the testing of nuclear weapons in the atmosphere stands on a quite different footing from the foregoing. It is a claim that Australia's rights are infringed by the testing of nuclear weapons by France in the atmosphere of the South Pacific. I have expressed it in that fashion, emphasizing that it is Australia's rights which are said to be infringed, though I am bound to say that the claim is not so expressed in the Australian Note of 3 January 1973. However, the expression of the relevant claim in paragraph 49 of the Application is susceptible of that interpretation. The relevant portion of that paragraph reads:

> "The Australian Government contends that the conduct of the tests as described above has violated and, if the tests are continued,

will further violate international law and the Charter of the United Nations, and, *inter alia*, Australia's rights in the following respects:

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

It is clear enough, in my opinion, that the Applicant has claimed that international law *now* prohibits any State from testing nuclear weapons, at least in the atmosphere. Of course, Australia would have no interest to complain in this case of any other form of testing, the French tests being in the atmosphere. The claim is not that the law should be changed on moral or political grounds, but that the law now is as the Applicant claims it to be. France denies that there is any such prohibition. It can readily be said, in my opinion, that this is a dispute as to the present state of international law. It is not claimed that that law has always been so, but it is claimed that it has now become so.

It is said that there has been such a progression of general opinion amongst the nations, evidenced in treaty, resolution and expression of international opinion, that the stage has been reached where the prohibition of the testing of nuclear weapons is now part of the customary international law.

It cannot be doubted that that customary law is subject to growth and to accretion as international opinion changes and hardens into law. It should not be doubted that the Court is called upon to play its part in the discernment of that growth and in the authoritative declaration that in point of law that growth has taken place to the requisite extent and that the stretch of customary law has been attained. The Court will, of course, confine itself to declaring what the law has already become, and in doing so will not be altering the law or deciding what the law ought to be, as distinct from declaring what it is.

I think it must be considered that it is legally possible that at some stage the testing of nuclear weapons could become, or could have become, prohibited by the customary international law. Treaties, resolutions, expressions of opinion and international practice, may all combine to produce the evidence of that customary law. The time when such a law emerges will not necessarily be deferred until all nations have acceded to a test ban treaty, or until opinion of the nations is universally held in the same sense. Customary law amongst the nations does not, in my opinion, depend on universal acceptance. Conventional law limited to the parties to the convention may become in appropriate circumstances customary law. On the other hand, it may be that even a widely accepted test ban treaty does not create or evidence a state of customary international law in which the testing of nuclear weapons is unlawful, and that resolutions of the United Nations and other expressions of international opinion, however frequent, numerous and emphatic, are insufficient to

warrant the view that customary law now embraces a prohibition on the testing of nuclear weapons.

The question raised by the Applicant's claim in respect of the nuclear testing of weapons and its denial by France is whether the stage has already been reached where it can be said as a matter of law that there is now a legal prohibition against the testing of nuclear weapons, particularly the testing of nuclear weapons in the atmosphere. If I might respectfully borrow Judge Petrén's phrase used in his dissenting opinion at an earlier stage in this case, the question which arises is whether:

> ". . . atmospheric tests of nuclear weapons are, generally speaking, already governed by norms of international law, or whether they do not still belong to a highly political domain where the norms concerning their international legality or illegality are still at the gestation stage" (*I.C.J. Reports 1973*, p. 126),

which is, in my opinion, a description of a question of law.

The difficulties in the way of establishing such a change in the customary international law are fairly obvious, and they are very considerable, but, as I have indicated earlier, it is not the validity of the claim that is in question at this stage. The question is whether a dispute as to the law exists. However much the mind may be impressed by the difficulties in the way of accepting the view that customary international law has reached the point of including a prohibition against the testing of nuclear weapons, it cannot, in my opinion, be said that such a claim is absurd or frivolous, or *ex facie* so untenable that it could be denied that the claim and its rejection have given rise to a dispute as to legal rights. There is, in my opinion, no justification for dismissing this basis of the Applicant's claim as to the present state of international law out of hand, particularly at a stage when the Court is limited to dealing with matters of an exclusively preliminary nature. Nor is it the case that the state of the customary law could not be determined by the application of legal considerations.

There remains, however, another and a difficult question, namely whether Australia has an interest to maintain an application for a declaration that the customary law has reached the point of including a prohibition against the testing of nuclear weapons.

In expressing its claim, it is noticeable that the Applicant speaks of its right as being a right along with all other States. It does not claim an individual right exclusive to itself. In its Memorial, it puts the obligation not to test nuclear weapons as owed by each State to every other State in the international community; thus it is claimed that each State can be held to have a legal interest in the maintenance of a prohibition against the testing of nuclear weapons. The Applicant, in support of this conclusion, relies upon the *obiter dictum* in the *Barcelona Traction, Light and Power Company, Limited* case (*Belgium* v. *Spain*, *supra*, *I.C.J. Reports 1970*, at p. 32):

"When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection: they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character."

The Applicant says that the prohibition it claims now to exist in the customary international law against the testing of nuclear weapons is of the same kind as the instances of laws concerning the basic rights of the human person as are given in paragraph 34 of the Court's Judgment in the *Barcelona Traction, Light and Power Company, Limited* case, and that therefore the obligation to observe the prohibition is *erga omnes*. The Applicant says that in consequence the right to observance of the prohibition is a right of each State corresponding to the duty of each State to observe the prohibition, a duty which the Applicant claims is owed by each State to each and every other State.

