MEMORIAL ON JURISDICTION AND ADMISSIBILITY SUBMITTED BY THE GOVERNMENT OF AUSTRALIA

INTRODUCTION

1. This Memorial is submitted to the Court in pursuance of the Order made by the Court on 22 June 1973, as amended in respect of time-limits by its Order of 28 August 1973.

2. In the Order of 22 June 1973, the Court directed that "the written proceedings shall first be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application".

3. The Government of Australia proposes to deal with these two questions separately.

4. In the present case it does not appear that the question of the admissibility is raised in connection with any default in the observance of purely formal requirements of the Rules but in respect of the question whether or not Australia has a legal interest in the subject of the dispute between the parties. It thus appears to be quite unconnected with the question of the jurisdiction of the Court to entertain the dispute and it would seem proper that the jurisdictional aspect of the case be treated first and disposed of independently of any question of admissibility.

5. In the first part of the present Memorial, the Australian Government will therefore deal first with the matters relating to the question of "jurisdiction". These will, where necessary, include points raised in the letter addressed to the Court on 16 May 1973 from the French Ambassador at The Hague (hereafter referred to as "the French Note") and in the Annex attached to the French Note (hereafter referred to as "the French Annex"). In the second part of this Memorial the Government of Australia will examine, quite separately, under the heading of "admissibility", the question of Australia's legal interest in its claims.

6. The Government of Australia recalls that the Government of France has not raised any objection to the jurisdiction of the Court in any form known to the Statute or Rules of the Court; and has not raised any question relating to the admissibility of the claim in any form whatsoever. The Government of Australia also notes that the Court has referred (in para. 11 of the Order of 22 June 1973) to the "non-appearance" of the French Government, but has not referred to Article 53 of the Statute.

7. At the same time, the Government of Australia also observes that the Court, in directing that the written proceedings shall first be addressed to questions of jurisdiction and of admissibility, has not referred to Article 67 of the Rules of Court which prescribes that "any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application . . . shall be made in writing".

8. The Government of Australia cannot, therefore, be certain that it has judged correctly the precise procedural framework within which the Court is dealing with the present stage of the case; and it must therefore ask for the Court's indulgence if it has in any respect failed to meet the Court's wishes. In particular, the Government of Australia expresses the hope that, if the Court should feel that the Government of Australia has not adequately dealt with a point which the Court finds material to its decision, the Court will so inform the Government of Australia and enable it to supplement the present Memorial either in writing or at the oral hearings.

9. This point is the more important because the Government of Australia

assumes that the Court wishes to follow, at the present stage, a procedure analogous to that laid down in Article 67, especially paragraph 7 thereof. The whole of this Article presupposes that a respondent has regularly raised specific objections to jurisdiction or admissibility. This, of course, is not the case here. Accordingly, the Government of Australia expresses the hope that in accordance with the fundamental standards of due process the Court will not consider any arguments running contrary to the Australian position without being satisfied that the Government of Australia has developed before the Court an argument directly and expressly dealing with that point.

10. The Government of Australia will conclude this Memorial with two principal submissions.

11. The first will be that the Court has jurisdiction to entertain the dispute.

12. The second will be that the Application is admissible.

PART ONE

JURISDICTION

A. Preliminary Observations

13. The French Note stated that the French Government considered that the Court was manifestly not competent in the case and that it could not accept the Court's jurisdiction. In contravention of Article 38 (3) of the Rules of Court, the French Government then informed the Court that it did not intend to appoint an agent, and requested the Court to remove the case from its lists. In the circumstances, the Court, wishing to satisfy itself that it has jurisdiction in accordance with Articles 36 and 37, decided in its Order of 22 June 1973 that it was necessary to resolve as soon as possible the questions of the Court's jurisdiction and of the admissibility of the Application, and that accordingly the written proceedings should first be addressed to these questions.

14. As has already been pointed out in paragraph 6 above, the question of the jurisdiction of the Court in the present case has not been raised by the defendant Government in any form known to the Statute or the Rules. This non-compliance by France with the Rules has put the Government of Australia in the quite novel situation of being required positively to establish the jurisdiction of the Court in the present case, instead of being simply requested to counter the arguments developed in support of a preliminary objection in writing.

15. Nevertheless, willing as it is to co-operate in any way with the Court in the difficult conditions created by the French Government, the Australian Government will be happy to set out in the present Memorial the reasons which, in its submission, fully support the existence of the jurisdiction of the Court to entertain the present dispute.

16. As the Court will recall, the question of the Court's jurisdiction has been examined at considerable length in the course of the oral proceedings relating to the request for interim measures of protection. There will, therefore, be an inescapable overlap between substantial parts of this Part of the Memorial and many points made in the oral proceedings.

17. The Government of Australia also observes that, ultimately, jurisdiction must derive from the Statute of the Court, which has opened up two different routes of access to the Court under Article 36 (1) and Article 36 (2) respectively. The Application invokes Article 17 of the General Act for the Pacific Settlement of International Disputes as a basis for the Court's jurisdiction. Under Article 36 (1) read with Article 37, the General Act is a treaty or convention in force between Australia and France and creates a special link of compulsory jurisdiction between the two States. The Application invokes, alternatively, Article 36 (2) and the respective declarations of Australia and France made thereunder which create between them a further link of compulsory jurisdiction.

B. The Link of Compulsory Jurisdiction between Australia and France according to the General Act for the Pacific Settlement of International Disputes

1. The Jurisdiction of the Court under the General Act

(a) *Australia and France are Parties to the General Act*

18. The General Act for the Pacific Settlement of International Disputes [1], done at Geneva, was opened for accession on 26 September 1928. It came into force pursuant to Article 44 on 16 August 1929. Under Article 45 (1) the General Act was to be concluded for a period of five years dating from its entry into force. Under Article 45 (2) it is to remain in force for successive periods of five years in the case of Contracting Parties which do not denounce it at least six months before the expiration of "the current period". Such periods expired on 15 August in the years 1934, 1939, 1944, 1949, 1954, 1959, 1964 and 1969. The current five-year period is due to expire on 15 August 1974.

19. Australia acceded to the General Act on 21 May 1931. The British Secretary of State for Foreign Affairs notified Australia's accession to Chapters I, II, III and IV of the General Act during a session of the Council of the League of Nations (Annex 1). Australia has not denounced the General Act.

20. On 8 April 1931 a law was passed authorizing the President of the French Republic, first, to accede to the General Act and, secondly, to ratify the declaration under the optional clause of the Statute of the Permanent Court of International Justice deposited by France on 19 September 1929, 16 months previously. However, the General Act was separately adhered to in Geneva on 21 May 1931, and was separately promulgated by a Presidential Decree dated 15 July 1931. The French accession, which also applied to Chapters I, II, III and IV of the General Act, is set forth in Annex 2.

21. Even though the authorizing law was the same in each case, it was clear that the accession to the General Act and the acceptance of the optional clause were totally independent. The then French Minister for Foreign Affairs, M. Aristide Briand, emphasized the special significance of the accession to the General Act in a letter of 10 April 1931 to the Secretary-General of the League of Nations:

> "I have the honour to inform you that, after the Chamber of Deputies, the Senate at its meeting of March 5th unanimously approved the draft law authorizing the President of the French Republic to accede to the General Act . . .
>
> The French Government is now in a position to deposit its definitive accession with the Secretariat of the League of Nations. However, taking account of the wishes of Parliament, and in order to emphasize the importance French opinion attaches to this Act, I intend to deposit our accession myself during the next session of the Council of the League [2]."

22. The Australian accession was made subject to certain reservations (Annex 1). On 7 September 1939 a further reservation was notified by telegram by Australia (Annex 1). None of these reservations is relevant to the present proceedings.

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[1] 93 *L.N.T.S.* 343.

[2] The full text is attached as Annex 3.

23. The French accession was also subject to certain reservations (Annex 2). In addition, on 13 February 1939, a further reservation under the General Act was notified by France (Annex 2). None of these reservations is relevant to the present proceedings.

24. France has not denounced the General Act.

(b) *The General Act Is a "Treaty in Force" which Vests Jurisdiction in the International Court of Justice in Accordance with Articles 36 (1) and 37 of the Statute of the Court*

(i) *Article 17 of the General Act*

25. Chapter II of the General Act entitled "Judicial Settlement" contains Article 17:

> "17. 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.
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> 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."

(ii) *Article 37 of the Statute of the Court*

26. The link between Article 17 and the present Court is furnished by Articles 36 (1) and 37 of the Statute of the Court. Presently, in paragraphs 35 to 46 it will be submitted that the General Act is a "treaty in force" within the meaning of Articles 36 (1) and 37. It is convenient however to consider first the operation and effect of Article 37. This Article provides:

> "37. Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

27. Australia and France are parties to the Statute of the Court. They are therefore bound by the replacement of the Permanent Court by the International Court effected by Article 37. As between them, the reference to the Permanent Court of International Justice in Article 17 of the General Act and other references to that Court in related Articles of the General Act—Articles 19, 20, 33, 34 *(b)*, 36, 37 and 41—are all to be read as references to the International Court of Justice.

28. The operation of Article 37 of the Statute as effecting a substitution of the present Court for the Permanent Court, in those places where references to the latter may be found in treaties in force between parties to the Statute, has repeatedly been acknowledged by the Court.

29. In the Advisory Opinion of 1950 on the *International Status of South West Africa*, the Court adverted to the role of Article 37, in observing that South Africa was under an obligation to accept the compulsory jurisdiction of the Court in relation to the Mandate in South West Africa (*I.C.J. Reports 1950*, at p. 138).

30. This conclusion was approved by the Court in 1962 in the *South West*

Africa cases *(Preliminary Objections)* (*I.C.J. Reports 1962*, at pp. 334-335). There was no disposition on the part of the Court to question this conclusion in the Second Phase of the case (see especially *I.C.J. Reports 1966*, at pp. 21 and 37).

31. In the meantime, the functioning of Article 37 had been fully considered in the *Barcelona Traction* case *(Preliminary Objections)* (*I.C.J. Reports 1964*, at pp. 31-36). The jurisdiction of the Court was invoked, in that case, on the basis of Article 17, paragraph 1, of the Hispano-Belgian Treaty of 1927 [1], which was, in effect, in this respect, a bilateral miniature General Act. It provided:

> "In the event of no amicable agreement being reached before the Permanent Conciliation Commission, the dispute shall be submitted either to an Arbitral Tribunal or to the Permanent Court of International Justice, as provided in Article 2 of the present Treaty."

32. The operative parts of that Article and of Article 17 of the General Act are virtually identical. In the one case "the dispute shall be submitted . . . to the Permanent Court of International Justice"; in the other "all disputes . . . shall . . . be submitted for decision to the Permanent Court of International Justice". No possible ground for distinguishing the impact of Article 37 upon these respective texts can exist.

33. In the *Barcelona Traction* case, Spain, in its second Preliminary Objection, denied that Article 17 of the Treaty of 1927 had created a bond of compulsory jurisdiction in respect of the International Court of Justice. Belgium argued that the Treaty was a "treaty in force", and by virtue of Article 37 of the Statute the present Court must be deemed to have replaced its predecessor for the purposes of the Article. The complication arising out of the fact that Spain did not become a member of the United Nations until 1955 does not exist in the present case.

34. It is unnecessary to urge upon the Court the considerations which it amply endorsed in the *Barcelona Traction* case concerning the objects and purposes of Article 37. The central aim and, as the Court held, the effective achievement of Article 37 was to preserve as many jurisdictional clauses as possible from extinction upon the forthcoming dissolution of the Permanent Court. The aim was realized by creating, in the Court's words, "a special régime which, as between the parties to the Statute, would automatically transform references to the Permanent Court in these jurisdictional clauses into references to the present Court". (*Ibid.*, at p. 31.) Article 37 mentions the Permanent Court for one purpose and one only, namely, that of defining or identifying the category of dispute covered. The Court summed up the total impact of the Article upon the relevant jurisdictional clauses in the form of three conditions: first, that there must be a treaty in force; secondly, that it should provide for the reference of "a matter" (i.e., the matter in litigation) to the Permanent Court; and, thirdly, that the dispute should be between parties to the Statute of the Court. It is submitted that all three conditions are fulfilled in the present case, and that no others need to be fulfilled.

(iii) "*Treaty in Force*"

35. Later in this Memorial the Government of Australia will develop at length its submission that the General Act is still in force and that it is therefore a "treaty in force" within Articles 36 and 37 of the Statute.

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[1] 80 *L.N.T.S.* 18.

36. Bearing in mind, however, that in the *Barcelona Traction* case *(Preliminary Objections)* the Court held the Hispano-Belgian Treaty of 1927 to be a treaty in force, it is helpful at this stage to compare the relevant provisions of that Treaty and the General Act and, because of their essential similarity, to consider the view which the Court adopted of the basic obligations in that Treaty. Indeed, the parallel that exists between the relevant provisions of the Hispano-Belgian Treaty and those of the General Act is so close as to be a strong, if not conclusive, argument in favour of Australia's submission that the General Act is clearly a treaty in force.

37. At the outset it is important to recall that both the General Act and the Hispano-Belgian Treaty had an identical aim and strikingly similar devices for attaining it.

38. The aim in both cases was the peaceful settlement of all disputes between the parties and the means were various and not confined to judicial action. The Court will recall that the General Act provides for the peaceful settlement of international disputes by three methods—conciliation, judicial settlement and arbitration. Under Article 38 accessions can be made to:

(a) all its provisions; or
(b) those dealing with conciliation and judicial settlement; or
(c) those relating to conciliation.

The provisions concerning conciliation deal with "disputes of every kind", i.e., political as well as legal disputes, which it has not been possible to settle by diplomacy. If a State is also party to the provisions relating to judicial settlement of legal disputes, i.e., of those "disputes with regard to which the parties are in conflict as to their respective rights" (Art. 17), these disputes will only be the subject of conciliation if the parties so agree (Art. 20). Under the provisions relating to judicial settlement, such disputes were to be submitted for decision to the Permanent Court of International Justice unless the parties agreed to have resort to an arbitral tribunal.

39. The parallel between this structure and that of the Hispano-Belgian Treaty is instructive. There, the recourse to judicial settlement was logically sequential to the effort to resolve disputes by diplomatic methods and conciliation. Articles 2 and 17 of that Treaty embody this logical order of procedure, and it is interesting to note that they incorporate the essential design of the General Act, as a consideration of them will readily demonstrate. These Articles provide:

> "2. All disputes of every kind between the High Contracting Parties with regard to which the Parties are in conflict as to their respective rights, and which it may not have been possible to settle amicably by the normal methods of diplomacy, shall be submitted for decision to an arbitral tribunal or to the Permanent Court of International Justice.
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> Disputes for the settlement of which a special procedure is laid down in other conventions in force between the High Contracting Parties shall be settled in conformity with the provisions of those conventions."

> "17. In the event of no amicable agreement being reached before the Permanent Conciliation Commission, the dispute shall be submitted either to an Arbitral Tribunal or to the Permanent Court of International Justice, as provided in Article 2 of the present Treaty.
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> In this case, and also when there has been no previous recourse to the Permanent Conciliation Commission, the Parties shall jointly draw up the special agreement referring the dispute to the Permanent Court of

International Justice or appointing arbitrators. The aforesaid agreement shall clearly state the subject of the dispute, the particular competence that might devolve upon the Permanent Court of International Justice or upon the Arbitral Tribunal and any other conditions arranged between the Parties. This agreement shall be constituted by an exchange of Notes between the two Governments.

The Permanent Court of International Justice, when requested to render a decision on the dispute, or the Arbitral Tribunal, when appointed for the same purpose, shall respectively be competent to interpret the terms of the special agreement.

If the special agreement has not been drawn up within three months from the date on which one of the Parties was requested to submit the matter for judicial settlement, either Party may, on the expiry of one month's notice, bring the question direct before the Permanent Court of International Justice by means of a request.

The procedure applicable shall be that laid down by the Statute of the Permanent Court of International Justice, or in the case of recourse to an Arbitral Tribunal, that laid down by the Hague Convention of October 18, 1907, for the Pacific Settlement of International Disputes."

40. Another striking similarity between the General Act and the Hispano-Belgian treaty is that they are both intrinsically bilateral in nature. Despite the multilateral form of the General Act the obligations under it are not global but are directed to other individual parties. Under Article 44 the General Act came into force on accession by two parties only, and theoretically it might have had only two. This served to emphasize the bilateral character of its operation and the fact that it created obligations between States independently of a general acceptance of it by a large number of States. Notwithstanding its general language it was in substance a means whereby parties could adopt a general system for the pacific settlement of their disputes, vis-à-vis those other States who are parties to it or became parties to it. If the Hispano-Belgian Treaty, which was so similar in character and purpose has survived, it is difficult to see why the General Act should not.

41. There is yet another similarity. The Hispano-Belgian Treaty did not and could not of its own force confer jurisdiction on the Permanent Court or on this Court. Prior to the demise of the Permanent Court its jurisdiction under the Treaty depended on it being a "treaty in force" within the first paragraph of Article 36 of that Court's Statute, which provided: "36. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force." Since then the jurisdiction of this Court has depended *(inter alia)* on the provisions of Articles 36 (1) and 37.

42. Likewise the General Act, even though adopted by the League of Nations, could not, independently of the Statute of the Permanent Court, have given the Court jurisdiction to deal with disputes referred to it thereunder. The Court obtained its jurisdiction in relation to disputes which fell within Article 17 of the General Act in the same way as it obtained its jurisdiction under the Hispano-Belgian Treaty, namely, by virtue of the combined operation of that Article and Article 36 (1) of the Court's Statute. On the accession of two parties the General Act became a treaty or convention in force and thereafter the Court had jurisdiction between parties in relation to disputes of the kind described in Article 17, subject of course to their respective reservations under Article 39.

43. The link supporting the jurisdiction of the International Court on the basis of Article 17 of the General Act is therefore clearly established. In the words of Judge Basdevant in the *Norwegian Loans* case:

> "This Act is, so far as they are concerned, one of those 'treaties and conventions in force' which establish the jurisdiction of the Court and which are referred to in Article 36, paragraph 1, of the Statute. For the purposes of the application of this Act, Article 37 of the Statute has substituted the International Court of Justice for the Permanent Court of International Justice." (*I.C.J. Reports 1957*, at p. 74.)

44. However, it is important not only to note the parallels that exist between these two treaties but also the view which the Court expressed in the *Barcelona Traction* case as to the nature of the obligations comprised in Articles 2 and 17 of the Hispano-Belgian Treaty. Of these provisions the Court said:

> "In the light of these provisions it would be difficult either to deny the seriousness of the intention to create an obligation to have recourse to compulsory adjudication—all other means of settlement failing—or to assert that this obligation was exclusively dependent on the existence of a particular forum, in such a way that it would become totally abrogated and extinguished by the disappearance of that forum. The error of such an assertion would lie in a confusion of ends with means—the end being obligatory judicial settlement, the means an indicated forum, but not necessarily the only possible one." (*I.C.J. Reports 1964*, at p. 38.)

45. This led the Court to stress the incidental character of the choice of forum:

> "If the obligation exists independently of the particular forum (a fact implicitly recognized in the course of the proceedings, inasmuch as the alleged extinction was related to Article 17 (4) rather than to Articles 2 or 17 (1), then if it subsequently happens that the forum goes out of existence, and no provision is made by the parties, or otherwise, for remedying the deficiency, it will follow that the clause containing the obligation will for the time being become (and perhaps remain indefinitely) inoperative, i.e., without possibility of effective application. But if the obligation remains substantively in existence, though not functionally capable of being implemented, it can always be rendered operative once more, if for instance the parties agree on another tribunal, or if another is supplied by the automatic operation of some other instrument by which both parties are bound. The Statute is such an instrument, and its Article 37 has precisely that effect." (*I.C.J. Reports 1964*, at pp. 38-39.)

The obligations in the General Act to refer disputes to conciliation, judicial settlement and arbitration are, it is submitted, of an identical character. It was possible, for instance, for a party to accede to only the conciliation procedures in the General Act, and it is obvious that the intention was not to subject the General Act *in toto* to the continued existence of the Permanent Court of International Justice. The obligations in all parts of the General Act are obligations to submit disputes to one or other of the forms of peaceful settlement. The actual procedures and instrumentalities are only the means by which these obligations could be carried into effect.

46. The emphasis which the Court placed upon the autonomy of the substantive undertakings of the Treaty of 1927 is therefore the emphasis which the

Government of Australia seeks to place upon those of the General Act. The Court said that it could not regard the obligation to have recourse to compulsory adjudication as being exclusively dependent on the existence of a particular forum, for judicial settlement was the substantive object of the Treaty, not judicial settlement by the Permanent Court. Judicial settlement is the object of Article 17 of the General Act just as it is the object of the corresponding Article of the 1927 Treaty.

(c) *The Specific Requirements of Article 17 of the General Act*

47. Article 17 of the General Act, in providing for the jurisdiction of the Permanent Court, uses language the effect of which is to prescribe four conditions which must be satisfied if the Article is to be effective. The Government of Australia will refer to each of these in turn:

(i) *The Existence of a "Dispute"*

48. First, there must exist a dispute between the parties. That there is such a dispute can hardly be questioned. Indeed, no contrary suggestion has been made, either in the French Note and Annex or in the Court's Order of 22 June 1973 or the declarations or dissenting opinions attached thereto.