If this submission were accepted, the Applicant would, in my opinion, have the requisite legal interest, the *locus standi* to maintain this basis of its claim. The right it claims in its dispute with France would be *its* right: the obligation it claims France to be under, namely an obligation to refrain from the atmospheric testing of nuclear weapons, would be an obligation owed to Australia. The Parties would be in dispute as to their respective rights.

But in my opinion the question this submission raises is not a matter which ought to be decided as a question of an exclusively preliminary character. Not only are there substantial matters to be considered in connection with it, but, if a prohibition of the kind suggested by the Applicant were to be found to be part of the customary international law, the precise formulation of, and perhaps limitations upon, that pro-

hibition may well bear on the question of the rights of individual States to seek to enforce it. Thus the decision and question of the admissibility of the Applicant's claim in this respect may trench upon the merits.

There is a further aspect of the possession of the requisite legal interest to maintain this basis of the Applicant's claim which has to be considered. The Applicant claims to have been specially affected by the breach of the prohibition against atmospheric testing of nuclear weapons. Conformably with its other bases of claim the Applicant says that there has been deleterious fall-out on to and into its land and environment from what it claims to be the unlawful atmospheric testing of nuclear weapons. It may well be that when the facts are fully examined, this basis of a legal interest to maintain the Application in relation to the testing of nuclear weapons may be made out, both in point of fact and in point of law, but again the matter is not, in my opinion, a question of an exclusively preliminary nature.

In the result, I am of opinion that the Applicant's claim is admissible in relation to the first three of the four bases which I have enumerated at an earlier part of this opinion. But I am not able to say affirmatively at this stage that the Application is admissible, as to the fourth of those bases of claim. In my opinion, the question whether the Application is in that respect admissible is not a question of an exclusively preliminary nature, and for that reason it cannot be decided at this stage of the proceedings.

I shall add that, if it were thought, contrary to my own opinion, that the question of admissibility involved to any extent an examination of the validity of the claims of right which are involved in the dispute between the Parties, it would be my opinion that the question of admissibility so viewed could not be decided as a question of an exclusively preliminary character.

To sum up my opinion to this point, I am of opinion that at the date of the lodging of the Application the Court had jurisdiction and that it still has jurisdiction to hear and determine the dispute between France and Australia which at that time existed as to the claim to the unlawfulness, in the respects specified in the first three bases of claim in my earlier enumeration, of the deposition and intrusion of radio-active particles of matter on to and into Australian land, air and adjacent seas resulting from the detonation by France in its territory at Mururoa in the South Pacific of nuclear devices, and as to the unlawfulness of the proposed French activity in relation to the high seas and the super-incumbent air space. I am of opinion that there is a dispute between the Parties as to a matter of legal right in respect of the testing by France of nuclear weapons in the atmosphere of the South Pacific. If it should be found that the Applicant has a legal right to complain of that testing and thus a legal interest to maintain this Application in respect of such testing, the Court has jurisdiction, in my opinion, to hear and determine the dispute between the Parties as to the unlawfulness of the testing by France of nuclear weapons in the atmosphere of the South Pacific. It will in that

event, in relation to this basis of claim also, be a dispute as to their respective rights within Article 17 of the General Act.

In so far as the admissibility of the Application may be a question separate from that of jurisdiction in this case, I am of opinion that the Application is admissible in respect of all the bases of claim other than that basis which asserts that the customary international law now includes a prohibition against the testing of nuclear weapons. In my opinion, it cannot be said, as a matter of an exclusively preliminary character, that the Application in respect of this basis of claim is inadmissible, that is to say, it cannot now be said that the Applicant certainly has no legal interest to maintain its Application in that respect. In my opinion, the question of admissibility in respect of this basis of claim is not a question of an exclusively preliminary character and that it ought to be decided at a later stage of the proceedings.

Dissent from Judgment

I have already expressed myself as to the injustice of the procedure adopted by the Court. I regret to find myself unable to agree with the substance of the Judgment, and must comment thereon in expressing my reasons for dissenting from it.

Explanation for not Notifying and Hearing Parties

The first matter to which I direct attention in the Judgment is that part of it which expresses the Court's reason for not having notified the Parties and for not having heard argument (e.g., see Judgment, para. 33).

The Judgment in this connection begins with the circumstance that a communiqué from the Office of the President of France dated 8 June 1974, which had been communicated to Australia, was brought to the attention of the Court by the Applicant in the course of the oral hearing on the preliminary questions. The Judgment then refers to a number of statements which it designates as acts of France and which it says are "consistent" with the communiqué of 8 June 1974; the Court says it would be proper to take cognizance of these statements (paras. 31 and 32 of the Judgment). I may remark in passing that the question is not whether these statements were matters which might properly be considered by the Court if appropriate procedures were adopted. The question is whether this evidentiary matter ought to be acted upon without notice to the Parties and without hearing them. The Court in its Judgment says:

> "It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings,

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

It is true that the communiqué of 8 June 1974 which issued from the Office of the President of France was brought to the Court's attention by the Applicant in the course of the oral hearing. Indeed, I should have thought the Applicant would have been bound to do so. But it seems to me that it was not introduced in relation to some further question beyond the two questions mentioned in the Order of 22 June 1973. It is true that a comment was made on the communiqué by the Applicant's counsel of which the terms are recited in the Judgment. But in my opinion it cannot truly be said that the reference to the communication was made to introduce and argue the questions the Court has decided. Counsel for the Applicant when making his comment thereon, as appears from the verbatim record of the proceedings, was reviewing developments in

relation to these proceedings since he last addressed the Court, that is to say, since he did so in connection with the indication of interim measures. He referred to the failure of France to observe the Court's indication of interim measures and to certain further resolutions of the General Assembly and of UNSCEAR. As indicative of what, from the Applicant's point of view, was continued French obduracy, he referred to the communiqué from the President's Office criticizing its factual inaccuracy and emphasizing that it did not contain any firm indication that atmospheric testing was to come to an end. He pointed out that a decision to test underground did not carry any necessary implication that no further atmospheric testing would take place. He asserted that the Applicant had had scientific advice that the possibility of further atmospheric testing taking place after the commencement of underground tests could not be excluded. He indicated that the communiqué had not satisfied the Applicant to the point that the Applicant desired to discontinue the legal proceedings. On the contrary, he indicated that the Applicant proposed to pursue its Application, as in fact it did, continuing the argument on the two questions mentioned in the Order of 22 June 1973. I might interpolate that that argument continued without any intervention by the Court.

But in my opinion this comment of counsel for the Applicant was in no sense a discussion of the question as to whether the claim had become "without object", either because the dispute as to the legal right had been settled, or because no opportunity remained for making a judicial Order upon the Application. It was not directed to that question at all. Nor was it directed to the question whether the communiqué was intended to undertake an international obligation. In no sense did it constitute in my opinion a submission with respect to those questions or either of them. In my opinion it cannot be made the basis for the decision without hearing the Parties. It cannot provide in my opinion any justification for the course the Court has taken. In my opinion it cannot justly be said, as it is said in the Judgment, that the Applicant "could reasonably expect that the Court would . . . come to its own conclusion" from the document of 8 June 1974 (see para. 33), i.e., as to whether or not the Application had become "without object". Apart from all else, the Applicant was not to know that the Court would receive the further statements and use them in its decision.

I have said that in my opinion the question whether the Application has, by reason of the events occurring since the Application was lodged, become "without object" is not in any sense embraced by or involved in the questions mentioned in the Order of 22 June 1973. They related, and in my opinion related exclusively, to the situation which obtained at the date of the lodging of the Application. They could not conceivably have related to facts and events subsequent to 22 June 1973. But, of course, events which occurred subsequent to the lodging of the Application might provoke further questions which might require to be dealt with in a

proper procedural manner and decided by the Court after hearing the Parties with respect to them.

If there is a question at this stage of the proceedings whether the Application has become "without object", either because the dispute which is before the Court had been resolved, or because the Court cannot in the present circumstances, within its judicial function, now make an Order having effect between the Parties, the Court ought, in my opinion, first to have decided the questions then before it and to have fixed times for a further hearing of the case at which the question whether the Application had become "without object" could be examined in a public hearing at which the Parties could place before the Court any relevant evidence which they desired the Court to consider, for it cannot be assumed that the material of which the Court has taken cognizance is necessarily the whole of the relevant material, and at which counsel could have been heard.

The decision of the questions of jurisdiction and of admissibility would in no wise have compromised the consideration and decision on the question which the Court has decided. Indeed, as I think, to have decided what was the nature of the Parties' dispute would have greatly clarified the question whether an admissible dispute had been resolved. Further the failure to decide these questions really saves no time or effort. As I have mentioned, the Memorial and argument of the Applicant have been presented and the questions have been discussed by the Court.

It is of course for the Court to resolve all questions which come before it: the Court is not bound by the views of one of the parties. But is this a sufficient or any reason for not notifying the parties of an additional question which the Court proposes to consider and for not affording the parties an opportunity to put before the Court their views as to how the Court should decide the question, whether it be one of fact or one of law? The Court's procedure is built on the basis that the parties will be heard in connection with matters that are before it for decision and that the Court will follow what is commonly called the "adversary procedure" in its consideration of such matters. See, e.g., Articles 42, 43, 46, 48 and 54 of the Statute of the Court. The Rules of Court *passim* are redolent of that fact. Whilst it is true that it is for the Court to determine what the fact is and what the law is, there is to my mind, to say the least, a degree of judicial novelty in the proposition that, in deciding matters of fact, the Court can properly spurn the participation of the parties. Even as to matters of law, a claim to judicial omniscience which can derive no assistance from the submissions of learned counsel would be to my mind an unfamiliar, indeed, a quaint but unconvincing affectation.

I find nothing in the Judgment of the Court which, in my opinion, can justify the course the Court has taken. It could not properly be said, in my opinion, consistently with the observance of the Court's judicial function,

that the Court could feel no obligation to hear the Parties' oral submissions or that "the reopening of the oral proceedings would serve no useful purpose" (see para. 33 of the Judgment).