49. In these circumstances it is necessary to do little more than simply to recall the history of the diplomatic correspondence that preceded the institution of the present proceedings; that history is described in paragraphs 8-18 of the Application and was amplified in certain respects in the Attorney-General's speech before the Court on 21 May 1973 on the question of interim measures of protection. The correspondence shows that over the last decade the Australian Government has been at pains to convey to the French Government its apprehension and concern at the conduct of French nuclear weapons tests at its Pacific Tests Centre. The Application directed particular attention to the Australian Note of 3 January 1973 and the French reply of 7 February. In its Note the Australian Government stated that in its opinion the conduct of further nuclear tests would be unlawful and it invited the French Government to refrain from any further atmospheric tests in the Pacific area and formally to assure the Australian Government that no more such tests would be held in the Pacific area. The French Government, in its reply of 7 February 1973, states its conviction that the conduct of the tests did not involve a violation of any rule of international law. In a Note to the French Government of 13 February 1973 the Australian Government identified this difference of view as amounting to a "substantial legal dispute" between the two Governments, but at the same time indicated its willingness to hold negotiations with the French Government. These took place on 18-20 April 1973. Further technical discussions between scientists were held between 7-9 May 1973. These discussions led to no settlement of the differences between the parties. Indeed, in a statement made in the French Parliament on 2 May 1973 the French Government had indicated that, regardless of the protests made by Australia and other countries, it did not envisage any cancellation or modification of the programme of nuclear testing as originally planned (see Application, para. 18).

(ii) *Dispute between "Parties"*

50. Subject to the question which will be examined in detail below, as to

whether the General Act is still in force, there has been no suggestion by the French Government or anyone else that Australia and France are not parties to the General Act. The acceptance by the two parties of the General Act and the fact that neither has terminated its acceptance are set out in paragraphs 19, 20 and 24 above.

(iii) *A Dispute as to the "Respective Rights" of the Parties*

51. It has already been indicated that, while in Chapter I, Article 1, of the General Act, the parties undertook to submit to a procedure of conciliation "disputes of every kind", in Chapter II, Article 17, they engaged themselves to submit for decision to the Permanent Court of International Justice "all disputes with regard to which the parties are in conflict as to their respective rights".

52. The reason for this difference in treatment is the essential distinction between political and legal disputes. A comparison between the two Articles clearly shows the distinction as to the means of settlement respectively provided for the two categories of disputes. Only conciliation and arbitration are foreseen for political disputes.

53. For legal disputes, on the other hand, no recourse to the conciliation procedure is foreseen unless both parties so agree. The agreement of the parties is also required for substituting arbitration for judicial settlement. The only compulsory means of settlement provided for with reference to a dispute of this kind is the submission for decision to the Permanent Court of International Justice by application from one of the contending parties.

54. An examination of the *travaux préparatoires* of Article 17 confirms that the formulation chosen was simply an attempt to provide a more precise formulation of the then more usual phrase, "disputes of a legal nature" [1].

55. The distinction between "legal" and "political" disputes which the above analysis reflects is too well known to require detailed support by reference to literature. There is, however, a succinct treatment of the subject in Oppenheim's *International Law*, Volume II (7th ed., 1952), at page 4, note 1, where three meanings of the distinction are examined. The third is that "it may have reference to the attitude of the party putting forward a claim or a defence. According to the last test only those disputes are 'legal' in which the parties admittedly base their claim or defence on existing law, while disputes which are admittedly concerned with a claim for a change in the law are disputes as to 'conflicts of interests', and as such political and non-justiciable". The same note later adds: "The third test, which is purely subjective and regards the attitude of the parties as the decisive factor, has a great number of adherents and finds support in the language of the General Act and of numerous other instruments."

56. For the purpose of establishing that the present dispute between Australia and France is one regarding legal rights it is quite sufficient to look only at the Application. The Government of Australia puts its case exclusively in terms of legal rights when it asserts the unlawfulness in international law of the nuclear tests executed by France in the atmosphere of the South Pacific Area. This is no more than a reflection of the terms in which the

[1] L. of N., *Records of the Ninth Ordinary Session of the Assembly; Official Journal; Special Supplement No. 65*, September 1928, at p. 61. The formulation was used in the Locarno Agreements, e.g., Arbitration Convention between Germany and Belgium of 1 October 1925, Article 1, 54 *L.N.T.S.*, p. 305.

Government of Australia addressed the French Government on 3 January and 13 February 1973 (Application, Annexes 9 and 11). Furthermore, the "legal" character of the dispute is conclusively demonstrated by the fact that the French Government, in its note of 7 February 1973 to the Australian Government (Application, Annex 10) expressly took issue with the Australian Government on this aspect of the matter: "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." It would be impossible to formulate a more explicit acknowledgement of the character of the present dispute as one relating to "respective rights", and therefore as one of those contemplated by Article 17 of the General Act. The fact that a particular question may have a political or military aspect does not of course prevent it from also being a legal question and a dispute about it from being a legal dispute.

(iv) *The Scope of the Reservations of the Parties*

57. It is perhaps hardly necessary to refer to the French reservations to the General Act. The French Annex, although it has put forward contentions in the alternative, on the basis, first, that the General Act is not in force and then on the basis that it is, does not invoke any reservation. Nor is any point made in this connection by the Court or its Members. However, in order that the position should not be left open or uncertain, the Australian Government will refer briefly to these reservations.

58. The French accession was limited in the first place to disputes arising after its accession with regard to situations or facts subsequent thereto. Clearly the present dispute meets that requirement.

59. Next, the French accession excluded disputes "bearing on a question left by international law to the exclusive competence of the State". Again, it is manifest that a dispute which raises such issues as the violation by France of its international obligations to abstain from carrying on nuclear tests in the atmosphere in the South Pacific area or not to infringe Australia's territorial sovereignty or the freedom of the seas does not fall within this limitation.

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

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

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

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

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

65. Fourthly, Australia excluded disputes concerning questions which according to international law are solely within the domestic jurisdiction of States. An indication has already been given, in relation to a similar French reservation, why this is irrelevant.

66. Fifthly, Australia excluded disputes with any party to the General Act who was not a Member of the League of Nations. France was at all material times prior to the dissolution of the League a Member of that Organization. A comparable reference to membership of the League was examined by the Court in the *South West Africa* cases *(Preliminary Objections)* (*I.C.J. Reports 1962*, at p. 335). Paragraph 2 of Article 7 of the Mandate provided that "if any dispute should arise between the Mandatory and another Member of the League of Nations" relating to the interpretation or application of the Mandate, it should be submitted to the Permanent Court of International Justice. South Africa contended, to use the words of the Judgment, "that since all Member States of the League necessarily lost their membership and its accompanying rights when the League itself ceased to exist on April 19, 1946, there could no longer be 'another Member of the League of Nations' today". This contention was rejected by the Court. Its conclusions were in substantive terms identical with the views expressed by Judge Sir Arnold McNair in his separate opinion on the *International Status of South West Africa*:

> "The expression 'Member of the League of Nations' is descriptive, in my opinion, not conditional, and does not mean 'so long as the League exists and they are Members of it'." (*I.C.J. Reports 1950*, at pp. 158-159.)

These views were referred to, evidently with approval, by Judge Jessup in his separate opinion in the *South West Africa* cases (*I.C.J. Reports 1962*, at p. 412).

67. The situation was thus one in which Liberia and Ethiopia, having been members of the League before its dissolution, were for the purposes of a jurisdictional clause, still to be regarded as "Members of the League of Nations" in 1962, 16 years after its dissolution. The Government of Australia can see no basis for distinguishing that situation from the present one, in which France was also a Member of the League of Nations before its dissolution. Nothing has happened between 1962 and 1973 to change the legal position.

68. The Australian accession also contained reservations in connection with disputes under consideration by the Council of the League. These reservations manifestly ceased to be relevant after the demise of the League of Nations.

69. Some further reference is made at page 7[1] of the French Annex to the effect of these two reservations. The precise legal thrust of the French submissions is far from clear. However, in so far as they appear to start from a proposition that in some way these reservations are "uncertain", the Government of Australia can only say that this comment appears to be entirely misplaced. The content of the reservations is absolutely clear and they are evidently quite irrelevant in the present case. It may also be said that the suggestion made by the French Government that the attitude of a party can, as it were, predetermine the decision by the Court as to the effect of the relevant reservations is obviously logically defective.

[1] II, pp. 353-354.

70. There remains only the Australian reservation, made at the outbreak of the Second World War, which excluded any dispute "arising out of events occurring during present crisis". This too is irrelevant in the present case.

71. It is evident, therefore, that no relevant reservation limits or excludes the jurisdiction of the Court in these proceedings.

(v) *Reference to the Permanent Court of International Justice*

72. For the reasons stated in paragraph 27 above, the reference in Article 17 to the Permanent Court of International Justice must now be read as being to the International Court of Justice.

(vi) *Exclusion of Reference to "Arbitral Tribunal"*

73. Finally, it may be observed that the terms of Article 17 apply "unless the parties agree to have resort to an arbitral tribunal". There has been no such agreement between the parties.

74. The Court is thus confronted by a situation in which every condition of Article 17 of the General Act is satisfied. There is, therefore, no reason why that Article should not serve to vest jurisdiction in this Court in these proceedings.

2. The General Act Has not Ceased to Be in Force by Reason of its Relationship with the League of Nations System

(a) *The French Assertion*

75. In the French Annex it is asserted that the General Act is no longer valid because *(inter alia)* of the circumstance that the Act was an integral part of the League of Nations system. It is said that it is linked ideologically and structurally with that system, that these links were emphasized in the Australian and New Zealand acceptances of the General Act and that after the demise of the League it was thought necessary to revise the Act.

76. In support of its main submission that the General Act is still in force, the Government of Australia submits that however one describes the relationship between the Act and the League of Nations system that relationship was insufficient to render the Act invalid by reason of the demise of the League in 1946. It is submitted that the vital parts of the Act on which the Australian Government relies to support its case that the Court has jurisdiction in this matter are still fully operative and in force notwithstanding such demise. To support this submission it is proposed to consider, first, the historical circumstances in which the Act came into force, and to analyse its provisions in so far as they depended on the League system.

(b) *The League System and the General Act—Distinct and Separate*

77. It is true that both the League of Nations system and the General Act were part of the same ideological milieu, since both were devised to bring about the peaceful settlement of international disputes in a world which had been shattered by the 1914-1918 war and which feared another such war. But, so far as the legal structures of the two systems are concerned—and this is what is relevant for present purposes—they were quite separate.

78. It would, indeed, even be inappropriate to describe them both as "systems", because any such designation of the General Act could operate

tendentiously to suggest an organizational or structural comparison between it and the League of Nations which cannot in fact be made, for the General Act was neither more nor less than a treaty in multilateral form which had no characteristic other than to create reciprocal obligations between individual parties. The Covenant of the League of Nations, on the other hand, was also the constitution of an international organization.

79. The fact that peaceful settlement of disputes is the sole purpose of the General Act and also a significant feature of the Covenant of the League certainly results in some partial parallelism, and it is certainly true that both were motivated by the same moral and political purposes. But, apart from this, the difference in purpose and machinery of the two instruments is sufficiently striking to demonstrate their mutual independence.

80. The League of Nations was the first effective move towards the organization of a world-wide political and social order. The Covenant, in Articles 12-15, indicated various ways in which disputes might be settled—by arbitration, by reference to a Permanent Court of International Justice to be established, or by laying them before the Council or Assembly of the League. But it was primarily concerned with disputes likely to lead to a "rupture".

81. It was because the provisions of the Covenant seemed incomplete and vague that during the 1920s various proposals were put forward to ensure international peace and security within the framework of the Covenant.

82. One such ambitious plan to perfect the Covenant as a barrier against war was the Geneva Protocol for the Pacific Settlement of Disputes adopted by the Assembly of the League of Nations on 2 October 1924. Under Article 1, the signatory States undertook to make every effort in their power to secure the introduction into the Covenant of certain amendments. The Protocol would have bound all its signatories to accept the compulsory jurisdiction of the Permanent Court of International Justice. For disputes that could not be settled by a process of law or by the Council it was provided that a special committee of arbitrators should be constituted. Various other provisions attempted to perfect the League of Nations system. But the Protocol was regarded as being too perfect and never came into force [1].

83. Another such proposal for strengthening the Covenant was the Treaty for Strengthening the Means to Prevent War, which was opened for signature on 26 September 1931, but which never came into force. This Treaty incorporated a German suggestion that the parties might undertake in advance to accept certain recommendations of the Council of the League of Nations in a crisis.

84. But various other proposals were made at the time which, although motivated by the same ideals as those upon which the League of Nations was founded, were separate and outside the League system. The most prominent of these was the General Pact for the Renunciation of War (the Kellogg-Briand Pact), which was signed in Paris on 27 August 1928 and which came into force on 24 July 1929 [2]. Articles 1 and 2 provide:

"*Article 1*

The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of

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[1] See Eppstein J. (ed.), *Ten Years' Life of the League of Nations* (London, 1929), Chapter VII (written by A. Henderson, U.K. Secretary of State for Foreign Affairs), at p. 99.

[2] 94 *L.N.T.S.* 59.

international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article 2

The high contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

85. The Kellogg-Briand Pact could be regarded as extending and complementing the Covenant of the League in that the parties to it renounced war and agreed to resolve their disputes only by pacific means. The Covenant, in Articles 12 to 15, laid down procedures for the pacific settlement of certain international disputes. But essentially the two documents proceeded from different conceptions, and harmony between the two could only have been achieved by a remodelling of the "disputes" articles of the Covenant to provide an all-inclusive system for the pacific settlement of all disputes. Proposals were made to knit the two documents into a single structure. The very title of the item under which the matter was discussed within the League of Nations serves to confirm this view of the matter. It read:

"Question of *amending* the Covenant of the League of Nations to bring it into *Harmony* with the Pact of Paris [1]." (Italics added.)

86. It was precisely because the need was felt at this time for an all-inclusive obligatory convention for the pacific settlement of all international disputes that the General Act was conceived. And it was precisely that kind of language that was used at the time by the Government of the United Kingdom to describe the origins of the General Act. In its "Memorandum on the Proposed Accession of His Majesty's Government in the United Kingdom to the General Act of 1928 for the Pacific Settlement of International Disputes [2]", it stated that a number of States Members of the League of Nations desired to accept the principle of all-inclusive obligatory pacific settlement of disputes and to achieve this end by means of an open multilateral treaty. The Memorandum went on to observe (p. 3):

"So long, however, as no such treaty was available, these States were compelled to have recourse to the much more lengthy and laborious expedient of making a series of bilateral treaties with one another. The multiplication of such treaties, often needlessly diverse in text, directed attention to the inconveniences of this system of bilateral engagements and to the urgent need for some open convention which would afford States Members of the League an easy means of accepting the principle of obligatory pacific settlement, and of a predetermined procedure in the handling of any disputes which might hereafter arise. The mere existence of such a predetermined procedure, and its acceptance in advance by States which might subsequently find themselves at variance, would, it was generally felt, be a powerful contribution to the sense of international security, and would have great psychological value in banishing from men's minds the idea of war, and replacing it by precise ideas of peaceful methods of settlement."

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[1] L. of N., *Committee for the Amendment of the Covenant of the League of Nations in Order to Bring it into Harmony with the Pact of Paris*, Minutes, doc. C. 160.M.69. 1930.V.

[2] Cmd. 3803, H.M.S.O., 1931, p. 3.

The criteria inspiring the General Act was accurately summed up in another reference as follows:

> "The work is divided . . . between three types of body, all strictly 'non-political'. There is the Permanent Court of International Justice which is to have the last word as regards legal disputes.
>
> There are Conciliation Commissions, which are to deal, in the first instance, with non-legal disputes. And, finally, there are Arbitral Tribunals, which are to have the final determination of non-legal disputes [1]."

87. The General Act was a completely distinct and separate instrument from the Covenant of the League and, because of its comprehensive nature, was ideally suited to the implementation of the pledge to settle disputes pacifically contained in Article 2 of the Kellogg-Briand Pact. A contemporary publication of the League of Nations Union—*The General Act of September 26, 1928, for the Peaceful Settlement of International Disputes*—makes clear (p. 4) the relationship between the two instruments, especially in view of the failure of attempts to amend the Covenant. The document observes (p. 6) with respect to the General Act, that—

> "reference to the League's machinery is as far as possible avoided. The object of this was to facilitate acceptance of the Treaty by States not members of the League."

88. A consideration of the drafting history of the General Act also serves to indicate its separate and distinct character.

89. The General Act originated in the appointment on 30 November 1927 of a Committee on Arbitration and Security by the Preparatory Commission for the Disarmament Conference, in pursuance of a resolution of the League of Nations Assembly dated 26 September 1927. This Committee instructed a drafting committee to prepare a certain number of model treaties of conciliation, arbitration, non-aggression and mutual assistance, as well as a series of draft resolutions. The Committee in due course submitted three model general conventions (A, B, C) and three model bilateral conventions for the pacific settlement of international disputes [2]. As it turned out, the three model general conventions were in fact to form the basis of the General Act. Each of these was to come into force on the accession of at least two contracting States.

90. The model treaties were discussed by the Third Committee of the League of Nations Assembly in the course of the ninth ordinary session of the Assembly in 1928. The Third Committee requested the First Committee to examine from a legal point of view the part of the work of the Committee on Arbitration and Security concerning the pacific settlement of international disputes, including the model conventions [3].

91. When the First Committee discussed the draft conventions for the pacific settlement of international disputes, it considered in particular whether

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[1] Zimmern A., *The League of Nations and the Rule of Law 1918-1934* (London, 1939), at p. 387.

[2] L. of N., *Official Journal, Records of the Ninth Ordinary Session of the Assembly, Report of the Work of the Committee on Arbitration and Security*, doc. A. 20, 1928 IX, pp. 1145-1176.

[3] L. of N., *Official Journal, Records of the Ninth Ordinary Session of the Assembly, Special Supplement, No. 61, Minutes of the Third Committee (Reduction of Armaments), Second Meeting*, 11 September 1928, pp. 8-13.

the three model general treaties might be fused into one treaty and this was referred to a sub-committee [1].

92. In due course, a sub-committee reported to the First Committee and recommended the amalgamation of the three draft conventions into a single General Act [2]. This was duly done and the draft was discussed and adopted at the Nineteenth Meeting of the Ninth Ordinary Session of the Assembly on 26 September 1928 [3]. On that date, the Assembly passed a resolution inviting all States to become parties to the General Act [4].

93. Reference to the drafting history shows in particular that the Act arose out of a desire to provide a comprehensive means for the pacific settlement of legal disputes separate and distinct from that provided under the optional clause provisions of the Statute of the Permanent Court of International Justice. Under Article 17 a dispute as to legal rights was to be referred to the Court and could be brought to it by unilateral application in those cases where the parties did not agree, previously, on a different method of settlement (conciliation or arbitration). The agreement to the jurisdiction of the Court was to be subject to reservations which could be made under Article 39 of the General Act. However, these reservations were limited to the classes enumerated in Article 39 (2) and any addition to them was subjected to specified time and procedural limitations. As has been previously noted, the Court found its jurisdiction in the combined operation of Article 17 and the first paragraph of Article 36 of the Statute which gave the Court jurisdiction in "all matters specially provided for in treaties and conventions in force".

94. The General Act was therefore in origin an attempt to provide separate and distinct means for the pacific settlement of international disputes and, in the submission of the Government of Australia, when drafted, it achieved that object.

(c) *The General Act Was not so Integrated Structurally with the League as to Render It or Any of Its Relevant Provisions Invalid or Inoperative by Reason of the Demise of the League*

95. In considering the terms of the General Act it is important always to have in mind the nature of the obligations it contains. As is apparent from the decision and reasoning of the Court in the *Barcelona Traction* case, already considered, they were obligations to submit disputes to the forms of peaceful settlement provided and were not dependent on the continued existence of the tribunals nominated. There can, it is submitted, be no doubt that the reasoning in that case applies directly to Chapter II relating to "Judicial Settlement", for there is no relevant ground of distinction. Nor is there any reason in principle why it should not equally apply to the basic obligations in Chapters I and III. This, in itself, is sufficient to answer the

[1] L. of N., *Special Supplement No. 65, Minutes of the First Committee (Constitutional and Legal Questions), Fifth Meeting*, 14 September 1928, pp. 27-33.

[2] *Ibid., Ninth Meeting*, 20 September 1928, pp. 57-65.

[3] *Ibid., Nineteenth Meeting*, 26 September 1928, pp. 178-184. The report of the Third Committee to the Assembly is contained in L. of N., *Official Journal, Records of the Ninth Ordinary Session of the Assembly*, pp. 486-497. Another important source regarding the drafting of the General Act is a joint meeting of the First and Third Committees which conducted a detailed examination of the articles of the General Act. *Joint Meeting of the First and Third Committees*, 24 September 1928, pp. 79-94.

[4] L. of N., *Official Journal, Special Supplement*, 1928, No. 63, p. 17.

contention that, because of its references to the League system, the Act is invalid or inoperative.

96. However, it is useful to analyse more closely the references to the League system for, on closer study, it will be found that they do not render the continued validity or operation of the General Act dependent thereon. As a matter of fact, references to the League and its officials only appear in Chapters I and IV.

97. In Chapter I, Articles 6 and 9 contain references to the League. Article 6 (1) provides for the choice of Commissioners to be entrusted on the request of the parties to the Acting President of the Council of the League. This is to be done as an alternative to entrusting it to a third power chosen by the parties. Article 6 (2), however, provides what is to happen, if no agreement is reached under Article 6 (1), and in so providing deals completely with any failure to agree arising from there being no Council of the League. Having in mind this and the fact that he only exercises this function at the request of the parties, the cessation of his office due to the demise of the League could hardly cause the conciliation provisions to be invalid or, for that matter, inoperative.

98. There are also references to the League and its officials in Article 9. Article 9 (1) provides that the conciliation commission shall meet at the seat of the League of Nations or at some other place selected by "its President". Article 4 (1) provides for the appointment of a president of the conciliation commission and he is the "President" referred to in Article 9 (1). It can readily be seen that the fact that the League ceases to exist cannot thwart the operation of the sub-article, for the president can always select a meeting place. Article 9 (2) enables the commission to request the assistance of the Secretary-General of the League. Again it is clear that the power to seek assistance and the ability to exercise it are not fundamental to the valid or effective operation of the conciliation provisions. It is a mere discretion and the inability to exercise it, due to there being no Secretary-General, could not possibly prevent the process of conciliation from being effectively carried out.

99. These are the only provisions of Chapter I of the General Act which are affected by the demise of the League. It is clear, it is submitted, that their operation is not touched in any essential way by the demise of the League, nor is their validity impugned.

100. Chapter II relates to "Judicial Settlement". It is the only chapter the operation of which is invoked to assert the Court's jurisdiction in the present case. It places no reliance at all on the League of Nations or its officials. It refers, of course, to the Permanent Court of International Justice. However, as has already been pointed out, Article 37 of the Statute overcomes this problem completely, with the result that Chapter II can operate with full force and effect.

101. Chapter III deals with settlement by arbitration. It contains, in Article 23 (3), provision for the appointment in certain events of members of the arbitral tribunal by the President or other judges of the Permanent Court. Under these provisions the Court only became involved after a series of disagreements and it was always open to the parties to resolve the problem by agreement. The existence of the Court was, therefore, not essential to the operation of Chapter III and, at most, if Article 37 of the Statute of this Court were inapplicable, the consequence would not be to abrogate it or render it invalid but to suspend its operation, temporarily, until some other body was substituted by agreement between the parties.

102. If, contrary to the Government of Australia's previous submissions, Chapters I and III (having no comparable provision to Article 37 to sustain them), were rendered invalid or inoperative by the demise of the League, Chapter II would, it is submitted, be clearly severable and operate independently thereof. The fact that it is severable is indicated not only by a consideration of its terms but also by Article 38 of the General Act which enables accessions thereto to be made to some only of the three Chapters.

103. None of the articles contained in Chapter II requires reference to Chapters I or III before its provisions can operate to bring disputes of the type therein referred to before the Court. Furthermore, judicial settlement is a distinct and separate means for peaceful settlement, and there is no reason to suppose that the parties would have intended that it should operate only in conjunction with one or both of the other Chapters. Article 20 does refer to the conciliation procedures of Chapter I, but this is only for the purpose of dealing with a problem which could arise if the relevant parties had acceded to both Chapters.

104. It is submitted therefore that Chapter II is valid and, by virtue of Article 37 of the Statute of this Court, can operate of its own force and, if need be, independently of the other Chapters.

105. It is in reality, only Chapter IV which contains significant references to the League and its officials. Articles 43 to 47 involve the League in the following relevant respects:

(a) Accession is open to Members of the League or to non-member States to which the Council of the League has communicated a copy for the purpose.

(b) Instruments of accession and additional declarations under Article 40 are to be transmitted to the Secretary-General who is to notify their receipt to member and non-member States referred in *(a)*.

(c) The Secretary-General is to draw up three lists showing the accessions and declarations and publish them.

(d) The Act is to come into force on the 90th day following receipt by the Secretary-General of the accession of not less than two States.

(e) Accessions received after the Act comes into force are to become effective from the 90th day following receipt by the Secretary-General.

(f) Denunciation of the Act shall be effected by a written notification addressed to the Secretary-General who is to inform members of the League and the non-members referred to in *(a)*.

106. Some of these provisions give the Secretary-General of the League depositary functions. By the time of the demise of the League the General Act was undoubtedly in force. The effect of its disappearance could not have been to nullify the effect of the accessions made before that time, for the Act had come into force between the parties who had acceded to it. The analysis of its substantive provisions undertaken in this Memorial clearly establishes, it is submitted, that the existence of the League was not essential to either their validity or continued operation and therefore the parties were entitled to look to their continued performance. In these circumstances the disappearance of the Secretary-General of the League could have had no larger effect than to render it a closed treaty but one still operating among those States who had already acceded to it. This is established by reference to the United Nations law and practice in the matter of League treaties which is examined in paragraphs 120-139 of this Memorial.

107. As noted above, the provisions in Articles 43 to 47 provide for

the Secretary-General to receive declarations under Article 40 and denunciations and to inform other States about them.

108. The function of the Secretary-General, in this respect, is clearly to act as a channel through which information on these matters is to be passed on to other States and as a storehouse of the relevant treaty information. Although the passing of information was not restricted to the parties to the General Act its purpose, so far as they are concerned, was clearly to inform them of the actions of the parties in respect of declarations and denunciations.

109. The object of notifying declarations under Article 40 and of denunciations under Article 45 could as easily be achieved by notice direct to other States or, for that matter, through the Secretary-General of the United Nations or some other suitable intermediary. Therefore, just as the continued existence of the League is not essential to the continued validity and operation of the basic obligations of the Act (e.g., Art. 17), so the role of the Secretary-General of the League under these Articles is not essential to its validity and effective operation. It is submitted that none of these provisions of the General Act is invalid or inoperative by reason of there being no Secretary-General of the League. They are not invalid because none is an essential condition. Nor are they altogether inoperative—because of resolution 24 (I) of the General Assembly of the United Nations (see para. 121 *et seq.* below) and also because a party wishing to make a declaration or denunciation can effectively achieve the object of the provisions by bringing it to the notice of the other parties. If the main obligations of the Act are not dependent on the continuance of the League it would clearly be contrary to common sense, in the absence of a clearly expressed intention, to hold that ancillary machinery provisions, such as these, are.

110. The Government of Australia therefore submits that on close analysis the General Act was not so integrated structurally with the League as to render it either invalid or inoperative by reason of the League's demise and that in any event no such effect could have been produced as to Chapter II of that Act.

(d) *References to the League in Other Treaties for Pacific Settlement not Made Under the Auspices of the League Were Never Regarded as Reasons for Preventing these Treaties from Remaining in Force After the Demise of the League*

111. The General Act is only one of many arbitration treaties concluded in the inter-war years. There were 130 such treaties concluded between 1918 and 1928, 94 of them subsequently to 1924, that is, to the Locarno Pact, embodying no less than 11 different methods of procedure. They have been collected in Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (1931), and they are also set forth in the League publication, *Systematic Survey of the Arbitration Conventions and Treaties of Mutual Security Deposited with the League of Nations* (2nd ed., 1927). Treaties entered into after 1927 up until the establishment of the United Nations are contained in the United Nations publication, *Systematic Survey of Treaties for the Pacific Settlement of Disputes 1928-1948*.

112. The General Act was unique among these treaties only in that it was in form a multilateral treaty and of a more comprehensive nature than most other systems for pacific settlement; and the reason for its existence, as the United Kingdom Government pointed out at the time (see para. 86 above) was only that it was convenient to have one instrument on the same subject

embodying standard rules for pacific settlement instead of a multiplicity of instruments which diverged in varying respects from each other.

113. Twenty-two of these treaties, concluded at the time of the League of Nations, make reference to the League of Nations, including its organs, and so far as the researches of the Government of Australia have revealed it has never been suggested that this in any way linked their continued existence to that of the League. These treaties, and the respective articles, are as follows:

1. Treaty of Conciliation between Norway and Sweden of 1924, Articles 7, 8 and 9;
2. Treaty of Conciliation between Denmark and Norway of 1924, Articles 7, 8 and 9;
3. Treaty of Conciliation between Denmark and Finland of 1924, Articles 7, 8 and 9;
4. Treaty of Conciliation between Finland and Norway of 1924, Articles 7, 8 and 9;
5. Treaty of Conciliation between Finland and Sweden of 1924, Articles 7, 8 and 9;
6. Treaty of Conciliation between Denmark and Sweden of 1924, Articles 7, 8 and 9;
7. Treaty of Conciliation, Arbitration and Compulsory Jurisdiction of 1928 between Greece and Romania, Articles 5 and 24;
8. Treaty of Arbitration between the United States and Italy of 1928, Article II *(d)*;
9. Treaty of Arbitration between the United States and Germany of 1928, Article II *(d)*;
10. Treaty of Arbitration between the United States and Finland of 1928, Article II *(d)*;
11. Treaty of Arbitration between the United States and Denmark of 1928, Article II *(d)*;
12. Treaty of Arbitration between the United States and Czechoslovakia of 1928, Article II *(d)*;
13. Treaty of Arbitration between the United States and Poland of 1928, Article II *(d)*;
14. Treaty of Arbitration between the United States and Albania of 1928, Article II *(d)*;
15. Treaty of Arbitration between the United States and Sweden of 1928, Article II *(d)*;
16. Treaty of Conciliation, Arbitration and Compulsory Adjudication between Denmark and Germany of 1926, Exchange of Notes;
17. Treaty of Conciliation, Arbitration and Compulsory Adjudication between France and Romania of 1926, Article 19;
18. Treaty of Conciliation, Arbitration and Compulsory Adjudication between Germany and Czechoslovakia of 1925, Articles 1, 18, 19 and 21;
19. Treaty of Conciliation, Arbitration and Compulsory Adjudication between Germany and Poland of 1925, Articles 1, 18, 19 and 21;
20. Treaty of Conciliation, Arbitration and Compulsory Adjudication between Czechoslovakia and Sweden of 1926, Articles 1, 18, 19 and 21;
21. Treaty of Conciliation between Sweden and Uruguay of 1921, Articles 1, 6, 8, 13 and 15;
22. Treaty of Conciliation between Sweden and Chile of 1921, Articles 1 and 15.

Many of these embodied references to the Council of the League of Nations,

the Seat of the League of Nations, and Commissions set up pursuant to the League of Nations, which, in addition to the provisions concerning submissions to the jurisdiction of the Permanent Court of International Justice, are strikingly parallel in almost all relevant details to the provisions in the General Act.

114. Treaties 8 to 15 in the above list are shown in the 1972 edition of *Treaties in Force* as being in force. Treaties 8 and 9 were specifically revived after the war. All these treaties contain articles to the effect that their provisions should not be invoked in any dispute the subject-matter of which would depend upon or involve the observance of the obligations of a Member of the League of Nations.

115. Treaty No. 16 between Denmark and Germany has been invoked since the demise of the League of Nations in judicial proceedings (*Petersen* v. *Federal Republic of Germany*, *International Law Reports*, Vol. 42, p. 383 (1961)). This Treaty provided for reference of any dispute not settled by the Permanent Board of Conciliation to be referred to the Council of the League of Nations, which would deal with it under Article XV of the Covenant of the League. Denmark stated in the proceedings that the Treaty might be taken into consideration.

116. Other important agreements of this nature which made reference to the League of Nations organs and yet stayed outside the League of Nations structure were the Locarno Arbitration Agreements which were similar bilateral treaties entered into by Germany with Belgium, France, Poland and Czechoslovakia. See 54 *League of Nations Treaty Series*, pages 305 ff.

117. Just because the General Act was in form a multilateral treaty it cannot be argued that it was any more an integral part of the League of Nations than any other of these treaties. There is no instance of any such treaty having been held not to be or having been treated as not being in force merely because it contained references to the League or its organs. The Court has already held that one of these treaties, the Hispano-Belgian treaty remained "in force" after 1946. This treaty certainly contained no reference to the organs of the League of Nations, but did refer to the Permanent Court of International Justice and this was a characteristic which it shared with most of the other treaties on the subject. However, is it conceivable that only the treaties which did make reference to the League are not in force? Is it likely, for instance, that the treaty between Denmark and Norway of 1924 which contains references to the League and to the Court is not in force while that between Spain and Belgium, which only contains references to the Court, is? Is it conceivable that the General Act is different from either of these treaties, because it shares with one the characteristic of references to the League of Nations and with both that of submission to the Permanent Court?

(e) *Conclusion*

118. While the General Act may have emerged from the same ideological milieu as the Covenant of the League of Nations, it constituted a comprehensive scheme for the settlement of all international disputes which existed separately from the League structures, and for which these did not provide. It was open to non-members of the League and reference to the League was, as far as possible, avoided. The specific stipulation was made that it was to "remain" in force until denounced in accordance with Article 45. The only conclusion open is that the Act was not brought down by the demise of the League.

119. Since the lapse of the General Act does not follow logically from the

construction of its provisions or the clearly expressed intentions of its contracting parties, the French suggestion that it did lapse raises questions of treaty law of importance, and to these the Government of Australia will later turn.

3. The Practice of the United Nations in Relation to the General Act and Similar Treaties Shows that It Remained in Force After the Termination of the League of Nations

120. The Government of Australia turns now to a further body of material which demonstrates in a striking way the continuity in force of the General Act at the demise of the League. This material consists of the practice of the United Nations in relation to multilateral treaties concluded under the League. This practice bears upon the present question in two ways:

(i) It provides an acknowledgement of the continuance in force specifically of the General Act.

(ii) It indicates clearly that, in the eyes of the United Nations the fact that the League of Nations came to an end did not by itself bring to an end multilateral treaties comparable to the General Act concluded during the period of the United Nations.

(a) *Acknowledgement of the Continuance in Force of the General Act*

121. In order to appreciate the significance of the United Nations practice in relation to the General Act, it is necessary to start from resolution 24 (I) of the General Assembly adopted on 12 February 1946 (for text see Annex 4, para. 1). This resolution referred to the fact that the League of Nations or its organs previously exercised numerous functions under treaties which, after the dissolution of the League, it would be desirable that the United Nations should perform. It also stated that certain Members of the United Nations who had previously been Members of the League of Nations and who were also parties to the League treaties were proposing at the forthcoming last Assembly of the League to move a resolution under which the Members of the League would assent to certain steps for which United Nations General Assembly resolution 24 (I) was going to make provision.

122. The United Nations resolution then recorded that the Members of the United Nations parties to the instrument referred to above would, by this resolution, "assent and give effect to the steps contemplated below". In addition the General Assembly declared that the United Nations was willing to assume the exercise of certain functions and powers. These fell into three groups:

(A) functions pertaining to a Secretariat;

(B) functions and powers of a technical and non-political character; and

(C) functions and powers under treaties, international conventions, agreements and other instruments having a political character.

The action of the Assembly differed in relation to each of these groups. What matters for present purposes, though, is that as regards group (A), no distinction was drawn between the two categories of, on the one hand, technical and non-political treaties and, on the other hand, treaties having a political character. As regards Group A treaties, the General Assembly declared that the United Nations was "willing to accept the authority of the instruments and to charge the Secretariat of the United Nations with the task of performing for the parties the functions pertaining to a secretariat, formerly entrusted to the League of Nations".

123. This resolution of the General Assembly was followed two months later, on 18 April 1946, by a resolution adopted at the final Assembly of the League (Annex 4, para. 2) in which directions were given to the League Secretary-General to transfer to the Secretariat of the United Nations "for safe custody and *performance of the functions hitherto performed by the Secretariat of the League*, all the original signed texts" of the League Treaties. (Italics added.)

124. Now there is nothing in the general language of these arrangements to exclude their application to the General Act. That treaty was included in a list of 72 multilateral conventions (not including additional protocols not separately registered with the Secretary-General) concluded under the auspices of the League of Nations, which was issued by the League in 1944 as *Special Supplement No. 193* to the *Official Journal* of the League. That list was in turn amended to bring the status of the parties up to date in *Special Supplement No. 195* which was issued by the League at the time of its dissolution in 1946.

125. The General Act was also listed at page 93 of another list issued by the League in September 1945, which was confined to treaties conferring powers on the organs of the League, other than purely administrative ones. (See *List of Conventions with Indication of the Relevant Articles Conferring Powers on the Organs of the League of Nations* (C. 100.M.100 1945V).)

126. Thus it can be seen that when, in February and April 1946 the United Nations and the League adopted their respective resolutions, all concerned had in mind a clear conception of the range of treaties covered by the arrangements.

127. This conception secured its first public reflection in the United Nations context in 1949, when the Secretary-General published his list of *Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in Respect of which the Secretary-General acts as Depositary* (Ref. UN Publications 1949, V.9.). The Secretary-General listed both the General Act (with a footnote reference to the last League of Nations text) (at p. 25) and, it may be noted, the Revised General Act (at p. 23).

128. Recognition of the survival of the General Act was repeated in 1959 in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7 of 7 August 1959, p. 56). This stated that—

> "the Secretary-General of the United Nations took over the functions of depositary in respect of the multilateral treaties concluded under the auspices of the League of Nations".

Footnote number 61 provided a reference to a list of these treaties:

> "For a list of these treaties, see *League of Nations Official Journal, Special Supplement*, No. 193, 1944."

This is the 1944 League list previously referred to.

129. Between 1949 and 1965 the Secretary-General did not publish a list of the treaties which he regarded as subject to the operation of resolution 24 (I). In 1965 in his publication *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions* (ST/LEG/SER. D/1), he listed in Part II under the heading "League of Nations Multilateral Treaties" 26 of the 72 treaties previously listed by him. This list did not include the General Act.

130. However, this is of no significance to the present question as a con-

sideration of the document will quickly reveal. Paragraphs 6 to 9 of the Introduction to the publication (pp. xv-xvi) make it clear that the list of treaties was intended to cover only two categories. First there were those treaties which fell within resolution 24 (I) in respect of which any action had been taken by States since the transfer of custody to the United Nations and communicated to the Secretary-General. The second category consisted of 11 League treaties that were the subjects of General Assembly resolutions 1903 (XVIII) of 18 November 1963 and 2021 (XX) of 5 November 1965. It would appear that the General Act was excluded from the terms of reference of these resolutions because it was unsuitable for extended participation in view of the existence of the Revised General Act of 1949.

131. This in itself would be sufficient explanation why the General Act was omitted from the United Nations study of the treaties of the League which had been effectively closed (para. 135 below), and also why it was omitted, along with many other League treaties, from Part II of the Secretary-General's list.

132. As no action had been taken by any State with regard to the General Act since the transfer of functions to the United Nations which had been communicated to the Secretary-General and as it was not one of the 11 treaties selected, it did not fall to be included in the list. Nor, for these reasons, has it fallen to be included in any subsequent list. In these circumstances the omission of the General Act is of no relevance to the present question.

(b) *The United Nations Practice Shows that Other League Treaties Were not Regarded as no Longer Remaining in Force Merely Because of the Demise of the League*

133. Although the Secretary-General was invested by virtue of resolution 24 (I) with depositary functions in respect of 72 League treaties, in the case of many of these, including the General Act, these functions did not include accession because the participation clauses excluded this possibility. In some cases the treaties restricted adherence to Members of the League, or to non-members who might be invited to attend the drafting conference, or were expressly nominated.

134. The General Act was a treaty of such restricted participation. Accessions to it by new States thus became impossible with the demise of the League of Nations unless steps were taken to amend participation clauses. But clearly this did not mean in any way that the General Act and the many other treaties which found themselves in a similar position were no longer in force.

135. The desirability of opening up some of these treaties to further participation was raised in the Sixth Committee of the General Assembly at its Seventeenth Session. A consideration of the events which followed the raising of this question indicates clearly that other multilateral League treaties were not regarded as no longer remaining in force because of the demise of the League. These are detailed in paragraphs 9-28 of Annex 4.

136. The Secretary-General's study of the effect of the demise of the League of Nations upon the Minorities Treaties (*Study of the Legal Validity of the Undertakings Concerning Minorities*, E/CN 4/367, 7 April 1950) also supports the Government of Australia's submission that the General Act did not lapse by reason of the demise of the League.

137. For, whereas the General Act was only peripherally connected with the League of Nations, the Minorities Treaties were intrinsically linked with

the exercise of "powers and functions" of the Council of the League. Yet the Secretary-General's view was that these treaties, although they might have incurred extinction because of the cumulative influence of many factors, including the wholesale migration of the minorities populations, did not suffer this fate by reason only of the disappearance of the League.

138. The Secretary-General concluded that, in the event of there coming into existence an organ which was competent to respond to the undertakings made in the Minorities Treaties to the Council of the League, these undertakings could be revived, since they were only suspended by reason of the demise of the League in the case of those treaties which survived the other terminating factors. This is a conclusion amply warranted by this Court's findings in the matter of the Mandate for South West Africa.

(c) *Conclusion*

139. The Government of Australia therefore submits that the United Nations practice with regard to League treaties, including the General Act, supports the continued existence of the General Act after 1946.

4. The Adoption of the Revised General Act on 28 April 1949 Did not Affect the Continuance in Force of the General Act

(a) *Introduction*

140. The practice of the United Nations, which has just been surveyed, strongly supports the view that the General Act could not have lapsed merely because of the termination of the League of Nations. It is now necessary to refer to the fact that in 1948-1949 steps were taken to revise the General Act. As will presently be seen, this episode, far from reflecting any termination of the original General Act, proceeded on the basis, and was a confirmation, of its continued existence and operation. Indeed, it is to be observed that even the French Annex does not seek to extract from the situation any unequivocal conclusion that the General Act was regarded as at an end.

141. There are two incontestable principles embodied within the framework of the rules applicable to treaty revision which are of fundamental importance in considering the effect and significance of the revision of the General Act of 1928 by the Revised General Act of 1949. They are:

(i) The revised treaty is not abrogated save as between the revising parties, if at all, and then only to the extent of the revision; and

(ii) Revision presupposes that the previous treaty to be revised is in force, otherwise the process would be negotiation of a new treaty and not treaty revision.

(b) *The Revision of 1949 Was Accompanied by Express Statements that the Original Act of 1928 Was continuing in Force*

142. The French Annex asserts that so closely did the Act appear to be integrated into the structure of the League that after its demise the necessity was recognized of proceeding to revise it. However, the Annex concedes that the revision of the Act was not accompanied by any clear affirmation that it had lapsed.