Elements of Judgment

The Judgment is compounded of the following elements: first, an interpretation of the claim in the Application. It is concluded that the true nature of the claim before the Court is no more than a claim to bring about the cessation of the testing of nuclear weapons in the South Pacific; second, a finding that the Applicant, in pursuit of its goal or objective to bring about that cessation would have been satisfied to accept what could have been regarded by it as a firm, explicit and binding undertaking by France no longer to test nuclear weapons in the atmosphere of that area. Such an assurance would have been accepted as fulfilling that purpose or objective; third, a finding that France by the communiqué of 8 June 1974, when viewed in the light of the later statements which are quoted in the Judgment intentionally gave an assurance, internationally binding, and presumably therefore binding France to Australia, that after the conclusion of the 1974 series of tests France would not again test nuclear weapons in the atmosphere of the South Pacific; and lastly, a conclusion that the giving of that assurance, though not found satisfactory and accepted by Australia, ended the dispute between Australia and France which had been brought before the Court, so that the Application lodged on 9 May 1973 no longer had any object, had become "without object".

Each of these elements of the Judgment has difficulties for me. The Judgment says that the "objective" of the Applicant was to obtain the termination of the atmospheric tests, "the original and ultimate objective of the Applicant was and has remained to obtain a termination of" the atmospheric nuclear tests (see paras. 26 and 30 of the Judgment). Paragraph 31 of the Judgment refers to "the object of the Applicant's claim" as being "to prevent further tests". Thus the objective or object is at times said to be that of the Applicant, at other times it is said to be the objective of the Application or of the claim.

The Judgment, in seeking what it describes as the true nature of the claim submitted by the Applicant, ought to have regarded the Application, which by the Rules of Court must state the subject of the dispute, as the point of reference for the consideration by the Court of the nature and extent of the dispute before it (see Art. 35 of the Rules of Court). The Applicant at no stage departed from the Application and the relief it claimed.

By the Application the Applicant seeks two elements in the Court's Judgment, that is to say, a declaration of the illegality of further tests and an Order terminating such tests. The Applicant's requests are directed to the future. But the future to which the Application in seeking a

declaration relates begins as from 9 May 1973, the date of the lodging of the Application, and not, as from the date of the Judgment or from some other time in 1974. The Judgment proceeds as I think, in direct contradiction of the language of the Application and of its clear intent, to conclude that the request for a declaration in the Application is no more than a basis for obtaining an Order having the effect of terminating atmospheric tests. The Judgment further says that a finding that further tests would not be consistent with international law would only be a means to an end and not an end in itself (see para. 30 of the Judgment). The Judgment overlooks the terms of paragraph 19 of the Application which is in part in the following terms:

> "The Australian Government will seek a declaration that the holding of further atmospheric tests by the French Government in the Pacific Ocean is not in accordance with international law and involves an infringement of the rights of Australia. The Australian Government will also request that, unless the French Government should give the Court an undertaking that the French Government will treat a declaration by the Court in the sense just stated as a sufficient ground for discontinuing further atmospheric testing, the Court should make an order calling upon the French Republic to refrain from any further atmospheric tests."

I might interpolate here the observation that it just could not be said, in my opinion, that a declaration, made now, that the tests carried out in 1973 and 1974 (which as of 9 May 1973, were "future tests") were unlawful, would do no more than provide a reason for an injunction to restrain the tests which might be carried out in 1975. In my opinion the obvious incorrectness of such a statement is illustrative of the fact that the request in the Application for a declaration was itself a request for substantive relief. Apart from a claim for compensatory relief in relation to them—a matter to which I later refer—a declaration of unlawfulness is all that could be done as to those tests. Obviously there could be no order for an injunction.

In concluding that the nature of the Application was no more than that of a claim for the cessation of the nuclear tests, two related steps are taken, the validity of neither of which I am able to accept. First of all, the purpose with which the litigation was commenced, the goal or objective sought thereby to be attained, is identified in the Judgment with the nature of the claim made in the Application and the relief sought in the proceedings. But it seems to me that they are not the same. They are quite different things. To confuse them must lead to an erroneous conclusion as in my opinion has happened.

Undoubtedly, the purpose of the Applicant in commencing the litigation was to prevent further atomic detonations in the course of testing nuclear weapons in the atmosphere of the South Pacific as from the date

of the lodgment of its Application. Apparently it desired to do so for two avowed reasons, first to prevent harmful fall-out entering the Australian environment and, secondly, to prevent the proliferation of nuclear armament. I have already called attention to the different bases of the Applicant's claim which reflect those different reasons. Diplomatic approaches having failed, the means of achieving that purpose was the creation of a dispute as to the legal rights of the Parties and the commencement of a suit in this Court founded on that dispute in which relief of two specific kinds was claimed, the principal of which in reality, in my opinion, is the declaration as to the matter of right. The injunctive relief was in truth consequential. The attitude of the Applicant expressed in paragraph 19 of its Application is consistent with the practice of international tribunals which deal with States and of municipal tribunals when dealing with governments. It is generally considered sufficient to declare the law expecting that States and governments will respect the Court's declaration and act accordingly. That I understand has been the practice of this Court and of its predecessor. Thus the request for a declaration of unlawfulness in international law is, in my opinion, not merely the primary but the principal claim of the Application. It is appropriate to the resolution of a dispute as to legal rights.