143. Not only was there no such affirmation but, as will appear from the analysis in the paragraphs that follow, the revision of the General Act was accompanied by the clearest affirmations, which went uncontested, that the General Act was still in force for those States which were party to it and was intended to remain in force between the parties to it. This was particularly clear in the case of Belgium, which promoted the revision. The revision was not based on the premise that the demise of the League had abrogated it, nor is there any real support in the General Assembly debates on the subject for such a proposition. In fact, the debates clearly support the contrary conclusion.

144. The revision was effected by General Assembly resolution 268 (III) of 28 April 1949, which itself provides evidence that the General Act is in force. There are three recitals in the preamble to this resolution:

> "Whereas the efficacy of the General Act . . . is impaired by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared,
>
> Whereas the amendments hereafter mentioned are of a nature to restore to the General Act its original efficacy,
>
> Whereas these amendments will only apply as between States having acceded to the General Act as thus amended and, as a consequence, will not affect the rights of such States parties to the Act as established on 26 September 1928 *as should claim to invoke it in so far as it might still be operative.*" (Italics added.)

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

(c) *As to the Substitution of the Words "International Court of Justice" for "Permanent Court of International Justice", the Revision of the Original General Act Had Already Been Automatically Realized, as Between States Members of the United Nations or States Otherwise Parties to the Statute of the International Court of Justice, by Virtue of Articles 37 and 36 (1) of the Statute*

146. The most far-reaching purpose of the proposal, adopted by the General Assembly on 28 April 1949, was to restore practical efficacy to the provisions of the General Act of 1928 concerning the settlement of what the Act described as "disputes of every kind", that is, to those clauses which provided for participation, in the exercise of specific functions, of League of Nations' organs. These clauses were rendered practically inoperative by the disappearance of the League of Nations, although in the very limited terms that this Memorial has already illustrated. It was in order to restore the full

efficacy of such clauses that the proposal was made to transfer the aforementioned functions to the corresponding organs of the United Nations.

147. But in so far as the settlement of purely legal disputes was concerned, the aim of the proposal, namely, the transfer to the International Court of Justice of the jurisdiction ascribed by the General Act to the Permanent Court, had already for the most part been achieved. It has already been recalled that in respect of the member States of the United Nations, or States otherwise parties to the Statute of the International Court of Justice, Articles 37 and 36 (1) of the new Court's Statute had already realized the revision that the proposal of 1949 aimed only to generalize.

148. It is therefore obvious that for the member States of the United Nations, such as France, Australia and New Zealand, there was no necessity for accession to the Revised General Act, for the purpose of carrying into effect the transfer to the International Court of Justice of the jurisdiction conferred on the Permanent Court by the original General Act of 1928. In actual fact, the hindrance caused by the disappearance of the Permanent Court of International Justice was in 1949 much less important than that caused by the disappearance of the League of Nations; it was limited to treaties concluded between or with States which were not, or were not yet, members of the United Nations or parties to the Statute of the International Court of Justice. And the Interim Committee of the General Assembly did not fail to note quite specifically that the provisions of the Act relating to the Permanent Court had lost a good part of their effectiveness only *in respect of Parties who were not members of the United Nations Organization, or who were not parties to the Statute of the International Court of Justice* [1].

149. Notwithstanding the fact that the States parties to the present dispute did not accede to the Revised General Act of 1949, this accession was not necessary in order that the transfer be made to the International Court of Justice of the jurisdiction conferred by the original General Act of 1928 on the Permanent Court of International Justice. As between those States, Chapter II of the General Act had already recovered its full effectiveness.

(d) *The "Travaux Préparatoires" of the Revised General Act of 1949 Clearly Evidence the Conviction of the Continuing Validity and Effectiveness of the Original General Act of 1928*

150. The history of the process which led to the adoption by the General Assembly of the resolutions containing the text of the Revised General Act fully supports the conclusion that the sponsors and the authors of the resolution were clearly convinced that the General Act of 1928 was still in force and will remain in force as between those parties to it who do not adhere to the Revised Act.

151. The proposal to establish a sub-committee to study the question and make a report to the Interim Committee of the General Assembly was submitted to the Interim Committee by the Representative for Belgium, the well-known international lawyer M. J. Nisot. In referring to the analogy of the purposes of the General Act of 1928 with those of the United Nations Charter, the Belgian delegation proposed that the sub-committee—

> "consider the possibility of ensuring the transfer to the organs of the United Nations, including the International Court of Justice, of the

[1] UN doc. A/605, 13 August 1948, para. 46.

functions conferred upon the organs of the League of Nations and upon the Permanent Court of International Justice by the General Act for the Pacific Settlement of International Disputes of September 26, 1928 [1]".

152. The proposal made by the Belgian delegation was, according to the statement submitted by it, aimed at—

"... restoring to the General Act for the Pacific Settlement of International Disputes of September 1928 its original efficacy, impaired by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared [2]".

However, the delegation took care to specify in the same text that—

"... the General Act, thus amended, will only apply as between States having acceded thereto, and, as a consequence, *will not affect the rights of such States, parties to the Act as established on 26 September 1928, as should claim to invoke it in so far as it might still be operative*" (italics added).

153. M. Nisot, in foreshadowing the specific proposal in the Interim Committee, stated that—

"*The General Act was still in force*, but its effectiveness was decreased owing to the disappeareance of certain essential parts of the machine, i.e., the Secretary-General, the Council of the League, and the Permanent Court of International Justice. The aim of the Belgian proposal was the transfer to the organs of the United Nations, including the International Court of Justice, of the functions which the Act accorded to the organs of the League of Nations and the Permanent Court. The proposal was practical and simple; it could be carried out without delay by a protocol consisting of a few articles; and it would result in the complete re-establishment of one of the most important collective treaties which existed up to the present in the field of the peaceful settlement of international disputes [3]." (Italics added.)

154. The same position was adopted in a preliminary report of sub-committee 2 of the Interim Committee, of which the French representative M. Ordonneau was Chairman and Dr. P. C. Jessup was Rapporteur. This document states that—

"*The proposal does not aim at remoulding the General Act which is still in force* and to which the Belgian Government is a party. Its sole object is to provide for the effective operation of the Act under present conditions by arranging for the transfer of the above-mentioned functions [4]." (Italics added.)

155. The statement of the Belgian representative, which is Annex A to that document, contains two relevant passages:

"*The General Act for the pacific settlement of international disputes of 26 September 1928 is still in force.* A great number of States have acceded to it. The aim of the Belgian proposal is to secure that certain adjustments

[1] UN doc. A/AC.18/18, 11 February 1948.
[2] *Ibid.*, Addendum 1.
[3] UN doc. A/AC.18/SR11, 2 March 1948, at pp. 4-5.
[4] UN doc. A/AC.18/48, 19 March 1948, at p. 10.

should be made which would restore it to complete efficacy [1]." (Italics added.)

"The Belgian proposal does not aim at remoulding the General Act, which is still in force.

Its sole object is to ensure the transfer to the organs of the United Nations, including the International Court of Justice, of those functions which the General Act conferred upon the organs of the League of Nations and upon the Permanent Court of International Justice. These functions have been mentioned in the analysis of the provisions of the General Act which has been made above [2]."

156. A history and analysis of the General Act prepared for the Interim Committee by the Secretariat also adopted the same position.

"III. *Present Status of the General Act*

26. In accordance with Article 44, paragraph 1, which provides for the entry into force of the General Act on the ninetieth day following receipt by the Secretary-General of the League of Nations of at least two accessions, the General Act came into force on 16 August 1929 and is now in force for the fourth successive period of five years, expiring on 15 August 1949 [3]."

157. The Report of the Interim Committee to the General Assembly of 13 August 1948 made the following observations on the Belgian proposal:

"In the view of the Belgian representative, the consent of the parties was unnecessary since . . . his proposal *did not suppress or modify the General Act, as established in 1928, but left it intact as also, therefore, whatever rights the parties to that Act might still derive from it.* The Belgian proposal would achieve its object through a revised General Act, binding only on States willing to accede thereto. There would thereby be created an entirely new and independent contractual relationship for the implementation of certain of the ends contemplated in Articles 11 (paragraph 1) and 13 (paragraph 1 *(a)*) of the Charter. Thanks to a few alterations, the new General Act would, for the benefit of those States acceding thereto, restore the original effectiveness of the machinery provided in the Act of 1928, an Act which, though still theoretically in existence, has become largely inapplicable.

It was noted, for example, that the provisions of the Act relating to the Permanent Court of International Justice had lost much of their effectiveness in respect of parties which are not Members of the United Nations or parties to the Statute of the International Court of Justice [4]." (Italics added.)

158. It has already been noted that the last remark by the Interim Committee applied to a very limited number of States, as in 1949 the great majority of the States parties to the General Act of 1928 had become Members of the United Nations or parties to the Statute of the International Court of Justice, so that for these States the provisions of the Act relating to judicial settlement of legal disputes had already recovered their full effec-

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[1] *Ibid.*, at p. 16.
[2] *Ibid.*, at p. 19.
[3] UN doc. A/AC.18/56, 4 May 1948, at p. 7.
[4] UN doc. A/605, *G.A.O.R., Suppl. No. 10*, at pp. 28-29.

tiveness. On this point, the purpose of the proposed revision was only fully to complete the transfer from one Court to the other of the commitments of compulsory jurisdiction already assured for the most part by Articles 37 and 36 (1) of the Statute of the International Court of Justice.

159. Thus it is clear that the Belgian delegation, the Interim Committee of the General Assembly, and the United Nations Secretariat regarded the General Act as still in force at the time the Revised General Act was adopted and that its continuation in force was not affected by the Revised General Act. The reference made in the preamble to the fact of the efficacy of the General Act being impaired was not a reference to the substantive obligations arising under the Act.

160. In the Twenty-Eighth Meeting of the *Ad Hoc* Political Committee of the Third Session of the General Assembly, the Belgian representative in his statement confirmed that the original Act "was still valid" [1]. Again, in the Plenary Session of the General Assembly at its 198th Meeting, the representative for Belgium said:

> "The General Act of 1928 was still in force; nevertheless its effectiveness had diminished since some of its machinery had disappeared; the Secretary-General of the League of Nations, the Council of the League of Nations, and the Permanent Court of International Justice [2]."

161. Even more importantly the representative for France M. Lapie, observed that—

> "The General Act of 1928 which it was proposed under draft resolution A (A/809) to restore to its original efficacy, was a valuable document inherited from the League of Nations and it had only to be brought into concordance with the new Organization. Moreover, it was an integral part of the long tradition of arbitration and conciliation which had proved itself effective long before the existence of the League itself [3]."

162. At the end of the debate on 28 April 1949 the resolution already quoted was passed opening the Revised General Act for signature.

163. It is the submission of the Australian Government that four major points emerge from this analysis:

(i) The General Act was regarded at that time as a treaty in force.

(ii) Although references were made to its impaired efficacy, this was only in relation to the machinery provisions of the Act and mainly to the fact that due to the demise of the League of Nations States could no longer accede to it. It was not made in relation to the substantive obligations arising thereunder.

(iii) The references to the provisions of the Act relating to judicial settlement of legal disputes having lost much of their effectiveness did not concern States parties to the Act which had already become Members of the United Nations or parties to the Statute of the International Court of Justice. For those States, Chapter II of the Act was regarded as having already recovered its full effectiveness.

(iv) The Revised General Act did not affect the rights of States parties to the General Act.

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[1] UN *Official Records*, Third Session, *Ad Hoc* Political Committee, 28th Meeting, p. 323.

[2] UN *Official Records*, Third Session Plenary, 198th Meeting, p. 176.

[3] *Ibid.*, p. 193.

164. In stressing so carefully, as has been seen, that the 1949 revision in no way affected the rights and obligations of the parties to the original Act of 1928, the States intended to emphasize that what they pursued was solely restoration of the Act to the fullest extent of its former efficacy. Clearly it was their firm conviction that the General Act still constituted—especially that part referring to the settlement of disputes—an agreement that was valid and operative for most of its original parties and particularly in relation to all its essential substantive obligations, and that it was not an obsolete instrument suitable only for revival. And certainly there is nothing that could lead one to believe that such a conviction has lost its force with the passing of time.

5. The General Act Has not Been Terminated by Desuetude or Obsolescence

165. The Government of Australia has so far shown two things. The first is that the demise of the League of Nations in 1946 did not by itself serve to bring the General Act to an end. The second is that the preparation of the Revised General Act within the United Nations in 1948-1949 proceeded on the basis that the original General Act was still in force and that the Revised General Act would not deprive the original Act of its effectiveness between the parties to it.

166. It is convenient now to turn briefly to a point which is made in the French Note in such fleeting terms that it is scarcely possible to determine whether it is seriously put forward as a legal argument. In a long sentence in the eighth paragraph of the Note, there appears the phrase "et la désuétude dans laquelle il est tombé depuis la disparition du système de la SdN". This is not elaborated in the Note. While the Annex spends some paragraphs in developing the thought that the General Act is no longer in force and uses the word "desuetude" twice, the idea is not further expanded. Once again, therefore, the Government of Australia is placed in the position of having to deal with a contention presented without sufficient elaboration or precision.

167. In so far as considerations of fact are material to the survival of the General Act, the Australian Government has shown above and will further show that there has been repeated recognition of the existence of the General Act as a valid and binding international instrument. Here the Government of Australia will set out certain material legal considerations.

168. The submissions of the Australian Government can conveniently begin from the presumption, too fundamental and well established to require citation of authority, that a legal situation once established will continue until altered by one or another recognized legal method. The French Government, in its Note, has indicated its opinion that "desuetude" is one of these recognized legal methods. But the Australian Government considers that this method cannot be applied to the case of the General Act. Nor can it be taken into consideration for establishing the termination of that instrument. The notions of "desuetude" and of "obsolescence" are not frequently referred to by authors of international law. The text books contain little discussion of them [1] and the Vienna Convention on the Law of Treaties makes no mention

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[1] Sir Gerald Fitzmaurice, one of the closest analysts of the subject, is very negative as to their existence:

> "Obsolescence is sometimes ranked as a ground determinative of treaties by lapse. But although such cases may involve circumstances rendering it possible to

of them. In the comment prepared by the International Law Commission on what is now Article 42 of the Vienna Convention, the following considerations were inserted:

> "[T]he Commission considered whether 'obsolescence' or 'desuetude' should be recognized as a distinct ground of termination of treaties. But it concluded that, while 'obsolescence' or 'desuetude' may be a factual cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty." (*Yearbook of the International Law Commission, 1966*, Vol. II, p. 237.)

169. Desuetude (or obsolescence) therefore in relation to treaty termination describes no more than this: conduct or practice of the parties from which it may be inferred that they all tacitly agree that the treaty is at an end.

170. It is evident that in determining whether a treaty has been so terminated the greatest caution is required. To prove the extinction by desuetude of a previously existing treaty is no easier nor simpler than proving the formation of a new treaty. What has to be proved is the clear intention of the parties to put an end to a valid treaty. Positive and conclusive evidence of intent must be produced. For instance, there must be sufficiently repeated instances of opposition by a party to the application of the treaty in question when invoked by the other parties and a final renunciation by the latter of their rights to insist on performance of the treaty. The abrogative effect can surely not result from the conduct of one party alone; nor simply from the fact that no practical use of the treaty clauses has been made over an extended period of time. This applies particularly to the case of treaties of only occasional or intermittent function as opposed to those in regular and necessary use. The difficulties of proof are manifestly greater in the case of a multilateral treaty than that of a bilateral treaty. For mere plurality of conduct would be of no more significance than unilateral conduct, unless it gave rise to a cogent inference of unanimous consent.

171. Similar considerations apply to treaties which contain clauses providing for their termination on short notice or at regular intervals.

172. There is the possibility that desuetude may have its effect upon a treaty by virtue of the emergence between the parties of a supervening custom. However, the requirements for the establishment of such a custom are no less exacting, especially in terms of the identification of the relevant concordant conduct of the parties and the existence of a sufficiently widely accepted *opinio juris*. It is evident that in this case these criteria are not satisfied.

173. The only instance of judicial consideration of desuetude which research has so far been able to discover is provided by the decision of the Senate of Hamburg acting as arbitrator in the case of *Yuille, Shortridge et Cie*. In this case, Portugal argued that certain British subjects were not protected by relevant British-Portuguese treaties because their rights had never previously been invoked. The Arbitrator said:

> "Néanmoins, de ce que plusieurs Anglais (quel qu'en soit le nombre) n'ont pas voulu se prévaloir de leur privilège, on ne saurait tirer une

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invoke some other principles of law conducing to termination, such as physical impossibility of further performance, the Rapporteur does not believe that there is any objective principle of law terminative of treaties on the ground of age, obsolescence, or desuetude as such." (*Yearbook of the International Law Commission, 1957*, Vol. II, p. 48.)

conclusion contraire à ceux qui le revendiquent. Ceux-la n'ont pas le droit d'établir un usage que ceux-ci seraient forcés d'accepter comme obligatoire. La question changereait de caractère si le gouvernement de la G.-.B. avait à plusieurs reprises refusé d'intervenir, estimant que le traité était tombé en désuétude, ou s'il avait, pour le même motif, renoncé à poursuivre une intervention commencée. Car il est certain qu'il appartient aux gouvernements d'abroger expressément un traité ou d'en suspendre l'usage, ce qui devra être regardé par leurs sujets comme une désuétude dérogeant au traité.

Mais ce non-usage devrait émaner du gouvernement et se manifester par le refus d'intervenir nonobstant les requêtes de ses sujets à cet effet, ou par l'abandon d'une intervention déjà commencée par suite des réclamations de la part du Portugal fondées sur la nullité du traité.

Alors même cependant, on ne devrait admettre la vertu suspensive de l'usage, relativement au traité, qu'avec une réserve extrême. Car dans les cas où il ne résulterait de la violation du traité que peu ou point de préjudice pour les sujets britanniques, l'intervention de leur gouvernement serait oiseuse; elle constituerait une impolitesse gratuite envers un gouvernement ami; s'en abstenir serait donc un acte de courtoisie et non de renonciation." (Lapradelle et Politis, *Recueil des Arbitrages Internationaux*, vol. 2, p. 78, at p. 105.)

174. The mere fact that a treaty is old or has not been invoked either at all or recently cannot by itself be treated as leading to its termination by desuetude. This is clearly recognized by a number of publicists of authority. Thus, Lord McNair makes the point in the following passage:

> "... by desuetude is meant not mere lapse of time, however long, but discontinuance of the use of and resort to, a treaty or acquiescence in such discontinuance. Not a great deal of authority on the matter exists. That mere lapse of time does not bring about the termination of a treaty is patent upon a consideration of the ancient treaties which the United Kingdom Government and other Governments regard as being still in force [1]." (*Law of Treaties* (1961), p. 516.)

175. The Government of Australia submits that it must be obvious that the General Act has not fallen into desuetude. True, it was not actually relied upon as a basis for the settlement of disputes during the period 1928-1945; but that is no more than a period of 17 years. It certainly did not put an end to the treaty, and was not regarded as having done so. Indeed, the French Government does not so allege. Clearly, the General Act is a treaty which by its terms is not intended for daily use. The settlement of disputes by the processes contemplated in the General Act is necessarily irregular and rare. Moreover, since recourse to the General Act is voluntary and available as an alternative to other methods, one cannot expect the regularity and uniformity of use to which treaties are put when the application of their terms is mandatory.

176. There is, therefore, nothing inherently destructive in the fact that the General Act has rarely been invoked. What matters is that it has on occasion

[1] McNair, *ibid.*, at pp. 516-517, gives a number of instances. For example, he refers to the treaties of alliance between the United Kingdom and Portugal, which though dating as far back as 1373 were regarded as still in force in an English Parliamentary Paper of 1898.

been used, that this use provoked no opposition at all from the defendant State, and that the continued existence of the Act has repeatedly been recognized by States in recent years, when no State has ever denied such existence.

177. In the period 1945-1949 there is clear evidence, as shown above, that the General Act was regarded as still in force; and this manifestly runs counter to any suggestion that the intention of the parties was to treat it as having lapsed. And, as will be shown below, there is striking evidence of the invocation of the General Act since 1945 by a number of States—and none more so than France—in a manner which runs quite counter to any idea of an intention to regard the treaty as at an end.

178. In these conditions, to assert the termination of the General Act of 1928 by "desuetude" appears as such an extravagant proposition that the Government of Australia can hardly understand how it can have been advanced. An allegation of desuetude, as already suggested, must be proved strictly. The burden of proof rests upon the party asserting the termination of the treaty; and this is a burden which the French Government has not even begun to support.

179. Moreover, it should not be forgotten that the General Act, notwithstanding the bilateral character of the relationship which exists between the parties to any dispute in which it is invoked, is a multilateral treaty; and in the case of such a treaty, if desuetude or any other form of general termination is to be established, it must be by reference to the intention or the *opinio juris* of all the parties, and not the slightest basis exists for a positive conclusion in this respect.

180. Summing up, the Government of Australia can regard as fully answered the French suggestion of the so-called "desuetude" of the General Act.

6. The General Act Has not Been Terminated Because of Any Fundamental Change of Circumstances

181. In spite of the conclusion just now reached, the Government of Australia thinks that it might be useful if brief reference is also made to a notion which, though not mentioned by the French Government, may lie hidden behind the curtain of notions like desuetude or obsolescence, although it is an entirely different one.