The second step taken by the Judgment not unrelated to the first is to identify the word "object" or "objective" in the sense of a goal to be attained or a purpose to be pursued, with the word "object" in the expression of art "without object" as used in the jurisprudence of this Court. This in my opinion is to confuse two quite disparate concepts. The one relates to motivation and the other to the substantive legal content of an Application. Motivation, unless the claim or dispute involved some matter of good faith, would in my opinion be of no concern to the Court when resolving a dispute as to legal right.

It is implicit in the Judgment, in my opinion, that the Parties at the date of the lodgment of the Application were in dispute and presumably in dispute as to their legal rights. But the Judgment does not condescend to an express examination of the nature of the dispute between the Parties which it decides has been resolved and has ceased to exist. I have expressed my views of that dispute in an earlier part of this opinion. If the Court had come to the same conclusion as I have, it would in my opinion have been immediately apparent that the goal or objective of the Applicant in commencing the litigation could not be identified with its claim to the resolution of the dispute as to the respective legal rights of the Parties. It would further have been apparent, in my opinion, that for a court called upon to decide whether such a dispute persisted, the motives, purposes or objective of the Applicant in launching the litigation were irrelevant. It would also have been seen that a voluntary promise given

without admission and whilst maintaining the right to do so, not to test atmospherically in the future could not resolve a dispute as to whether it had been or would be unlawful to do so. I add "had been" because of the 1973 series of tests which had taken place before the issue of the communiqué of 8 June 1974.

If, on the other hand, the Court on such an examination of the nature of the dispute, had decided that the dispute between the Parties was not a dispute as to their respective legal rights, the Court would have decided either that it had no jurisdiction to hear and determine the Application or that the Application was inadmissible. In that event no question of the dispute having been resolved would have emerged.

Although the matter receives no express discussion, and although I think it is implicit in the Judgment that the Parties were relevantly in dispute when the Application was lodged, the Judgment, it seems to me, treats the Parties as having then been in dispute as to whether or not France should cease tests in the Pacific. But if the Parties had only been in dispute as to whether or not France should do so or should give an assurance that it would do so, the dispute would not have been justiciable; in which case, no question as to the Application having *become* without object would arise. Whether the Application when lodged was or was not justiciable was in my opinion part of the questions to which the Order of 22 June 1973 was directed and I have so treated the matter in what I have so far written. It seems to me that in that connection some have thought that the dispute between France and Australia was no more than a dispute as to whether France ought or ought not in comity to cease to test in the atmosphere of the South Pacific. If that were the dispute the Court could have had no function in its resolution: it could properly have been regarded as an exclusively political dispute. The Application could properly have been said to be "without object" when lodged. I have found myself and I find myself still unable to accept that view. The dispute which is brought before the Court by the Application is claimed to be, and as I have said in my opinion it is, a dispute as to the legal rights of the Parties. The question between them which the Application brings for resolution by the Court in my opinion is not whether France of its own volition *will* not, but whether lawfully it *cannot*, continue to do as it has done theretofore at Mururoa with the stated consequences for Australia. The importance of the Court first deciding whether or not the dispute between the Parties was a dispute as to their respective rights is thus quite apparent. But in any case it seems to me that the Applicant's purpose in commencing the litigation is irrelevant to the question whether the claim which is made is one the Court can entertain and decide according to legal norms, and the relief which is sought is relief which the Court judicially can grant.

The confusion of motivation with the substance of the Application permeates the Judgment in the discussion of the nature of the claim the

Application makes. The Judgment refers to statements of counsel in the course of the oral hearing and proceeds in paragraph 27:

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

In this passage there is again implicit an identification of the Applicant's ultimate purpose in bringing the proceedings with the claim which it makes in the Application before the Court. If it were to be assumed that the Applicant would in fact have treated such an undertaking as the Court describes as sufficient for its purposes in commencing the litigation, the Applicant, in my opinion, could not have regarded that undertaking as having resolved the matter of right which in my opinion was the basis of its claim in the Application before the Court. It could not have regarded its dispute as to legal rights as having been resolved. The assurance which the Court finds to have been given was in no sense an admission of illegality of the French testing and of its consequences. France throughout continued to maintain that its nuclear tests "do not contravene any subsisting provision of international law" (French *White Book*). All the Applicant could have done would have been to accept the assurance as in the nature of a settlement of the litigation and thereupon to have withdrawn the Application in accordance with the Rules of Court. It would not do so in my opinion, because the dispute as to the respective rights of the Parties had been resolved, nor because its claim in the Application "had been met", but because as a compromise the Applicant had been prepared to accept the assurance as sufficient for its purposes.

The question whether a litigant will accept less than that which it has claimed in the Court as a satisfaction of its purpose in commencing a litigation is essentially a matter for the litigant. It is not a matter, in my opinion, which can be controlled by the Court directly or indirectly. Indeed, it is not a matter into which the Court, if it confines itself to its judicial function, ought to enter at all. Even if it be right that the Applicant would have accepted what the Applicant regarded as a firm, explicit and binding undertaking to refrain from further atmospheric tests, the Court is not warranted in deciding what the Applicant ought to accept in lieu of its claim to the Court's Judgment. So to do is in effect to compromise the claim, not to resolve the dispute as to a matter of right. There is in any case, to my mind, obvious incongruity in regarding a voluntary assurance of future conduct which makes no admission of any legal right as the resolution of a dispute as to the existence of the legal right which, if upheld, would preclude that conduct.