182. For some writers, in fact, "obsolescence", in so far as it can be distinguished from "desuetude", is regarded as an aspect of, or as an alternative way of referring to, the concept of *rebus sic stantibus*. It is so treated by Lord McNair in his *Law of Treaties* (*op. cit.*, p. 518) and similarly by Scelle in his *Précis de droit des gens* (pp. 417-418).

183. Indeed, to the extent that any reasoned reference is made to the concept of *rebus sic stantibus*, i.e., of a fundamental change of circumstances, it is abundantly clear that the concept totally fails to establish the termination of the General Act.

184. As recently as February 1973, the Court has had occasion to discuss the principle of *rebus sic stantibus* in terms which clearly exclude its application in the present case. First, the Court acknowledged that Article 62 of the Vienna Convention, dealing with "Fundamental Change of Circumstances", might be treated as declaratory of existing law on the subject. The Court said:

"... the conditions and exceptions to which it is subject, have been

embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances" (*Fisheries Jurisdiction* case, *I.C.J. Reports 1973*, at p. 63).

185. It is permissible, therefore, to look more closely at Article 62. The material parts read thus:

"1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."

186. What fundamental change of circumstances could be alleged as having taken place in the present case? Non-use is not such a change; nor is the demise of the League. To justify the exclusion of these factors it is necessary to do no more than quote the Court's own words in the *Fisheries Jurisdiction* case:

"The invocation by Iceland of its 'vital interests', which were not made the subject of an express reservation to the acceptance of the jurisdictional obligation under the 1961 Exchange of Notes, must be interpreted, in the context of the assertion of changed circumstances, as an indication by Iceland of the reason why it regards as fundamental the changes which in its view have taken place in previously existing fishing techniques. This interpretation would correspond to the traditional view that the changes of circumstances which must be regarded as fundamental or vital are those which imperil the existence or vital development of one of the parties . . . But the alleged changes could not affect in the least the obligation to submit to the Court's jurisdiction, which is the only issue at the present stage of the proceedings" (pp. 63-64).

"Moreover, in order that a change of circumstances may give rise to a ground for invoking the termination of a treaty it is also necessary that it should have resulted in a radical transformation of the extent of the obligations still to be performed. The change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken" (*ibid.*, p. 65).

Need the Government of Australia say more?

187. And, it may be added, even if there were some suggestion that a fundamental change of circumstances had taken place, it would be appropriate to recall the fundamental rules of consistency and good faith in treaty relations which underlie the terms of Article 45 of the Vienna Convention:

"A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under Articles 46 to 50 or Articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acqui-

esced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

188. French conduct which may, at the least, be considered as demonstrating acquiescence in the validity of the General Act, or in its maintenance in force and operation, will be amongst the matters set out in the next section. This will be devoted to a consideration of the confirmation in State practice and otherwise of the continuing validity of the General Act.

7. The General Act Remains Valid and Effective

(a) *General Remarks*

189. It has already been recalled that the French Note and Annex allege that the General Act lost its effectiveness and became invalid after the collapse of the League of Nations. Although an attempt is made to support this assertion by invoking the demise of the League and the notion of desuetude, the assertion nevertheless remains extremely vague. Not the slightest piece of evidence is advanced to confirm it. Moreover, it is manifestly insufficient, in such a sweeping fashion, to contend that a treaty is terminated because of extraneous circumstances without any indication being given as to exactly when, let alone how, this occurred. Without some such explanation, the Court could hardly be satisfied of the correctness of this broad assertion, or that the onus, which lies on a party making it, had been discharged. Not only has France failed to make the allegation in a form which would put it in issue in these proceedings, but it has revealed an attitude of indifference to the question of the moment when it considers the General Act to have expired—an indifference which can only reveal the embarrassment which France must experience in considering the evidence of its own practice, and that of other parties to the General Act, that the General Act was clearly considered in force at some stage long after the date of the dissolution of the League of Nations.

190. The previous sections of the Memorial and those which follow demonstrate that whatever date is suggested for the lapse of the General Act, there is strong evidence to support the contrary view that it continued in force. For instance, if it is suggested that its lapse was instantaneous with the winding up of the League, why did France, several months later, make a treaty referring to the General Act as if it was still in force? (see para. 219 below). Again, if it is suggested that it lapsed when the Revised General Act was adopted in 1949, why did the sub-committee of the Interim Committee, set up to consider the Belgian proposal which led to the revision, express the view that it was still in force (see para. 154 above); and why did the Secretary-General of the United Nations list both the General Act and the Revised General Act in connection with his depositary functions in that year (see para. 127 above)? Further, if it is said to have lapsed after the judgment of the Court in the *Norwegian Loans* case (see para. 193 below), why did the French Foreign Minister refer to it as still being in force in 1964 (see para. 233 below)? And finally, if it is said to have lapsed even later, how does France explain that the Netherlands Foreign Minister, as late as 1971, has told the Netherlands Parliament that the General Act is in force (see para. 239 below)?

191. It is submitted that the French assertion that the General Act has fallen into desuetude is not only unsupported by the argument in the French Note but is supported neither by the practice of States and other relevant circumstances, nor by the principles of international law.

192. *The Australian Government has, until now, negatively proved that* the General Act of 1928 has not ceased to be in force because of the specific fact of the termination of the League of Nations or because of the Revision of 1949, or else because of factors like obsolescence, desuetude or fundamental change of circumstances. The Australian Government will now complete its argumentation by positively showing how the jurisprudence, the practice of the States and the opinions of authors confirm the continuing validity and effectiveness of the General Act.

(b) *The Judicial Authority Supporting the Continuation of the General Act*

193. Judicial recognition of the continuing applicability of the General Act after the demise of the League of Nations is found in the judgment of Judge Basdevant in a separate opinion in the *Norwegian Loans* case (*I.C.J. Reports 1957*, at p. 9). He said emphatically (at p. 74) that there was "no reason to think that the General Act should not receive the attention of the Court". While the Court did not itself utilize the General Act in its Judgment, this was for reasons quite unconnected with its continuing applicability, which neither the Court nor the parties to the case contested. These reasons become clear upon analysis of the way in which France introduced the General Act into that case.

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

195. To these objections the French Government replied on 31 August 1956 with its "Observations and Conclusions", in which it made no less than three separate references to the General Act.

196. First, at page 172 of the *Pleadings* (Vol. I), the French Government said:

> "Le refus général d'arbitrage de la Norvège est une violation d'engagements internationaux entre la France et la Norvège sur laquelle la Cour est naturellement compétente pour se prononcer, qu'il s'agisse de la violation de la convention d'arbitrage entre la France et la Norvège du 9 juillet 1904 *(annexe XII)*, de la II^me^ convention de La Haye du 18 octobre 1907 *(annexe XIII)*, de l'acceptation sans réserves par la France (le 21 mai 1931) et la Norvège (le 11 juin 1930) de l'acte général du 26 septembre 1928 ou de l'acceptation de la juridiction obligatoire de la Cour par les deux États."

197. Its second reference appears at page 173 where it said:

> "Le chapitre II de l'acte général de Genève du 26 septembre 1928 sur le règlement judiciaire vise 'tous différends au sujet desquels les Parties se contesteraient réciproquement un droit'. L'article 36, § b, du Statut de la Cour parle des différends sur 'tout point de droit international'. Quels que soient les termes des obligations assumées par la France et la Norvège dans ces divers actes, ils recouvrent en tout cas le présent litige. Le Gouvernement de la République française a une divergence de vues avec le Gouvernement norvégien qui, tout en procédant de la réclamation de ses ressortissants, constitue un différend international. Par sa nature ce différend rentre dans les cas d'arbitrage obligatoire et peut être porté

directement devant le juge international en application des règles conventionnelles en vigueur entre la France et la Norvège.

Malgré ses patients efforts de règlement par la voie diplomatique, le Gouvernement de la République constate aujourd'hui que la Norvège, par ses 'Exceptions préliminaires', lui oppose un refus absolu d'arbitrage. Ce refus est illicite, car il est contraire à une série d'obligations conventionnelles de la Norvège d'après lesquelles le litige actuel entre la France et la Norvège est un cas d'arbitrage obligatoire."

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

"Si l'on devait entendre de la thèse norvégienne que c'est la Cour internationale de Justice seule qui est incompétente, la Cour permanente d'arbitrage devant être saisie à sa place, le Gouvernement de la République ferait remarquer que l'offre de sa part de l'arbitrage a rencontré un refus absolu par la Norvège de toute forme d'arbitrage. Le Gouvernement de la République devrait alors demander à la Cour de constater qu'il y a, par ce refus d'une offre d'arbitrage, violation de la convention du 9 juillet 1904, de la convention du 18 octobre 1907 et de l'acte général du 26 septembre 1928."

199. There are thus no less than three specific and unqualified assertions in the French pleading that the General Act was then in force and capable of being invoked.

200. There was nothing casual about the invocation of the General Act in the French Observations of 31 August 1956, submitted by the Agent of the French Government. In less than three weeks what had been said to the Court in the Observations was formally repeated to the Norwegian Government in a Note from the French Ministry of Foreign Affairs dated 17 September 1956. The text of the Note is set forth in the *Pleadings* (Vol. I, at p. 301). The French Government apparently decided to renew its appeal to the Norwegian Government to agree to arbitration, even if the latter would not accept the jurisdiction of the Court. And so in the course of the Note the French Government said:

"Le Gouvernement de la République a l'honneur de faire remarquer au Gouvernement du Royaume de Norvège qu'un refus formel de tout arbitrage dans le différend actuellement soumis à la Cour prendrait une grande importance. Par la convention d'arbitrage du 9 juillet 1904 la II^me^ convention de La Haye du 18 octobre 1907, l'acte général du 26 septembre 1928, la Norvège a pris, à l'égard de la France, des obligations formelles d'arbitrage. Le Gouvernement de la République regretterait de devoir constater que les engagements résultant de ces accords ne seraient pas remplis."

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

202. The Norwegian Government replied to the French Note on 9 October 1956, reminding the French Government that the matter was already under consideration by the Court and should be dealt with within the framework of the Court's procedure. So it was not until its Memorial, dated 20 December 1956, that the Norwegian Government dealt with the references to the General Act. There are two significant features of the way in which the

Norwegian Government approached this task. First, at no moment did it suggest that the General Act was no longer in force. To put it at its lowest, the point either did not occur to, or was rejected by, Norwegian Counsel, who included Professor Bourquin, generally acknowledged as one of the most skilled and distinguished advocates ever to have appeared before this Court.

203. The second point of significance is that the Norwegian Government specifically stated that the French Government had not previously invoked in the case three conventions which it was then mentioning. The Norwegian Government concluded that:

> "si le Gouvernement français croit pouvoir articuler contre lui le grief de ne pas se conformer aux obligations qui découlent desdites conventions, on se trouverait en présence d'une demande nouvelle" (*Pleadings*, Vol. I, at pp. 220-221).

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

> "2. Il constate en premier lieu que le Gouvernement de la République française ne fait plus état dans sa réplique ni de la convention d'arbitrage franco-norvégienne du 9 juillet 1904, ni de l'acte général de Genève du 26 septembre 1928, auxquels il accordait une importance majeure dans ses observations et conclusions sur les exceptions préliminaires (pp. 172-173). L'argumentation qui en avait été tirée et à laquelle le Gouvernement norvégien avait répondu dans son contre-mémoire semble donc abandonnée." *(Ibid.)*

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

205. During the oral hearings on 14 May 1957, when discussing the question of whether the non-payment of contract debts was in the domain of questions governed by international law, the distinguished French Agent reintroduced the subject of the General Act. The Agent said that the Norwegian refusal of arbitration had a bearing on the payment of Norway's international obligations. He continued as follows:

> "Le Gouvernement norvégien porte ses efforts sur l'idée que, s'il y a refus d'arbitrage contraire aux engagements internationaux de la Norvège, c'est là problème différent, demande nouvelle. A cet argument de pure procédure, le Gouvernement de la République répondra de deux manières." (*Pleadings*, Vol. II, at pp. 59-60.)

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

> "Une fois de plus, devant le juge — dont la Norvège, comme la France, a fait le souverain de tout litige juridique — le Gouvernement de la République fait appel au Gouvernement norvégien pour qu'il accepte la juridiction de la Cour. Comme le sait mon éminent collègue, M. l'agent du Gouvernement norvégien, l'accord des Parties est possible à tout moment de la procédure (arrêt n° 4, arrêt n° 5, arrêt n° 12). Car, encore une fois, je dois, au nom du Gouvernement de la République, lui rappeler

les engagements formels de la Norvège, d'abord en vertu de la convention franco-norvégienne d'arbitrage du 9 juillet 1904: 'Les différends d'ordre juridique ou relatifs à l'interprétation des traités existant entre les Hautes Parties contractantes . . . seront soumis à la Cour permanente d'Arbitrage', puis de l'article 17 de l'acte général du 26 septembre 1928: 'Tous différends au sujet desquels les Parties se contesteraient réciproquement un droit seront soumis à la Cour permanente de Justice internationale.' Cette disposition est applicable à moins que les Parties ne choisissent un arbitre, ce que la Norvège a constamment refusé.

La Cour a donc juridiction en notre affaire, sur la requête dont le Gouvernement de la République l'a saisie, sur la base de l'article 36, paragraphe 2, du Statut, parce qu'il y a un point de droit international soulevé dans un différend de droit international entre les deux États et parce qu'il y a un problème de violation de l'obligation d'un État débiteur de payer ses emprunts internationaux." (*Ibid.*, at p. 60.)

207. Thus the French Agent was clearly invoking the General Act as a valid and effective treaty and he referred also, specifically, to Article 17. However, most important of all in understanding the Court's subsequent attitude—he limited his statement of the basis of the Court's jurisdiction to Article 36 (2)—the optional clause. In other words, and for some reason, he invoked the General Act and the obligations deriving from it but he did not invoke the said Act as itself being a basis of the Court's jurisdiction. But surely that reason, whatever it may have been, could not have been, in the light of the way in which the Act was cited elsewhere, any feeling on the part of France that the Act was no longer in force. If it was sufficiently in force to form the basis for the assertion of an obligation—and the Government of Australia would emphasize the word "obligation"—to arbitrate, it was sufficiently in force to serve as a foundation for the Court's own jurisdiction.

208. Turning from the conduct of the parties to the attitudes taken by the Members of the Court, one finds the clearest expression of judicial opinion, in the dissenting opinion of Judge Basdevant, on the continuing validity and applicability of the General Act. He said:

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

There is no reason to think that this General Act should not receive the attention of the Court." (*I.C.J. Reports 1957*, at p. 74.)

209. He continued with the observation that: "At no time did it appear that the French Government had abandoned its right to rely on it." (*Ibid.*, at p. 74.)

210. Nothing could be clearer than those observations of Judge Basdevant. He said three things:

(i) the General Act was in force;
(ii) the present Court was substituted for the Permanent Court by Article 37 of the Statute; and
(iii) the General Act had been invoked by France.

211. What the Court said on the subject was (*I.C.J. Reports 1957*, at pp. 24 and 25):

> "The French Government also referred to the Franco-Norwegian Arbitration Convention of 1904 and to the General Act of Geneva of September 26, 1928, to which both France and Norway are parties, as showing that the two Governments have agreed to submit their disputes to arbitration or judicial settlement in certain circumstances which it is unnecessary here to relate.
>
> These engagements were referred to in the Observations and Submissions of the French Government on the Preliminary Objections and subsequently and more explicitly in the oral presentations of the French Agent. Neither of these references, however, can be regarded as sufficient to justify the view that the Application of the French Government was, so far as the question of jurisdiction is concerned, based upon the Convention or the General Act. If the French Government had intended to proceed upon that basis it would expressly have so stated.
>
> As already shown, the Application of the French Government is based clearly and precisely on the Norwegian and French Declarations under Article 36, paragraph 2, of the Statute. In those circumstances the Court would not be justified in seeking a basis for its jurisdiction different from that which the French Government itself set out in its Application and by reference to which the case has been presented by both Parties to the Court."

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

213. The *Norwegian Loans* case therefore has a special significance for the present proceedings. In Judge Basdevant's opinion, there is the clearest expression of judicial opinion on the continuing validity and applicability of the General Act.

214. The French Annex states that it is difficult to believe that the Court would have so summarily excluded the General Act as a ground of its competence if it had provided a manifest basis for taking jurisdiction. However, there is nothing to support this view for the judgment of the Court expresses no disagreement with the view that the General Act was still in force. Indeed the judgment treats the Act as in force when it refers to it as being one "to which both France and Norway *are* parties". The whole tenor of the judgment is that the Court's only reason for not considering the General Act is solely on the view that the Application of the French Government so far as questions of jurisdiction are concerned was not based upon the General Act. It is impossible to deduce from this circumstance that the Court was thereby indicating, as the French Annex suggests, that the General Act did not provide a manifest basis of jurisdiction. It is also apparent that those

judges who delivered separate or dissenting opinions also adopted the view of the Court as to the jurisdictional basis relied on in the French Application and therefore excluded consideration of the General Act.

215. Judge Basdevant's judgment on the question of the General Act should, therefore, be regarded as a distinct and undisturbed authority on the subject.

(c) *The Practice of States Confirms the Continuing Validity of the General Act*

216. There is ample State practice since 1946 confirming the continuance in force of the General Act. This practice has included the invocation of the Act in judicial proceedings, and other references by States to the Act as a treaty in being. Indeed, the bulk of State practice relating to the General Act belongs to the period after the demise of the League in 1946.

217. Prior to that date, practice appears to have been almost wholly confined to the actions of parties in lodging accessions and reservations; in 1939 Spain lodged an instrument of denunciation. This relative lack of activity before 1946 is not to be regarded as unusual or significant. Treaties for pacific settlement are there to be invoked only when the occasion arises. Thus an examination of the *International Law Reports* (1919-1972) showed only ten reported cases of recourse to one or other of the many arbitration treaties concluded since 1900 [1].

218. Instances of State practice since 1946 are as follows:

(i) *The Settlement Agreement of 17 November 1946 Between France and Thailand*

219. The League of Nations was wound up on 18 April 1946. On 17 No-

[1] The reported cases referred to are: (1) *Norway* v. *United States* (*Requisition of Shipbuilding Contracts* case) (1 *I.L.R.*, p. 414), in which the Norway-United States Arbitration Convention of 4 April 1908 was invoked in 1922; (2) the arbitration in 1935 between Abyssinia and Italy on the Walwal incident, under the Treaty of Amity, Conciliation and Arbitration of 2 August 1928 (8 *I.L.R.*, p. 268); (3) *In re Société Commerciale de Belgique* (9 *I.L.R.*, p. 521), in which the Treaty of Conciliation, Arbitration and Judicial Settlement of 25 June 1929 between Belgium and Greece was invoked in 1938; (4) *Electricity Company of Sofia and Bulgaria* case (9 *I.L.R.*, p. 511), in which Belgium invoked the Treaty of Conciliation, Arbitration and Judicial Settlement of 23 June 1931 between it and Bulgaria in 1938; (5) *In re Vitianu* (16 *I.L.R.*, p. 281), in which the Treaty of Conciliation, Compulsory Arbitration and Judicial Settlement of 3 February 1926 between Rumania and Switzerland was applied and interpreted by the Swiss Federal Tribunal in 1949; (6) *Re Application to Swiss Nationals of the Italian Special Capital Levy Duty* (25 *I.L.R.*, p. 313), in which the Italian-Swiss Permanent Conciliation Commission provided for in the Treaty of Conciliation and Judicial Settlement between Italy and Switzerland of 20 September 1924 dealt in 1956 with a dispute concerning the application to Swiss nationals of an Italian tax; (7) the Lake Lanoux arbitration brought under the *compromis* of 19 November 1956 pursuant to the Arbitration Treaty of 10 July 1929 between France and Spain (24 *I.L.R.*, p. 101); (8) the *Norwegian Loans* case (24 *I.L.R.*, p. 782) in which France invoked, as well as the 1928 General Act, the France/Norway Treaty for the Pacific Settlement of International Disputes of 9 July 1904; (9) in a note of 9 August 1956 in relation to the *Interhandel* dispute, Switzerland requested that the claim of I.G. Chemie be submitted to conciliation or arbitration under the Treaty of Arbitration and Conciliation of 16 February 1931 with the United States (22 *I.L.R.*, p. 197 n); (10) *Petersen* v. *Federal Republic of Germany* (1961) (42 *I.L.R.*, p. 383), in which Denmark claimed that the Danish-German Arbitration Agreement of 1926 could be taken into consideration.

vember 1946 a Settlement Agreement was concluded by France and Thailand to set up a special commission of conciliation. Article 3 read as follows:

> "Article 3—Immediately after the signing of the present Agreement, France and Siam shall set up, by application of Article 21 of the Franco-Siamese Treaty of December 7th, 1937, a Commission of Conciliation composed of two representatives of the parties and three neutrals, in conformity with the General Act of Geneva of September 26th, 1928 for the pacific settlement of international disputes, which regulates the constitution and the working of the Commission. The Commission shall begin its work as soon as possible after the transfer of the territories specified in the 2nd paragraph of Article I shall have been effected. It shall be charged with the examination of ethnical, geographical and economic arguments of the parties in favour of the revision or confirmation of the clauses of the Treaty of October 3rd, 1893, the Convention of February 13th 1904 and the Treaty of March 23rd 1907, kept in force by Article 22 of the Treaty of December 7th 1937 [1]."

220. Not only does the Article speak of the General Act as if it was then in force, but it seems highly unlikely that the parties would have incorporated such a reference to a treaty which either of them considered to be no longer in force.

(ii) *The European Convention for the Peaceful Settlement of International Disputes 1957*

221. Several references were made to the General Act during the drafting of the European Convention for the Peaceful Settlement of International Disputes. On 22 November 1950, M. Bastid presented to the Consultative Assembly of the Council of Europe on behalf of its Committee on Legal and Administrative Questions a report relative to the creation of a permanent organization for the peaceful settlement of disputes between Members of the Council of Europe. This report set out the opinion of the Committee on the matter and recommended its adoption in the form of a draft resolution. This opinion referred to the General Act in the following terms:

> "In so far as concerns disputes justiciable in accordance with the definition contained in Article 17 of the General Act of Geneva, 1928, and with Article 36 of the Statute of the International Court of Justice, the Committee is of the opinion that a European Court for the settlement of disputes would overlap with the International Court of Justice whose jurisdiction has been accepted as binding by several Members of the Council of Europe and further that a new Court, unless it were sub-ordinated to the International Court of Justice, would put an end to the unity of jurisprudence assured by the Hague organ and indispensable to the development of International Law [2]."

The opinion of the Committee was adopted by the Consultative Assembly on 24 November 1950 [3].

The Hispano-Belgian Treaty of 1927 was, of course, invoked in the *Barcelona Traction* case begun, on the second application, in 1962.

[1] Reproduced in Annex 5 of the Cambodian Memorial in *I.C.J. Pleadings, Temple of Preah Vihear*, Vol. I, at p. 20.

[2] Council of Europe, *Consultative Assembly Documents*, Ordinary Session 1950, doc. No. 149.

[3] *Ibid.*

222. This opinion of the Committee in mentioning Article 17 of the General Act and Article 36 of the Statute of the Court not only emphasizes the two means of access to the Court but also clearly treats the General Act as still in force.

223. A Draft European Convention for the Peaceful Settlement of International Disputes was presented by M. Rolin of Belgium during the Seventh Ordinary Session of the Consultative Assembly [1]. In presenting it he indicates that it was modelled on the General Act of 1928 [2].

224. In the course of the debates M. Lannung (Denmark) specifically referred to the General Act as being in force for 20 States:

> "First, it follows from the views so far expressed here that the draft European Convention will, in a way, be a successor to the Geneva General Act of 1928 for the Pacific Settlement of International Disputes. This Convention, which, as is said in the Report of the Committee on Legal and Administrative Questions, was revised in some minor details by the General Assembly of the United Nations in 1949, binds twenty States, some of which are not, of course, members of the Council of Europe [3]."

225. Thus the *travaux préparatoires* leading to the European Convention for the Peaceful Settlement of International Disputes provide further evidence of the practice of States and the opinions of learned jurists confirming the continuation in force of the General Act.

(iii) *Recourse to the General Act in the Norwegian Loans Case*

226. The attitude of France and Norway to the continuation in force of the General Act in the *Norwegian Loans* case (*I.C.J. Reports 1957*, at p. 9) has already been referred to at some length in this Memorial (see paras. 194-207). France invoked it specifically as a treaty in force and, although it would have been to its advantage in that case to do so, Norway did not argue to the contrary.

(iv) *The Temple of Preah Vihear Case*

227. The suggestion made in the French Annex that the General Act is a forgotten instrument is strikingly rebutted by certain features of the *Temple of Preah Vihear* case. These individually and cumulatively demonstrate that France and Siam in 1946, and Cambodia and Thailand in 1959-1961 considered the General Act as in force at those times. Equally significant is the fact that the General Act as a living instrument was brought to the attention of the Court; that publicity was given to it in the Judgment and the Pleadings of the Court; that it was invoked on behalf of Cambodia by a team of counsel experienced in international litigation and including one, Professor Reuter, who had appeared as Counsel and even Deputy-Agent for the Government of France on a number of occasions [4]; and who is on record as saying cate-

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[1] Council of Europe, *op. cit.*, doc. No. 356, 21 June 1955.

[2] Council of Europe, *Consultative Assembly Official Report of Debates*, 1955, Seventh Session, at p. 295.

[3] *Ibid.*, at p. 302.

[4] It may be appropriate to recall how closely Professor Reuter has been associated with the presentation of the French Government's position in this Court: in 1952 he appeared on behalf of France in the case of the *Rights of Nationals of the United States*

gorically that the General Act is "in force"; and that when the application of the General Act was opposed by Thailand it was only on the ground that neither Cambodia nor Thailand was party to it. There was not even the slightest suggestion that the General Act may have fallen into desuetude.

228. Those aspects of the case relevant to the continued operation of the General Act are set out below in greater detail.

229. First, the Cambodian Application referred to Article 3 of the French-Thailand Agreement of 17 November 1946 [1]. The Agreement is referred to in paragraphs 219 and 220 above. As indicated in those paragraphs it hardly seems likely that these two States would in 1946 deliberately have based the whole functioning and procedure of a new system of settlement upon a treaty which, in their eyes, had, following the demise of the League of Nations, become inoperative.

230. Secondly, the special conciliation commission for which provision was thus made was actually constituted and sat in Washington in May-June 1947. The reliance of the commission upon the General Act is shown in paragraph 7 of the Report of the Commission dated 27 June 1947 [2], where it said "... in accordance with Article 10 of the General Act of Geneva, it was decided that the work of the Commission would not be public..."

231. Thirdly, the Preliminary Objections of Thailand, though discussing in some detail the applicability of the General Act, do so exclusively to show that neither Cambodia nor Thailand became a party to it [3]. Counsel for Thailand referred specifically to those passages in the 1948 Report of the Interim Committee of the United Nations General Assembly which said of the 1928 Act that "though theoretically still in existence . . . has become largely inapplicable". Thailand did not in any way suggest that the Act had lapsed. And this is particularly significant when it is recalled that Thailand argued that the jurisdictional obligations arising from another treaty, one of 1937, had lapsed as a result of the disappearance of the Permanent Court.

232. Fourthly, the same elements reappear in the oral pleadings. Counsel for Thailand argued in detail that neither Cambodia nor Thailand had become parties to the General Act [4], but never contested its continuing validity. Similarly counsel for Cambodia, who relied upon the General Act, never made any suggestion that it could have lapsed [5].

(v) *Further French Reliance on the General Act in 1964*

233. On 11 December 1964, in explaining in the French National Assembly why the French Government did not then envisage becoming a party to the

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in Morocco, *I.C.J. Reports 1952*, at p. 176, where he was described as "Assistant Legal Adviser to the Ministry of Foreign Affairs"; in 1954, under the same title he represented the French Government in the proceedings leading up to the Advisory Opinion on the *Effect of Awards of Compensation made by the U.N. Administrative Tribunal*, *I.C.J. Reports 1954*, at p. 47; and in 1957, again under the same title, he appeared in the *Certain Norwegian Loans* case, *I.C.J. Reports 1957*, at p. 9, where France relied upon the General Act and to which separate reference is made. Does it seem likely that Professor Reuter would have relied upon the General Act in 1961, five years after France had relied upon it in 1956, if he had had reason to believe that it had lapsed in the interim?

[1] *I.C.J. Pleadings, Temple of Preah Vihear*, Vol. I, at p. 20.

[2] *Ibid.*, at p. 22.

[3] *Ibid.*, at pp. 140-145.

[4] *Ibid.*, Vol. II, at pp. 22-25, 103.

[5] *Ibid.*, Vol. II, at p. 76.

European Convention on Pacific Settlement, the Foreign Minister pointed out that France was already bound ("liée") by numerous obligations relating to the pacific settlement of international disputes. One of the treaties referred to by him in this connection was the General Act of 1928.

234. The Minister said:

> "La France, comme la plupart des Etats européens, est liée par de nombreuses obligations de règlement pacifique des différends depuis les conventions de la Haye de 1899 et 1907, le statut de la Cour permanente de justice internationale et de la Cour internationale de justice, l'acte général d'arbitrage du 26 septembre 1928 revisé en 1949, auxquels viennent s'ajouter plusieurs conventions bilatérales de conciliation de d'arbitrage. La convention européenne sur le règlement pacifique des différends internationaux risque de faire double emploi avec plusieurs des textes susvisés. Sa ratification rendrait donc nécessaire une révision complète des engagements internationaux de la France en la matière. Dans ces conditions, le gouvernement n'envisage pas d'entamer pour l'instant la procédure de ratification de ladite convention [1]."

Clearly in referring to the revision of the General Act the Minister was not stating that France was bound by the Revised General Act. He was merely making a comment about a treaty, namely, the 1928 General Act, by which, as he acknowledged, France was bound and which, by way of description, was referred to as having been amended.

(vi) *Continued Inclusion of the General Act in Treaty Compilations and Lists*

235. Another material fact which supports the continuance in force of the General Act is the continued inclusion of the Act in treaty compilations and lists of many of the countries that became parties to the Act. These include, as well as official compilations and lists, unofficial publications prepared by international legal authorities who may be presumed to have been acquainted with any relevant thinking on the part of the government in question. In no case that has been examined is it stated that the General Act has been terminated.

236. The compilations and lists that have been examined are as follows:

(1) *Australia*—The official treaty lists published by the Australian Government have invariably included the General Act. The latest list was published in 1971, covering the position up to 31 December 1970; the reference is *Australian Treaty Series*, No. 1 of 1971, page 189.

(2) *Belgium*—The treaty list edited by the Director of the Treaty Section of the Belgian Ministry of Foreign Affairs and published in 1973 lists the General Act. See I. de Troyer, *Répertoire des traités conclus par la Belgique 1830-1940*, Brussels, 1973, page 369.

(3) *Canada*—*Canada Treaty Series 1928-1964*, Ottawa, 1966, lists the General Act without any comment.

(4) *Denmark*—The General Act is included in the publication *Samling af Traktater m.v. af saerlig interesse for forsvaret*, Copenhagen, 1947, page 1108.

(5) *Ethiopia*—The United Nations list of Treaty Collections refers to A. L.

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[1] *Journal Officiel de la République Française, Assemblée Nationale*, 11 December 1964, p. 6064.

Paddock, Jr., *International Treaties binding Ethiopia*, Addis Ababa, 1952. This makes no reference to the General Act but the foreword states:

> "Many of the old agreements have not been reproduced here. What was intended was to show, by reproduction of the texts of agreements that contributed to the development of Ethiopian engagements, the thread of development over the years."

(6) *Finland*—The General Act is reprinted at page 71 of *Finlands forfattningssamlings fordragsserie*, Helsinki, 1930. It is included in the 1967 list of Finnish treaties: *Vieraiden valtioiden kanssa tehdyt Sopimukset*, Helsinki, 1967, page 29.

(7) *France*—Although there is no official French treaty list, a list of multilateral treaties to which France is a party, prepared by Dr. Henri Rollet, includes the General Act at page 54: see *Liste des Engagements Multilatéraux au 30 juin 1969*, Paris, 1971, page 54.

(8) *Great Britain*—There is no official British treaty list. The General Act is listed at page 729 in Volume 3, *An Index to British Treaties* 1101-1968, London, 1970, by C. Parry and C. Hopkins.

(9) *India*—An unofficial list compiled by C. M. Samuel includes the General Act as "binding India in 1966". See C. M. Samuel, *Indian Treaty Manual 1966*, Kozhikode, 1967, page 65. (The list of treaties which was prepared at the time of the partition of British India and which was included in the *Partition Proceedings* (Vol. III, pp. 217-276) omitted the General Act. But it omitted many of the other League treaties to which India was a party because of the manner of its compilation, which was to assemble treaties in the order in which departments of the Government of India were responsible for their administration. The General Act was one of the many treaties (including almost all the extradition agreements) which escaped this procedure because they were Imperial and not local.)

(10) *Ireland—The General Index to the Treaty Series 1930-1953*, Dublin, 1954, includes the General Act at page 18.

(11) *Italy*—The publication by E. Buda, *Le convenzioni internazionali collettive ratificate dall' Italia dal 1861 al 1959*, Milano, 1959, includes the General Act at page 25.

(12) *Netherlands*—A. M. Stuyt, *Repertorium van door Nederland tussen 1813 en 1950 gesloten verdragen*, 's-Gravenhage, 1953, lists the General Act as among the Netherlands treaties at page 190.

(13) *New Zealand*—the official New Zealand treaty list published in 1948 (*New Zealand Treaty Series*, 1948, No. 11) includes the General Act at page 48.

(14) *Norway*—the General Act is listed in the official Norwegian Treaty List dated 1 January 1960, at page 177. The subsequent publication—*Norges Traktater, 1661-1968*—does not reprint the General Act; however, the preface states "these volumes do not contain the texts of all treaties to which Norway is a party", and the index volume lists the Act (Vol. 4, at p. 57).

(15) *Peru*—A list of Peruvian Treaties published in 1962 and edited by E. Gonzales Dittoni, *Textos internacionales del Peru (los mas importantes tratados del Peru, bilaterales y multilaterales*, Lima, 1962, does not list the General Act. But the only pre-1945 documents in the book are the

"Acta de la Jura de la Independencia" and treaties regarding Peru's boundaries and "dominio maritimo".

(16) *Sweden*—The treaty list *Kungl Utrikesdepartementets kalender*, Uppsala, 1969, published by the Swedish Ministry of Foreign Affairs, includes the General Act at page 311. A footnote to that reference reads as follows:

> "Fortfarande giltig mot vissa stater—Se aven reviderade generalakten av den 28 April 1949."

The footnote may be translated:

> "Still in force as respects some countries. See as well the Revised General Act of 28 April 1949."

(17) *Switzerland*—Volumes 11 to 14 of *Recueil systématique des lois et ordonnances 1848-1947*, Berne, 1949-1953, contains treaties. The General Act is included in Volume 11, page 219.

(18) *Turkey*—A. Gunduz Okcun, *A Guide to Turkish Treaties (1920-1964)*, Ankara, 1966, refers to the General Act at page 222.

The researches carried out have not located any treaty list relating to Greece or Luxembourg.

237. The official compilations and lists enumerated in the preceding paragraph are clearly acts of State practice which are quite inconsistent with the proposition that the General Act was treated by the parties concerned as moribund. The unofficial treaty lists also attest the continuing vitality of the General Act in the eyes of the experts concerned.

(vii) *Two Further Significant Instances of State Practice Confirming the Continuation in Force of the General Act*

238. Finally two further items of significant State practice are worthy of being referred to. The United States *Department of State Bulletin*, 1951, contains notes on the compulsory jurisdiction of the Court and includes references to the Revised General Act (pp. 664-669). The notes include the following paragraph (p. 668):

> "The General Act of September 26, 1928 remains in force, the current 5-year period beginning August 16, 1949. An accession is subject to denunciation for the period beginning August 16, 1954 on 6-months' notice before that date."

The notes go on to list the accessions in force; these include all the countries so listed by the League of Nations, *Signatures, Ratifications & Accessions in respect of Agreements and Conventions concluded under the auspices of the League of Nations*, Geneva, 1944 (para. 124 above).

239. In a memorandum dated 3 March 1971 from the Foreign Minister of the Netherlands to the Second Chamber of the States-General describing the Revised General Act and explaining the reasons of the Government of the Netherlands for seeking the Parliament's consent to ratify it, the General Act is spoken of as "still in force for 22 States including the Kingdom [1]."

[1] Translation. Ref. *BIJL*. HAN. II 1970-71-11 202 (R 780 No. 1).

(d) *The Views of Highly Qualified Publicists Confirm the Continued Existence of the General Act*

240. The views of highly qualified publicists support and confirm the submission of the Government of Australia that the General Act continues in force.

241. It is true that some authors, when comparing the General Act and the Revised General Act, have observed that some doubt might exist concerning the scope of the former as a result of the disappearance of the machinery of the League of Nations. One of these is Professor O'Connell (*International Law* (2nd ed., 1971), Vol. 2, p. 1071) who nonetheless records that there are 20 parties to the General Act and clearly regards the instrument as still in force. (See also O'Connell, *State Succession in International Law and Municipal Law*, 1967, Vol. II, p. 213, where the discussion of non-succession to the General Act proceeds entirely on the basis of the continuation in force of the General Act.) Generally there is a very considerable number of authors who have in recent years treated the General Act as being in force. No less important is the fact that no author can be found who has expressly stated that the General Act has ceased to be in force. On the contrary, there is a truly massive accumulation of authoritative opinion that it is in force.

242. In reviewing the authorities it is convenient to begin with the French authorities. All of the authors of the standard French treatises on public international law treat the General Act as being in force. Specifically, *Reuter:* at the time "jurisconsult adjoint" to the French Foreign Office, says in his work *Droit International Public* (1958) that:

> "L'Acte général est toujours en vigueur, mais il n'engage qu'une vingtaine d'Etats parmi lesquels le Royaume-Uni, la France et le Canada" (at p. 310).

(The same passage appears at p. 274 in the 2nd ed., 1963; at p. 289 in the 3rd ed., 1968; and at p. 346 in the 4th ed., 1973.)

243. *Professor Rousseau* in his Chapter *Règlement pacifique des Conflits* in his work *Droit International Public* (5th ed., 1970) dedicates the whole of Section 334 to the General Act, containing the following:

> "En vigueur depuis le 16 août 1929, cet Acte — auquel ont adhéré 23 Etats (dont seulement 3 grandes Puissances: la France, la Grande-Bretagne et l'Italie) et que l'Espagne a dénoncé le 1er avril 1939 — institue trois procédures distinctes . . ." (at p. 294).

244. *Mme Bastid* in her *Cours de droit international* for the third year Licence course in the University of Paris has several sections devoted to the General Act. A typical passage is the following:

> "Très souvent, on se trouve en présence de traités qui sont appelés *traités de règlement pacifique ou traités d'arbitrage et de conciliation.* De plus dans ces traités on voit souvent, à côté de l'engagement d'arbitrage, des engagements touchant le recours à la C.P.J.I. . . . Tel a été l'objet de ce que l'on appelle souvent, couramment, l'Acte général d'arbitrage élaboré par la S.D.N. et dont le titre véritable est: *Acte général pour le règlement pacifique des différends internationaux* (1928).
>
> Cet Acte d'arbitrage, en réalité, réserve l'arbitrage pour des différends qui peuvent être des différends de caractère politique. Pour les différends juridiques, on a prévu le système du recours à la C.P.J.I." (at pp. 866-867).

245. *Scelle*, in his *Cours de droit international public* also delivered at the University of Paris, devoted a whole section to the General Act in which, again, he writes of it in the present tense as a current treaty.

246. *Colliard* in his *Institutions internationales* (4th ed., 1967), a study of the role of law in contemporary diplomacy, also writes of the General Act in the present tense (at p. 314).

247. This opinion of authoritative French writers is shared by the standard authorities of other countries, particularly those specially concerned with arbitration and pacific settlement.

248. *C. Wilfred Jenks* in 1964 wrote that "the General Act also appears to be still in force for a number of States": *The Prospects of International Adjudication* (1964), at page 24. He had already expressed the same opinion in his report of 20 December 1956 to the Institut de droit international entitled "Compétence obligatoire des instances judiciaires et arbitraires internationales".

249. *J. L. Simpson* and *Hazel Fox* in several passages refer to both the General Act and the Revised General Act as providing, at the present time, for aspects of international arbitration: *International Arbitration* (1959), pages 20-23, 40, 46, 83, 184.

250. *Sereni* in his *Diritto Internazionale* (1965), discusses the General Act as a treaty in force at great length at pages 61, 139, 1611, 1626, 1627, 1647 and 1688 ff. Specifically he says:

> "*L'Atto è ancora in vigore*" (italics added) (Vol. IV, p. 1669).

He also says:

> "Esso fu menzionato dalle parti nell' *Affare dei prestiti norvegesi* tra la Francia e la Norvegia innanzi alla CIG; il giudice Basdevant dichiarava nella sua opinione dissidente: 'A aucun moment, il n'a été mis en doute que l'acte fît droit entre la France et la Norvège'." *(Ibid.)*

251. *Professor Guggenheim* in his *Lehrbuch des Völkerrechts* (1951) discussed the General Act in the present tense at pages 74, 78, 80, 114, 150, 532, 572, 609, 619, 620, 644, 675, 676, 677, 697, 699, 700-702, 708; and in his *Traité de droit international public* (1954), Vol. 2, at pages 113, 123 and 189.

252. *Dr. Hambro*, once Registrar of this Court, wrote that the "General Act is still in force and is fully valid for the greater part of the Members of the United Nations": *Rechtsfragen der Internationalen Organisation in Festschrift für Hans Wehberg* (1958), page 167.

253. *Dahm* treats the General Act and the Revised General Act together in the present tense, analysing in detail the provisions relating to this Court's jurisdiction by reference to the enumeration of Articles 17-20. Incorporating the Revised General Act he wrote that:

> "While the General Act of 1928 is ratified by over twenty States, including Great Britain and France, the Revised Act is up to now only sparsely ratified." (*Völkerrecht*, Vol. 2, 1959, translation at p. 353.)

254. *Professor François* discusses the General Act in the present tense in very great detail and in every context: *Handboek van het Volkenrecht* (2nd ed., 1950), pages 106 ff., 153 ff. and page 171 ff. This is significant because of François' importance in the practical field of arbitration as Secretary-General of the Permanent Court of Arbitration.

255. *Professor Sohn* in his *Basic Documents of the United Nations* (1956) at page 76 lists the General Act, with the Revised General Act incorporated in

its text within parentheses, which indicates his view on the parallelism of the two instruments. In a Note on page 84 he speaks of the 1928 Act and the 1949 Revision as both current for the accessionary parties.

256. *Professor Verdross* in his *Völkerrecht* (5th ed., by Verosta and Zemanek) (1964) does the same at page 419.

257. *Professor Seidl-Hohenveldern* mentions the General Act in his *Völkerrecht* (1965), in paragraph 1268.

258. The leading English treatise *Oppenheim's International Law*, Vol. II (7th ed. 1955), treats the General Act as still being in force (see especially p. 94, note 2).