The departure from the language of the Application and the identification of the claim which it makes with the object, objective or goal of the

Applicant in making the Application thus provided, in my opinion, an erroneous base upon which to build the Judgment.

Further, the Judgment, it seems to me, overlooks the fact that in all the references to assurances in the correspondence and in the oral hearings the Applicant referred to an assurance with the nature and terms of which it was satisfied. These references cannot be read in my opinion as indicating such an assurance as might be regarded as sufficient for Australia's purposes by any other judgment than its own.

The Judgment proceeds to hold that France by the communiqué of 8 June 1974, as confirmed by the subsequent Presidential and Ministerial statements to the press, did give to the international community and thus to Australia an undertaking, binding internationally, not on any occasion subsequent to the conclusion of the 1974 series of tests to test nuclear weapons in the atmosphere of the South Pacific.

My first observation is that this is a conclusion of fact. It is not in my opinion a conclusion of law. The inferences to be drawn from the issuing and the terms of the communiqué of 8 June 1974 are, in my opinion, inferences of fact, including the critical fact of the intention of France in the matter. So also, in my opinion, is the meaning to be given to the various statements which are set out in the Judgment. A decision as to those inferences and those meanings is not in my opinion an exercise in legal interpretation; it is an exercise in fact-finding.

But whether the conclusion be one of fact or one of law, my comments as to the judicial impropriety of deciding the matter without notice to the Parties of the questions to be considered, and without affording them an opportunity to make their submissions, are equally applicable.

This is a very important conclusion purporting to impose on France an internationally binding obligation of a far-reaching kind. Nothing is found as to the duration of the obligation although nothing said in the Judgment would suggest that it is of a temporary nature. There are apparently no qualifications of it related to changes in circumstances or to the varying needs of French security. Apparently it is restricted to the South Pacific area, a limitation implied from the fact that the source of the obligation is the communiqué of 8 June 1974 issued in the context of the imminence of the 1974 series of tests.

The purpose and intention of issuing the communiqué and subsequently making the various statements is to my mind far from clear. The Judgment finds an intention to enter into a binding legal obligation after giving the warning that statements limiting a State's freedom of action should receive a restrictive interpretation. The Judgment apparently finds the clear intention in the language used. I regret to say that I am unable to do so. There seems to be nothing, either in the language used or in the circumstances of its employment, which in my opinion would warrant, and certainly nothing to compel, the conclusion that those

making the statements were intending to enter into a solemn and far-reaching international obligation rather than to announce the current intention of the French Government. I would have thought myself that the more natural conclusion to draw from the various statements was that they were statements of policy and not intended as undertaking to the international community such a far-reaching obligation. The Judgment does not seem to my mind to offer any reason why these statements should be regarded as expressing an intention to accept an internationally binding undertaking rather than an intention to make statements of current government policy and intention.

Further, it seems to me strange to say the least that the French Government at a time when it had not completed its 1974 series of tests and did not know that the weather conditions of the winter in the southern hemisphere would permit them to be carried out, should pre-empt itself from testing again in the atmosphere, even if the 1974 series should, apart from the effects of weather, prove inadequate for the purposes which prompted France to undertake them. A conclusion that France has made such an undertaking without any reservation of any kind, such, for example, as is found in the Moscow Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, to which France is not a party, is quite remarkable and difficult to accept.

It is noticeable that the communiqué itself as sent to Australia makes no express reference to atmospheric testing. The message sent by the French Embassy in Wellington to the Government of New Zealand with respect to the communiqué, drew a conclusion not expressed in the communiqué itself. Somewhat guardedly the Embassy added the words "in the normal course of events" which tended to weaken the inference which apparently the Embassy had drawn from the terms of the communiqué.

In this connection it may be observed that both the Government of Australia and the Government of New Zealand in responding to the communiqué of 8 June 1974, virtually challenged France to give to them an express undertaking that no further tests would be carried out in the South Pacific. There has been ample opportunity for France to have unequivocally made such a statement: but no such express statement has been communicated to either Applicant. Without entering further into detailed criticism of the finding of fact of which personally I am not convinced, it is enough to say that there is, in my opinion, much room for grave doubt as to the correctness of the conclusion which the Court has drawn. That circumstance underlines the essential need to have heard argument before decision.

There is a further substantial matter to be mentioned in this connection. The Court has purported to decide that France has assumed an international obligation of which Australia has the benefit. It is this

circumstance which the Judgment holds has resolved the dispute between France and Australia and caused it to cease to exist. But the Court has not decided its jurisdiction as between these Parties. France has steadfastly maintained that the Court has no jurisdiction. The Court's finding that France has entered into an international obligation is intended to be a finding binding both Parties to the litigation, France as well as Australia. But I am at a loss to understand how France can be bound by the finding if the Court has not declared its jurisdiction in the matter.