(e) *France's Present Contention as to the Attitude of States Derives no Support from the Alleged Parallelism Between Reservations Under the General Act and Optional Clause*

259. Again, with reference to the practice of States, it is to be specially noted that the French Annex places great emphasis on the parallelism which it alleges existed between the reservations which countries inserted in their accessions to the General Act and their respective declarations under Article 36 of the Statute of the Permanent Court of International Justice. It also alleges that in relation to countries which acceded to the Revised General Act this parallelism between their accessions to that Act and their declarations under the Statute of the present Court, "stands unbelied".

260. The purpose of these assertions was to found a submission that the "contrast between the total lack of concern shown by the parties to the 1928 Act, to maintain consistency between the various situations in which they would recognize the Court to be competent, can only be explained by the feeling that the 1928 Act had lost its validity" (French Annex, p. 7). The logical link between these assertions and the submission which they are intended to support is quite unclear.

261. The Government of Australia has already given an effective answer to the French claim that the Act has lost its validity and this answer would be quite sufficient to counter these assertions.

262. However, it is proposed at this stage to examine them more closely, for an analysis of the various reservations and declarations will quickly show that to the extent that they are relevant they are quite inaccurate.

(i) *Comparison of the Reservations in Accessions to the General Act with Reservations to Declarations under Article 36 of the Statute of the Permanent Court of International Justice*

263. As to these, the French Annex asserts that for so long as the General Act was manifestly in force the reservations to the Court's competence on either basis were always similar.

264. Twenty-three countries acceded to the General Act. All of these were Members of the League of Nations. All were parties to the Statute of the Permanent Court and lodged declarations under Article 36. If their respective reservations to the General Act and their respective declarations under Article 36 are examined it will be found in the cases of at least 15 countries there are material differences.

265. This is so in the case of the British Commonwealth countries (United Kingdom, Canada, Australia, India, New Zealand). Not only had they excluded disputes, in each case, after differing dates but the declarations under

the optional clause do not in any case contain a reservation comparable with reservation (v) to their General Act accessions, i.e., "disputes with any party to the General Act who is not a Member of the League of Nations". This is a material difference for Article 34 of the Statute of the Court made it clear that States who were not Members of the League could become parties to the Statute of the Court.

266. A consideration of the position of France itself will also reveal that, even though prepared at the same time, the terms of the reservations in its accession to the General Act and of its declaration of 1931 under the optional clause are different.

267. A consideration of the reservations in at least nine other cases will also reveal material differences [1].

(ii) *The Special Position of France after 1940*

268. The French Declaration under Article 36 of the Statute of the Permanent Court of International Justice deposited on 25 April 1931 was for a period of five years. It was renewed on 25 April 1936 for a further period of five years but expired without any further declaration on 24 April 1941. The only link between France and the Court from that date until the Court ceased to exist was through the General Act. When the Statute of the International Court of Justice came into force there was therefore no current declaration by France upon which Article 36 (5) of the Statute could work. France did not lodge a declaration under Article 36 (2) of this Statute until 1 March 1949. The only link which France could have had with this Court between its establishment and 1 March 1949 was through the General Act. Therefore, from 1941 to March 1949 no such parallelism as is suggested existed or could have existed in the case of France.

(iii) *Comparison of Reservations to Accessions to the Revised General Act and Reservations to Declarations under Article 36 (2) of the Statute of the International Court of Justice*

269. To date seven countries have acceded to the Revised General Act, i.e., Belgium, Denmark, Luxembourg, the Netherlands, Norway, Sweden and Upper Volta. All except Upper Volta have lodged declarations under Article 36 (2) of this Court's Statute.

270. The French Annex alleges that in the cases of Belgium, Denmark, Luxembourg, Norway and Sweden, the conditions on which the Court's jurisdiction was accepted by each method were identical.

271. Again, comparison of the respective declarations will indicate that this statement is quite inaccurate.

272. The accession of Belgium to the Revised General Act dated 23 December 1949 contained no reservations. Its declaration under Article 36 (2) then in force, deposited 13 July 1948, was confined to legal disputes which might arise after the ratification of the declaration concerning any situation or fact arising thereafter save in cases where the parties have agreed or agree to employ other means of peaceful settlement. Belgium's subsequent declaration under the optional clause deposited on 17 June 1958 repeated this restriction.

273. Similar differences can be found in the case of Luxembourg and the Netherlands.

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[1] Belgium, Estonia, Ethiopia, Greece, Italy, Latvia, Luxembourg, Peru, the Netherlands.

274. In the case of Sweden, the acceptance of the compulsory jurisdiction of the Court was confined to disputes which arose with regard to situations or facts subsequent to 6 April 1947. The accession to the Revised General Act dated 22 June 1950 reserved disputes arising out of facts prior to the accession.

275. As previously indicated, Upper Volta has not lodged a declaration under Article 36 (2).

(iv) *Conclusion*

276. The above analysis clearly indicates the inaccuracy of the French assertion that when the General Act was manifestly in force States took care to maintain an identity between their accessions to the General Act and their declarations under Article 36 and that a similar position has applied in relation to the Revised General Act where countries party to it have also filed declarations under the Optional Clause. The lack of parallelism is even more pronounced when one takes into account the differing dates of termination or possible termination of the respective declarations under Article 36 and accessions to the General Act and where relevant the Revised General Act.

277. It is therefore apparent that no reliance can be placed on the practice of States in this regard to support the French contention that the General Act has lost its validity. Indeed, a comparison of the reservations which the parties to the General Act attached to their accessions with the conditions attached to their declarations (if any) under Article 36 (2) of the Statute of this Court will show that in general there is between them practically the same difference that already existed between those reservations and the conditions attached by those countries to their declarations under Article 36 of the Statute of the Permanent Court of International Justice.

(f) *The Failure of Many States to Accede to the Revised General Act Is of No Significance*

278. A further matter relied upon in the French Annex to support the view that the General Act has lapsed is the fact that few States have been willing to accede to the Revised General Act. The point was made that, as the two Acts are identical, except that one substituted United Nations organs for defunct League of Nations organs, it was difficult to see why States should have preferred the version which bound their commitments to non-existent structures except on the basis that the original Act had lapsed.

279. A question was asked of the Government of Australia by Judge Dillard during the hearing of the Interim Measures Proceedings in this case. The distinguished Judge asked:

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

The Judge's question was answered on behalf of the Government of Australia by Professor D. P. O'Connell of Counsel on Friday, 25 May 1973 [1].

280. The Government of Australia submits that the answer which it gave

[1] See pp. 231-234, *supra*.

to Judge Dillard's question is a complete answer to the French contention and that it is not possible to draw from the failure of States to accede to the Revised General Act any conclusion that the General Act has lapsed nor does this fact in any way support an argument that the General Act has lapsed.

8. Applicability of the General Act in Relations Between France and Australia

281. The Government of Australia before concluding this part of the Memorial will make some reference to certain observations which appear in the French Annex under the heading "Inapplicability of the General Act in relations between France and Australia and New Zealand". This heading itself falls under the larger heading "II—Hypothesis of the General Act not being wholly without validity today".

282. The French observations fell into two parts. Of these one, relating to the uncertainty of reservations, has already been dealt with.

283. The second group of French observations in this part of the Annex starts from what purports to be a statement of fact—that Australia's most recent action in relation to the General Act "amounted to a patent violation of it". It concludes that "if the French Government is now going to be called on to observe an agreement from which other parties have freed themselves, it will contend that it does not consider that it is bound to respect a treaty which Australia itself has ceased to respect since a date now long past".

284. The Government of Australia is unable to accept the accuracy or validity of any of these points.

285. First, as to the statement of fact, it is not correct to say that any action of the Government of Australia has amounted to a violation of the General Act. As to the specific sugestion that Australia violated the General Act by the manner and content of its action in September 1939, it is clear that Australia was not freeing itself from the provisions of the Act concerning modifications to reservations. It was making a statement as to its intention with regard to disputes which would have arisen out of the War. France and a number of other countries (United Kingdom, New Zealand and India) had already lodged communications which also indicated the disputes which were to be reserved from their accessions to the Act. These however were made at least six months before the expiry of the then current period of the General Act (i.e., 15 August 1939). Although it is a fact that these reservations were made for other purposes, it is true to say that, in so far as the principle of reciprocity applied, the Government of Australia would have had the benefit of these amendments to reservations by other parties and to this extent its accession to the General Act would not cover or relate to disputes arising out of events occurring during the then crisis. The action of the Government of Australia was not an attempt to free itself from the relevant provisions of the Act. There is no basis upon which the telegram could be so construed.

286. Moreover, the telegram could only affect Australia's accession to the General Act to the extent to which it conformed with its provisions. Under Article 45, Australia's reservations contained in its accession to the General Act could only be modified in the sense of the addition of new reservations within the time therein described. Clearly enough the telegram was out of time to take effect as an extension of reservations previously made so as to operate from 16 August 1939. However, it could operate under Article 45 from the expiration of the next current period, i.e., 16 August 1944 and to this extent it

was a valid partial denunciation. It contains no expression of an intention on the part of the Government of Australia wrongfully to repudiate the General Act. The presumption was clearly that it intended to act regularly and within the terms of the Act. The communication made in September 1939 was an act incapable of producing effect until 1944, but it certainly was not a breach of the Act.

287. The French Annex clearly confuses a temporarily invalid act with a wrongful act. An act such as the telegram of 1939 cannot surely be described as a material violation of the General Act, as such entitling France to invoke it as a ground for suspending the operation of the General Act between herself and Australia.

288. Secondly, even if the Australian action could be regarded as a departure from the procedural requirements of the General Act, what conceivable relevance can that have today? Did the so-called "breach" terminate the General Act or Australia's acceptance thereof? Manifestly, it could not and did not. Did it adversely affect the rights of France under the General Act? There is no suggestion that it did. And if, in 1973, France chooses to say that her rights in relation to Australian actions during the Second World War were injured by what happened in 1939, it is now completely out of time. What is the purpose of protest? Surely it must be to preserve rights from extinction by lapse of time. Yet time has passed and there has been no French protest. Or did the so-called "breach" in 1939 vest in France some right to take reprisal action which now, in 1973, it seeks to exercise in the form of a refusal to accept the application of the General Act as a basis of the Court's jurisdiction? If so, have the usual conditions for recourse to reprisals been satisfied: was an injury inflicted upon France by Australia? Was there a request for redress by France? Is the conduct of France proportionate to the wrong suffered?

289. In the light of its contentions and in the face of so many unanswered questions about the true force and effect of the French observations, the Government of Australia submits that there is no substance in these French arguments.

C. The Link of Compulsory Jurisdiction Between Australia and France under Article 36 (2) of the Statute of the Court

1. Preliminary Remarks

290. The Government of Australia now turns from the development of its contention that the Court possesses jurisdiction under the General Act to an alternative basis for the jurisdiction of the Court—the operation of Article 36 (2) of the Statute of the Court. This alternative basis was invoked in paragraph 50 of the Application in this case.

291. On 9 May 1973, the date of the Application, both Australia and France were bound by declarations made under Article 36 (2) (the optional clause) of the Statute of the Court (Annexes 4 and 5).

292. The current Australian declaration was filed on 6 February 1954. Its period of duration was not limited and it was in full force and effect on 9 May 1973. Although it contains a number of reservations, none of these make it inapplicable *ratione personae* to France as a defendant, or *ratione materiae* to the circumstances of this case. To put the same point in a different way, there is nothing in the Australian reservations which, if invoked by

France on a basis of reciprocity, would restrict the Court's jurisdiction in this case in such a way as to favour France.

293. The current French declaration was filed on 20 May 1966. It was in force on 9 May 1973. It contains nothing which *ratione personae* excludes its application in proceedings instituted by Australia. Of the four reservations which the Declaration makes, only one could have any relevance to the present proceedings. The third reservation excludes—

> "disputes arising out of a war or international hostilities, disputes arising out of a crisis affecting national security or out of any measure or action relating thereto, and disputes concerning activities connected with national defence".

The French Government has referred to this reservation in its Note and Annex as a basis for contesting the jurisdiction of the Court under Article 36 (2). It has done so in short and direct terms. The conduct of the atmospheric nuclear tests in the South Pacific area, it states, is an activity connected with national defence. The connection is alleged to be too obvious to require specification or elaboration. The applicability of the reservation is thus seen in the eyes of the French Government to rest solely upon its own assertion.

294. The Government of Australia has already had occasion to draw attention to the manner in which the French Government has invoked its reservations. The French Note and Annex manifestly do not fall in form, content or intention within the terms of Article 67 of the Rules; and neither the Statute nor the Rules contemplate any other manner of lodging preliminary objections. However, while fully maintaining the objections which it has raised to the manner in which France has invoked the reservation, the Government of Australia assumes from the terms of the Court's Order of 22 June 1973 that it is the wish of the Court that the French reservations should be dealt with on the basis that they have been properly invoked; and the Government of Australia is prepared to meet the Court's wishes on this point.

295. At the same time, the Government of Australia is bound once more to draw the attention of the Court to the inappropriate form used by the French Government for raising its objection and to the abnormal position in which the Government of Australia has, in consequence, been placed.

296. Having made this remark, the Government of Australia submits that logic dictates that there are only two ways of approaching the French reservation of "disputes concerning activities connected with national defence". Either it must be considered as a "subjective" and "automatic" reservation, or as an "objective" one. The Government of Australia does not have to choose between the two, for, in its submission, if the reservation is deemed to be a subjective one, it is tainted by the vice of incompatibility with the principles governing the Court's jurisdiction and must be disregarded. If, on the other hand, it is to be considered as an "objective" reservation the criteria have not been satisfied. It may be added that the very fact that this degree of uncertainty can exist is itself an additional consideration militating against the validity of the reservation.

2. The French Reservation Regarded as a "Subjective" Reservation

297. It will be convenient to examine the French reservation on the basis, first, that it ought to be deemed subjective in character. This implies that its

content cannot be determined by reference to objective criteria but must be left to be settled in accordance with the view of the French Government.

298. It must be observed in this respect that, although the reservation in question is apparently drafted in an "objective form", the Court may conclude that it is nevertheless subjective in substance. To ascertain its true nature it is necessary first to consider its origin and the history of the relevant French reservations which preceded it.

299. The declaration made by France on 18 February 1947 and ratified on 1 March 1949 contained the following:

> "This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic."

This was clearly a subjective reservation.

300. On 10 July 1959, presumably in order to remedy the defect in its acceptance demonstrated by the Judges of the Court in both the *Norwegian Loans* and *Interhandel* cases, the Government of France amended her acceptance by replacing the original reservation by four more specific ones, of which three were expressed in clearly objective terms. The fourth (number 3) reads:

> "(3) disputes arising out of any war or international hostilities and disputes arising out of a crisis affecting the national security or out of any measure or action relating thereto;".

301. Comment in the *Annuaire français de droit international* (1959), page 270, by Simone Dreyfus drew this conclusion:

> "Il semble donc que la 'réserve automatique' soit appelée à disparaître et l'on ne saurait trop le souhaiter. Ce mouvement, auquel il est tout à l'honneur de la France de s'être jointe sans retard, est conforme au droit puisque, selon l'article 36 du Statut, 'en cas de contestation sur le point de savoir si la Cour est compétente, la Cour décide'."

302. Mme Bastid also drew attention specifically to the purpose which the French Government had in mind, namely to rectify the inconvenience resulting from the use made of the French reservation in the *Norwegian Loans* case [1].

303. By the current declaration filed on 20 May 1966, reservation number (3) set out above was amended by adding the words: "and disputes concerning activities connected with national defence."

304. The new declaration of 1966 did not return to the subjective form of 1947 and it was apparent that the intention of the Government of France was that the whole of its declaration, including the relevant reservation, should be objectively construed so that this Court would be fully competent to determine the effect of it upon its jurisdiction in a particular case. The intention of the Government of France seems therefore to have been that the newly added reservation should always be susceptible of an objective determination by the Court alone. In other words, its intention seems to have been that its declaration was to be construed so as not to nullify the acceptance of the Court's compulsory jurisdiction by introducing a reservation the scope of which would be left to the unilateral and arbitrary determination of the French Government. However, notwithstanding this apparent intention on the part of the

[1] Bastid, *Cours de droit international public* (licences 3e année), p. 108.

Government of France, a close consideration of the relevant reservation reveals, it is submitted, that it may have chosen words which are not susceptible of an objective meaning and which therefore do not enable the Court to determine the effect of it upon its jurisdiction in this case.

305. So far as the researches of the Government of Australia extend, this is the only instance where a country has used in a reservation to its declarations under the optional clause or in its accession to the General Act a phrase containing the words "activities connected with national defence".

306. Professor Rousseau, in commenting upon the declaration when it was made, drew attention as follows, to the purport of the reservation as negating in substance the declaration itself:

> "La limitation est de taille et, dans les termes imprécis où elle est formulée, elle risque de réduire dans des proportions imprévisibles le maigre domaine encore assigné à la Cour." (*Revue générale de droit international public*, Vol. 70, 1966, p. 1040.)

307. The phrase "activities connected with national defence" could be argued to cover anything. For instance, the making of buttons in a factory might be such an activity. On the other hand, it might not. The question thus arises—how can it be determined in a given case? The true answer may well be that its application can never be ascertained independently of the views of the Government of France. If this is so, the reservation is truly subjective.

308. In truth, the difficulty can readily be recognized of evaluating the scope of national defence or the extent to which conduct is connected with it in an objective way and independently from the views, values and ideas of the government concerned, in this case the French Government. "War" and "international hostilities" are concepts which can be objectively evaluated—"national defence" on the other hand is much less susceptible of objective evaluation. Unlike "war" or "international hostilities" which describe events actually occurring, "national defence" construed in the widest sense can also be said to encompass a consideration of contingencies and circumstances in the future, conceived by or known only to the particular government concerned. This necessarily introduces a subjective element.

309. If the view thus stated is correct, the French reservation could in reality only be given effect to on the basis of French judgment, that is to say, when France in its subjective or self-judging role proclaims that its activity is or is not "an activity connected with national defence". It would not be for the Government of Australia nor for the Court itself to attempt to put objective content into it. This would be the task of the Government of France alone and it would be precisely because it was a task that only she could perform that the truly subjective nature of the reservation would be revealed. This might well explain why the Government of France did not develop in its Note or Annex the assertion that French tests in the Pacific constituted an activity connected with national defence, being convinced that it alone could determine whether or not it was.

310. But if, for these reasons, the reservation were to be considered as being, in reality, a subjective or automatic one, the Government of Australia contends, first, that it would be null and void, and, secondly that it should be severed from the rest of the French declaration leaving the remainder standing and effective to confer jurisdiction upon the Court.

311. The most convenient starting point for the development of the contention that a subjective reservation is null and void is the separate opinion of Judge Lauterpacht in the *Norwegian Loans* case (*I.C.J. Reports 1957*, p. 9, at

p. 34 ff.) [1]. The reason for so saying is that this appears to have been the first significant judicial expression of doubt about the validity of such a reservation. If it were an isolated statement which had not secured the support of any other judges of the Court, the justification for extended reliance upon it might be questionable. But the significant feature of the opinion is that four other judges of the Court came to share its essential conclusions.

312. It will be recalled that in the *Norwegian Loans* case France was the applicant and Norway the respondent. The Court's jurisdiction was invoked by France on the basis of the optional clause. The French declaration in force at that time contained a reservation excluding "matters which are essentially within the national jurisdiction, as understood by the Government of the French Republic". This reservation was described by Judge Lauterpacht as an "automatic reservation". "That description", he said, "expresses the automatic operation of that reservation in the sense that, by virtue of it, the function of the Court is confined to registering the decision made by the defendant Government and not subject to review by the Court" (*I.C.J. Reports 1957*, at p. 34).

313. The French reservation was invoked by the Norwegian Government by reference to the concept of reciprocity. Noting that the validity of the reservation had not been questioned by the parties in the specific case, the Court considered itself (*ibid.*, at p. 26) to be relieved from the duty of examining—

> "whether the French reservation is consistent with the undertaking of a legal obligation and is compatible with Article 36, paragraph 6, of the Statute".

Therefore, although emphasizing that it did so "without prejudging the question" the Court gave effect to the reservation, as it stood, as both parties to the dispute regarded it "as constituting an expression of their common will relating to the competence of the Court" (*ibid.*, at p. 27).

314. Thus the Court really expressed no view of principle on the validity of a "subjective" reservation.

315. Consequently, the view of Judge Lauterpacht and those who shared it cannot be read as being really in opposition to those of the Court.

316. Judge Lauterpacht summarized his views as follows:

> "I consider it legally impossible for the Court to act in disregard of its Statute which imposes upon it the duty and confers upon it the right to determine its jurisdiction. That right cannot be exercised by a party to the dispute. The Court cannot, in any circumstances, treat as admissible the claim that the parties have accepted its jurisdiction subject to the condition that they, and not the Court, will decide on its jurisdiction. To do so is in my view contrary to Article 36 (6) of the Statute which, without any qualification, confers upon the Court the right and imposes upon it the duty to determine its jurisdiction. Moreover, it is also contrary to Article 1 of the Statute of the Court and Article 92 of the Charter of the United Nations which lay down that the Court shall function in accordance with the provisions of its Statute" (*ibid.*, at p. 43).

317. Judge Sir Hersch Lauterpacht then proceeded to examine in detail the

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[1] The problem had been discussed earlier by Professor Waldock (as he then was) in his article "The Plea of Domestic Jurisdiction before International Legal Tribunals", 31 *B.Y.B.I.L.* 1954, p. 90, at pp. 131-137.

two principal reasons for his conclusion; that the reservation is inconsistent with the Statute and that it is void because it is deprived of legal content. The Government of Australia will not here repeat these passages, which run from pages 43 to 52 of the *Reports*, but it respectfully adopts the reasoning in these passages as part of its argument. Accordingly, the Government of Australia submits that the French reservation in the present case is null and void.