The Judgment seems to call in aid what it calls an inherent jurisdiction to provide for the orderly settlement of all matters in dispute, to ensure the observance of the inherent limitations on the exercise of the judicial function of the Court and to maintain its judicial character. I do not wish to enter into a discussion of this very broadly stated and, as I think, far-reaching claim to jurisdiction. Let it be supposed that the so-called inherent or incidental jurisdiction as some writers call it would enable the Court to decide that it had no jurisdiction or that an application was not admissible where this could be done without deciding matters of fact; where the matter could be decided upon the face of an admitted or uncontested document. In such a case the Court may be able to find a lack of jurisdiction or of admissibility. But that is not the position here. The Judgment does not merely deny the Applicant a hearing of the Application because of the disappearance of the Applicant's case. The Court purports to decide a matter of fact whereby to bind France to an international obligation. Assuming without deciding that the claim to jurisdiction made in paragraph 23 of the Judgment is properly made, that jurisdiction could not extend in my opinion to give the Court authority to bind France, which has stoutly and consistently denied that it has consented to the jurisdiction.

It may well be that even if the Court decided that it has jurisdiction under Article 36 (1) and the General Act to settle a dispute between Australia and France as to their respective rights in relation to nuclear testing, the consent of France given through Article 17 may not extend to include or involve a consent by France to the determination by the Court that France had accepted a binding obligation to the international community not to test in the atmosphere again, a fact not involved in settling the dispute as to their respective rights. But I have no need to examine that question for the Court has not even decided that it has jurisdiction to settle the dispute between the Parties. I am unable to accept that France is bound by the Court's finding of fact that it has accepted an internationally binding obligation not again to test in the atmosphere of the South Pacific. This is an additional reason why the dispute between Australia and France should not be regarded as resolved.

For all these reasons, I am unable to accept the conclusion that, by

reason of the communiqué of 8 June 1974 and the statements recited in the Judgment, the dispute between Australia and France has been resolved and has ceased to exist.

Could the Court Properly Make an Order?

I would now consider the other reason for which a case may become "without object", namely that in the existing circumstances no judicial Order capable of effect between the Parties could be made.

Since the Application was lodged, France has conducted two series of atmospheric nuclear tests in the South Pacific Ocean, one in 1973 and another in 1974. It has done so in direct breach of this Court's indication of interim measures. It would seem to be incontestable that as a result thereof radio-active matter, "fall-out", has entered the Australian territory and environment. From the information conveyed by the Applicant to the Court during the hearings, it seems that the Applicant has monitored its land and atmosphere following upon such nuclear tests in order to determine whether they were followed by fall-out and in order to determine the precise extent of such fall-out. I have already indicated that these were future tests within the meaning of the Application.

Australia has not yet been required to make its final submissions in this case. These two series of tests and their consequences were clearly not events for which the Applicant had to make provision in its Application. It seems to me, therefore, that in the situation that now obtains nothing said in or omitted from the Application or in its presentation to the Court could preclude the Applicant from asking in its final submissions for some relief appropriate to the fact that these nuclear tests, carried out in breach of the Court's indication of interim measures, caused harm to Australia and its population and indeed involved the expenditure of money; for though perhaps a minor matter, it can scarcely be doubted that the monitoring to determine fall-out, if any, and its extent has involved considerable expenditure, expenditure that would appear to me to be causally related to the explosions carried out by France during the 1973 and 1974 series of tests.

It is observable that the request in the Application is not for a declaration that tests which have already been carried out prior to 9 May 1973 were unlawful, though of course in the nature of things a declaration that further tests after 9 May 1973 would be unlawful would carry in this case the conclusion that those which had already taken place were also unlawful. In the presentation of its case the Applicant said that "at the present time" it did not seek any compensatory Order in the nature of damages. In truth such a claim for damages made in the Application

would not easily have been seen to be consistent with the nature of the claims actually made in the Application. They, as I have pointed out, are for a declaration of right and an Order to prevent any tests occurring after 9 May 1973; hence the request for the indication of interim measures made immediately upon the lodging of the Application. Any claim to be paid damages if made in the Application itself would in the circumstances necessarily have been a claim in respect of past tests carried out by France, which were not directly embraced in the claim made in the Application. Further, a claim for damages could scarcely relate to tests which might yet, as of 9 May 1973, be carried out by France. If the Applicant were to succeed there would be none, for the Applicant seeks to restrain them as from the date of the lodgment of the Application. Further, the case was not one in which the Applicant could ask for compensation as a substitute for an injunction, that is to say on the assumption that the Applicant succeeded in obtaining a declaration and failed to get an Order for injunction.

A claim, therefore, by the Applicant in its final submissions for relief appropriate to the events of 1973 and 1974 would not be inconsistent with what has been said so far. Indeed, such a claim would be related to the dispute on which the Application was founded. Assuming the Applicant to be right in its contentions, the tests of 1973 and 1974 and their consequences in Australia constitute a breach of Australia's rights. Thus, as I said earlier, it could not properly be said that a declaration made now in conformity with the Application, would be doing no more than affording a reason for an Order of injunction. A claim for relief related to what has occurred since the Application was lodged and to the consequences of the tests of 1973 and 1974 would not transform the dispute which existed at the date of the lodgment of the Application into another dispute different in character: nor would it be a profound transformation of the character of the case by amendment, to use the expression of the Court in the *Société Commerciale de Belgique* case (*P.C.I.J., Series A/B, No. 78*, at p. 173). Rather it would attract the observations of the Court in that case to the effect that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably but without infringing the terms of the Statute or the Rules of Court *(op. cit.)*.

This ability of the Applicant to include in its final submissions to the Court a claim for relief of the kind I have suggested indicates that a declaration by the Court in terms of the Application, but made more specific by a reference to those nuclear tests which took place in 1973 and 1974 and their consequences, is capable of affecting the legal interests or relationship of the Parties. It could not properly, in my opinion, be said that to make such a declaration would be an exercise outside the judicial function or that it would be purposeless. It would be dealing with a matter

of substance. The Court, in my opinion, could also make an Order for some form of compensatory relief if such an Order were sought. Indeed, if the Applicant succeeded on the merits of its claim, some Order with respect to the conduct and consequences of the tests of 1973 and 1974 might well be expected.

In any case, and quite apart from any question of any additional claim for relief contained in the Applicant's final submission, should the Applicant succeed on the merits of its Application in respect of any of the first three bases of its claim, a declaration by the Court in relation to that basis or those bases of claim, with possibly a specific reference to the results in Australia of the carrying out by France of the 1973 and 1974 series of tests, would, in my opinion, be properly made within the scope of the Court's judicial function. Quite apart from any damage caused by the 1973-1974 series of tests, such a declaration could found subsequent claims by Australia upon France in respect of past testing by France of nuclear weapons in the South Pacific.

It was said by the Court in the case of the *Northern Cameroons (supra)*:

> "The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations." (*I.C.J. Reports 1963*, pp. 33-34.)

The Court also said:

> "Moreover the Court observes that if in a declaratory judgment it expounds a rule of customary law or interprets a treaty which remains in force, its judgment has a continuing applicability."

Success of the Applicant in respect of one or more of the first three bases of its claim would establish that it had been in dispute with France as to their respective legal rights, that its claims of right to which the Court's declaration related was or were valid, and that France had been in breach of that right or those rights. To declare this situation, the Judgment, in my opinion, would satisfy what the Court said in the quotations I have made. The judgment would be stating the law in connection with a concrete case, where the Parties remained in dispute as to their respective legal rights. The Court's declaration would affect their existing legal rights and obligations. In addition, the Court would be expounding a rule of customary law in relation to the territorial sovereignty of the Applicant as a State in the international community.

A judgment affirming the Court's jurisdiction would involve a decision

that the General Act remained in force and a decision that the Parties were in dispute as to their respective rights within the meaning of Article 17 of the General Act. Thus an interpretation would be placed on Article 17. Therefore a declaration could properly be made and would have legal effect.

If the Applicant were also to succeed upon the fourth basis of its claim, again the Court would be stating the law in a concrete case where the Parties remained in dispute, and it would be expounding a rule of customary law, and the other comments I have made would be applicable.

These results would follow, in my opinion, even if the Court, in its discretion, refrained from making any immediate Order of injunction. It might do so because it was satisfied that France would not again explode nuclear devices or test weapons in the atmosphere of the South Pacific, either because the Court was satisfied that France had already resolved not to do so, or because the Court was satisfied that France would respect the declaration of right which the Court had made in the matter. But the Court, if it saw fit, could in my opinion, with legal propriety, make an Order for injunction nonetheless. It is a matter of discretion for a court whether or not to make an order of injunction where it is satisfied that without the making of the order the conduct sought to be restrained will not occur.

Lastly, for the course the Judgment takes there is no precedent. The case of the *Northern Cameroons (supra)*, in my opinion, cannot be called in aid to justify the Judgment. In that case, what the Applicant claimed in its Application, the Court at the time of giving Judgment held that it could not do. The Court was asked to declare the breach of a trusteeship agreement which had ceased to be operative within a day or so of the lodging of the Application. The Court held that a declaration of its breach during the period of its operation could have no effect whatever between the Parties, there being no claim for compensation for the breach.

Judge Sir Gerald Fitzmaurice, in his separate opinion, expressed the view that from the outset of the case there was no justiciable dispute. Sir Gerald held that from the terms of the Application it was clear that the Court was not able to make an Order in the case affecting the legal relations of the Parties; therefore, in conformity with the definition he adopted in the case, there was no relevant dispute. He expressed himself at page 111 of his opinion *(I.C.J. Reports 1963)* in terms which I have already quoted.

The contrast between the situation of the present case and that of the case of the *Northern Cameroons* is apparent. Even for those who accept the validity of the Court's decision in the case of the *Northern Cameroons*, that case affords, in my opinion, no support for the present Judgment.

In my opinion, there is no discretion in this Court to refuse to decide a dispute submitted to it which it has jurisdiction to decide. Article 38 of

its Statute seems to lay upon this Court a duty to decide. The case of *Northern Cameroons* at best covers a very narrow field in which no Order at all can properly be made by the Court.

Of course, if the dispute upon which it is sought to found jurisdiction has been resolved, no Order settling it can be made. Thus, the Judgment in this case can only be justified if the dispute between the Parties as to their legal rights has been resolved and ceased to exist.

However, for all the reasons I have expressed, I can find no ground upon which it can properly be held that the dispute between the Parties as to their respective rights has been resolved or has ceased to exist, or that the Court could not, in the circumstances of the case, properly make a judicial Order having effect between the Parties. The Application, in my opinion, has not become "without object".

(Signed) G. E. BARWICK.