318. A similar assessment of the French reservation was made by Judge Guerrero, than whom no one served longer on the Court or enjoyed greater international respect. His comment on the reservation was: "The great defect of this reservation is that it does not conform either to the spirit of the Statute of the Court or to the provisions of paragraphs 2 and 6 of Article 36" (*I.C.J. Reports 1957*, at p. 68). After further discussion he concluded that "such reservations must be regarded as devoid of all legal validity" (*ibid.*, at p. 69).

319. Later, in the *Interhandel* case (*I.C.J. Reports 1959*, p. 6), Judge Sir Hersch Lauterpacht developed his earlier expressed views at greater length (at pp. 97-119). Moreover he was joined by Judge Sir Percy Spender (at pp. 55-57), Judge Klaestad (at pp. 76-78) and Judge Armand-Ugon (at pp. 91-93).

320. The question remains of the effect of this invalidity upon the declaration of which the reservation forms part. In the *Norwegian Loans* case, Judge Sir Hersch Lauterpacht expressed the view that on the facts there present the reservation could not be severed from the declaration, which was accordingly tainted and destroyed by the nullity of the reservation. However, if his reasoning is applied to the facts of the present case, it will be seen that in this instance he would in all likelihood have held that the declaration could be severed from the offending reservation and could survive.

321. The legal principle which Judge Sir Hersch Lauterpacht held to be applicable is—

> "that it is legitimate—and perhaps obligatory—to sever an invalid condition from the rest of the instrument and to treat the latter as valid provided that having regard to the intention of the parties and the nature of the instrument the condition in question does not constitute an essential part of the instrument. *Utile non debet per inutile vitiari.* The same applies also to provisions and reservations relating to the jurisdiction of the Court" (*ibid.*, at pp. 56-57) [1].

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[1] In the *Interhandel* case, *I.C.J. Reports 1959*, p. 6, too, Judge Sir Hersch Lauterpacht took the view that the reservation made by the United States was not severable from the declaration of which it formed part. This view was shared by Judge Sir Percy Spender (*ibid.*, at p. 57). But Judges Klaestad and Armand-Ugon (at pp. 78 and 93 respectively) while reaching the conclusion that the reservation was a nullity, were nonetheless inclined to treat it as severable from the rest of the declaration and to regard the latter as surviving. The problem was solved by the United States Government renouncing any right it had to avail itself of the reservation.

Since the date of the *Norwegian Loans* case and the *Interhandel* case, the law relating to severability as there developed has been restated in terms which appear fully to support the Australian position. Article 44 (3) of the Vienna Convention on the Law of Treaties provides:

> "If the ground (for invalidating a treaty) relates solely to particular clauses, it may be invoked only with respect to those clauses where:
>
> . . . . . .
>
> *(b)* it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole . . ."

322. The reason why he held that principle inapplicable in the *Norwegian Loans* case was that "the principle of severance applies only to provisions and conditions which are not of the essence of the undertaking" (*ibid.*, at p. 57). His view of the situation was that—

> "the Court is therefore confronted with the decisive fact that the Government in question was not prepared to subscribe to or renew its commitment of compulsory judicial settlement unless it safeguarded in that particular way its freedom of action. That particular formulation of the reservation is an essential condition of the Acceptance as a whole. It is not severable from it" (*ibid.*, at p. 58).

323. A big difference is to be noted between the scope and character of the reservation made by the French Government in its 1959 declaration and those of the reservation of "disputes concerning activities connected with national defence" which appears in the 1966 declaration. The first reservation was made jointly and simultaneously with the acceptance of the jurisdiction of the Court. One can understand that those who deemed the offending reservation, made in 1949, to be void thought that this implied the nullity of the whole declaration.

324. The 1966 reservation was only an addition made to a reservation formulated in 1959, which existed for seven years without the addition being considered necessary or, what is more, "essential" by the French Government. Therefore, it could hardly be said to be "an essential condition of the acceptance" to use another phrase of Judge Lauterpacht.

325. Moreover, the reservation of 1959 was an "objective" one. Should the added reservation be considered "subjective" an inconsistency would appear with the intention manifested in 1959 to submit the question of jurisdiction to the decision of the Court, and the added reservation would, in a sense, be incompatible with the original part of the reservation. In these conditions it seems evident that the addition, if null and void, would not nullify either the acceptance or the original reservation. If a clear instance were sought of a proper application of the principle of severability, this undoubtedly would be it.

326. In other words, if the reservation of "activities connected with national defence" is to be considered as a "subjective" or "automatic" reservation, it should be severed from the French declaration, leaving the rest of it intact.

327. Once it is established that the reservation is null and that it is severable from the declaration of which it forms part, the submission which the Government of Australia makes is that the French acceptance has to be read as if the words "disputes concerning activities connected with national defence" are not there. The result is that the Court has jurisdiction on the basis of concurrent acceptances by both parties unrestricted by any material reservation.

3. The French Reservation Regarded as an "Objective" Reservation

328. Having thus examined the French reservation as if it were a subjective reservation, the Government of Australia would now turn to a consideration of the bearing of the French reservation on the Court's jurisdiction in the present case on the assumption that its content could be objectively determinable.

329. However, a major obstacle to this way of proceeding has been erected by the French Government itself. If, when adding in 1966 the new reservation to the one originally formulated in 1959, it did not intend to depart from the intention then manifested of acknowledging that the Court alone has the right to appreciate and decide on any question concerning its jurisdiction, logic would have required the French Government duly to appear in the Court, properly to invoke in the proceedings the existence of its reservation in the form of a preliminary objection, adequately to provide the Court with all the information as to the nature, scope and purpose of the activities performed as well as all the objective elements capable of proving that the conduct of the tests in issue were objectively to be considered as an activity really connected with the national defence of France, and finally to leave to the Court the decision of the matter.

330. But the French Government has done none of these things. Instead, it has bluntly refused to appear and has merely asserted, unilaterally and dogmatically, that its activities in the South Pacific area were *indisputably* connected with its national defence, drawing from that premise the consequence that the lack of jurisdiction of the Court in the specific case was *unquestionable* up to the point of dispensing it from the duty to appear before the Court. By such an attitude, amounting to making itself judge of the whole question, the French Government was, in effect, giving to its reservation that subjective character which, as has been shown in the previous section, is to be considered void and of no effect. Even if the original intention as to the operation of the reservation was different, the present conduct of France clearly contradicts and nullifies it.

331. Moreover, in its letter of 16 May 1973, the French Government does no more than make two assertions namely, that it is incontestable that:

(i) the tests form part of a programme for the preparation of nuclear weapons; and
(ii) *thus* constitute an activity connected with national defence [1].

332. No element of proof has been produced which could assist the Court in fulfilling its task in deciding whether in all circumstances—or indeed whether in the present circumstances—the reservation thus invoked serves to limit the French acceptance of the Court's jurisdiction. In fact, in the understanding of the Government of Australia, the operation of an objective reservation is dependent upon the Court satisfying itself that the conduct which is exposed to judicial challenge truly and fully falls within the words of exclusion.

333. The French Government says that its atmospheric tests are connected with the preparation of a nuclear armament, but nothing is said, it may be observed, to indicate the degree of connection of the tests with the preparation of nuclear armament. The Court is not informed what kind of nuclear armament is involved; nor is any material given on which to judge whether the development of it is for national defence. The matter is left solely to the assertion of the French Government.

334. It is no answer to the identification of the undeveloped features of the

[1] "... il n'est pas contestable que les expériences nucléaires françaises dans le Pacifique, que le Gouvernement Australien considère comme illicites, font partie d'un programme de mise au point d'un armement nucléaire et constituent *donc* une de ces activités se rapportant à la défense nationale que la déclaration française de 1966 a entendu exclure." (Italics added.)

French argument, no answer to its complete failure to provide the Court with the necessary material to enable it to make an objective appreciation of the validity of recourse to the reservation, to say that these elements are for the French Government alone to assess. For if that is said, then the Court is taken away from an "objective" reservation to one which is alleged to have "subjective" content and is, for the reason already stated, null and void.

335. In these circumstances, the Australian Government suggests that the proper conclusion should be that, whatever may have been the original character of the 1966 addition, the present attitude of the French Government rendered it a purely subjective and automatic reservation, the application of which should be refused without even attempting to appreciate its possible effect on the Court's jurisdiction to entertain the present case.

336. However, should the Court deem that the 1966 reservation to the French unilateral acceptance of the compulsory jurisdiction is worthy of consideration with reference to the present case, and should the Court (notwithstanding the points already made as to its character and the way it has been utilized by the French Government in this case) wish to strive to treat it as an objective reservation, the Australian Government ventures respectfully to express its conviction that certain considerations ought to be taken into account in the performance of this difficult task.

337. It would seem appropriate, for example, to reflect on the meaning of "activities connected with national defence" when read as a phrase forming the third of a series of eventualities in which the French declaration was intended not to be operative. The third head of the French reservations excludes:

(i) disputes arising out of a *war or international hostilities*;
(ii) disputes arising out of a *crisis affecting national security* or out of any measure or action relating thereto; and
(iii) disputes concerning *activities connected with national defence*.

Item (iii), as has been said, was added in 1966. What does it add?

338. One must suppose that the concepts of "war" or "international hostilities" or "a crisis affecting national security" are probably intended to refer to episodes identifiable in terms of place, time and participants. "National defence" is not so easily identifiable in the terms just suggested and may be intended to be a much wider concept. But if this is the intention, where does the concept stop? Is national defence to be thought of exclusively in terms of reaction to hostile physical violence in an age when economic factors can affect the vital interests of the State every bit as much as military ones? Is "defence" much the same as "security"; and if so does it affect a host of other matters involving the well-being of the State? If so, would it raise considerations which must depend on the view of the government concerned? Once again, one is forced back to the position that unless, when the reservation is invoked, facts are adduced which relate an objectively verifiable concept of "national defence" to the circumstances, the Court is confronted by a reservation which is entirely subjective in its content and is practically unlimited. This would leave to the State invoking it the opportunity to escape from the jurisdiction of the Court on virtually any occasion.

339. The foregoing consideration of the phrase "activities connected with national defence" illustrates that if the words are given a broad meaning they inevitably involve subjective considerations which depend on the views of the Government of France. In these circumstances, the Government of Australia submits that if the words are to be given an objective meaning consistent with

an intention not to exclude from the Court almost any conceivable activity and a meaning which, *ex hypothesi*, cannot depend on a mere expression of opinion by the French Government, they must be construed strictly as referring to activities which, in the specific case, are "intrinsically" or "essentially" connected with national defence.

340. The frustrating consequence of the French failure to explain the connection between its activities and national defence is exacerbated by the fact that the present case rests upon three claims, each of which is related to a different activity. With regard to the breach of a norm of customary international law, the activity is the explosion of nuclear devices in the atmosphere in an island territory of the Pacific remote from France. In relation to the claim of a breach of sovereignty, the activity is the explosion there of such devices in such a way as inevitably to deposit radio-active material on and over Australia's territory. In relation to the infringement of freedom of the high seas, the activity includes not only the explosion of the devices involving consequent fall-out, but also the act of closure of the high seas and airspace.

341. In which, if any, of these cases is the activity one which is intrinsically or inherently connected with national defence? For unless every one of these aspects of French activity can be connected with national defence, then the remainder could not prevent the French declaration from being an appropriate basis of jurisdiction in respect of those claims to which they relate.

342. It is true that nuclear explosions are *capable* of being activities connected with national defence. But when they are undertaken, as here, in a remote place, can it be said of them without knowing more that they *are* so connected? The Government of Australia submits that it cannot. This is particularly so when the activity is one involving the deposit, as French scientists have conceded, of radio-active material on other countries. It is surely part of any objective concept of national defence that it excludes activities involving consequences in the territory of another friendly State.

343. One reason why they are not so connected, whether the activity is atmospheric nuclear explosions or the closure of the high seas and airspace, is that there is nothing about the activity itself which intrinsically or essentially connects it with national defence. Gunnery practice by armed forces in time of peace is intrinsically an activity connected with national defence. Likewise army manoeuvres within a country's territory or bombing practice on a range. Nuclear explosions, however, are consistent with activity directed towards other purposes and there is nothing which intrinsically or essentially connects them with national defence.

344. Furthermore, if the Court were to look at the expressed intention of the Government of France, it would not be assisted towards a decision that the activity was for the purpose of national defence.

345. How is the Court to conclude that the nuclear tests are in fact activities connected with national defence? There is only the simple assertion by the French Government that they are. No reasons are given by them to the Court.

346. There are a number of authoritative official statements by members of the French Government which suggest that France's nuclear programme has other purposes than national defence—to give France a place in the councils of the great powers, for example, and to give her mastery of nuclear technology. Most recently, declarations emanating from the highest French political personality have particularly called the attention of the French public to the financial advantages of the French effort to create a nuclear force. This form of armament was described as much less expensive than a

comparably strong conventional armament. "Quoi qu'on pense" it was said "l'arme atomique est moins chère que l'arme conventionnelle, telle qu'il faudrait la développer si on reconçait à l'arme atomique [1]".

347. Is it then not open to conclude in the absence of evidence to the contrary that these tests are not indispensable for the national defence and are not at all "essentially connected" with it?

348. Can it not also be asked whether it is only because France was in the past able to conduct its atmospheric tests in the Sahara and is now able to conduct them in an island of the South Pacific—both regions being quite remote from the metropolitan territory of France—that its choice in favour of atomic armament against a more expensive conventional one was possible? The French Government has not provided the Court with an answer to this question. The reactions that were provoked last August in French public opinion by the simple rumour that the authorities were planning to create an "underground" test site in south-west France obliged the Government officially to declare that it was "absolument exclu" that nuclear tests of any kind may be effected in French metropolitan territory [2].

349. Is it unreasonable to deduce from these facts, without evidence to the contrary from France, that if France had been unable to go to the Pacific to conduct its atmospheric nuclear tests, the Government would have been unable to develop its nuclear armament and would, like many others, have had to base its defence effort on conventional weapons to defend itself?

350. Is it then to be so easily accepted without proof that the French nuclear atmospheric tests in the South Pacific are really activities essentially connected with France's national defence?

351. Finally, there are the frequently repeated and authoritative statements by the French Government which have indicated that the primary purpose of France's development of a nuclear force was connected much more closely with political aims than with simple defence. While there have been official statements by the French Government indicating the defence reasons, why should not the Court conclude in the absence of proof to the contrary by France that the statements emphasizing the political reasons are the more complete indication of French intentions?

352. The Australian Government therefore submits that even if—which is surely not the case—*the jurisdiction of the Court in the present proceedings* can only be based on the declarations of acceptance by the parties to the optional clause, and even if the French declaration should be considered as validly limited by an "objective" reservation excluding activities connected with national defence, this reservation should be so construed, with reference to the present case, as not to include in its scope the nuclear tests effected by the French Government in the South Pacific area.

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[1] See *Le Monde*, 29 September 1973, p. 3.

[2] The paper *Sud-Ouest* of Bordeaux reported on 26 July 1973 that it received this precise assurance from M. Robert Galley, Minister of the Armed Forces. A footnote to the report stated that M. Galley's denial may be taken as an advance reply to a question asked in the National Assembly by M. Henri Lavielle, Deputy of the Landes. The paper then reassured its readers by indicating that the underground explosions were to be executed in the Kerguelen Islands or in an island of the Pacific.

D. The Relationship Between the Jurisdiction of the Court Under the General Act and the Optional Clause

353. It remains now to consider an argument briefly raised by the French Government at the end of both the Note and the Annex. It proceeds on the assumptions, first, that the General Act is valid and operative and, secondly, that the reservation to the French declaration of 1966 is valid and effective to deprive the French declaration under the optional clause of its applicability to the present case. Although the Government of Australia obviously accepts the first assumption which it believes to be fully in accord with reality, it can only accept the second (which it believes to be wrong) for the purposes of the present argument. The French contention is to the effect that the Court would be here confronted with "a problem of the relationship between two successive acts in the nature of agreements relating to the same matter" and that the expression of French intention in its declaration under the optional clause made in 1966 should override the obligations which it assumed under the General Act in 1931.

1. The Case of the Electricity Company of Sofia and Bulgaria

354. Before meeting the French contention in specific terms, it is as well to recall the fact—so manifestly ignored in the French Note and Annex—that the question of the co-existence of two separate and independent sources of jurisdiction has already been authoritatively examined and answered by the Court. The answer is crystal clear: when two valid sources of jurisdiction exist at the same time, neither overrides the other. Each may be used. The answer was given in the well-known case of the *Electricity Company of Sofia and Bulgaria* (*P.C.I.J., Series A/B, No. 77*, p. 64).

355. This was a case brought by Belgium against Bulgaria. The substantive cause of action arose out of the treatment by Bulgaria of a Belgian company operating in Bulgaria and that substantive cause of action does not matter for present purposes. In that case, as in this, two grounds of jurisdiction were invoked. The first consisted of the declarations made by Bulgaria in 1921 and Belgium in 1926 under the optional clause. The second ground of jurisdiction was the Treaty of Conciliation, Arbitration and Judicial Settlement concluded between the two countries in 1931. This treaty may, for convenience, be described as a sort of bilateral general act of a kind promoted by the League of Nations at the same time as the General Act itself was drawn up, and in material content it was very similar to the General Act. On analysis it will be found to be as much a general treaty for the peaceful settlement of disputes, in particular, judicial settlement, as the French Note has suggested the General Act to be. This, therefore, is not a ground for distinguishing this case from the present.

356. The factual point of difference in that case from the present case is that there the declarations under the optional clause were earlier in time than the treaty.

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

358. However, the point was pursued within the Court. Although the

Judgment itself is relatively brief in its treatment of the question, it is significant that the Court's conclusion on the matter was quite clear.

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

> "The Court holds that the suggestions first made by Counsel for the Belgian Government cannot be regarded as having the effect of modifying that Party's attitude in regard to this question. The Belgian Government in fact has always been in agreement with the Bulgarian Government in holding that, when the Application was filed, their declarations accepting the Court's jurisdiction as compulsory were still in force.
>
> The Court shares the view of the Parties. In its opinion, the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to *open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain.*
>
> In concluding the Treaty of conciliation, arbitration and judicial settlement, the object of Belgium and Bulgaria was to institute a very complete system of mutual obligations with a view to the pacific settlement of any disputes which might arise between them. *There is, however, no justification for holding that in so doing they intended to weaken the obligations which they had previously entered into with a similar purpose, and especially where such obligations were more extensive than those ensuing from the Treaty.*
>
> It follows that if, in a particular case, a dispute could not be referred to the Court under the Treaty [the later instrument] whereas it might be submitted to it under the declarations of Belgium and Bulgaria accepting as compulsory the jurisdiction of the Court [the earlier instruments], in accordance with Article 36 of the Statute, *the Treaty [the later instrument] cannot be adduced to prevent those declarations from exercising their effects and disputes from being thus submitted to the Court.*" (Italics added.)

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

361. Now the decision of the Court, read by itself, provides the most powerful support for the submissions of the Government of Australia. There, as here, were two sources of jurisdiction; there, as here, the earlier source of jurisdiction was more extensive, that is, *less restricted by reservations* than the later source. In the *Electricity Company* case the significant difference between the optional clause declarations and the 1931 Treaty was that the latter contained a provision making exhaustion of local remedies a condition precedent to the proceedings. This made more precise the rule of customary international law that would otherwise have applied, and significantly reduced the benefit of the 1931 Treaty to the claimant State, Belgium. Hence its preference for the optional clause as a basis for jurisdiction.

362. There is another distinction between the *Electricity Company* case and the present case which serves only to strengthen the contention in the present case that the optional clause declaration does not override the acceptance under the General Act. The *Electricity Company* case was one of conflict

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

363. In terms of citing a clear precedent to this Court from its previous practice, it is impossible to find one more exact than the *Electricity Company* case. It is evident that when one takes the Judgment of the Court in the *Electricity Company* case as containing the law upon this subject, the effect is directly contrary to the French contention that the reservation of "activities connected with national defence" should override the General Act.

364. In the course of the oral proceedings before the Court on the application for interim measures, Counsel for the Government of Australia, Mr. E. Lauterpacht, Q.C., in answer to a question by Judge Dillard and Judge Jiménez d'Aréchaga, dealt with the dissenting judgments of Judges Anzilotti and Hudson in the *Electricity Company* case and their relevance to the present question (pp. 235-244, *supra*). The Government of Australia considers that it is unnecessary to do more than recall those observations at this point.

2. The Opinion of Judge Basdevant in the Norwegian Loans Case

365. The views of the Permanent Court in the *Electricity Company* case were followed without, it would seem, any hesitation by Judge Basdevant in the *Norwegian Loans* case (*I.C.J. Reports 1957*, p. 9). Reference has already been made to the terms in which he treated the General Act as still in force and operative. He then went on to consider specifically the effect of the co-existence of the General Act and of a subsequent optional clause declaration narrower in scope than the prior acceptance of the General Act. He said (at p. 75):

> "The Declaration by which the French Government accepted compulsory jurisdiction on the basis of Article 36, paragraph 2, of the Statute contains a reservation of wider scope, since it refers not to what is recognized by international law, but to the understanding of the Government which invokes the reservation and, further, since it does not submit that understanding to the verification of the Court. At all events, it does not do so expressly. The Declaration thus limits the sphere of compulsory jurisdiction more than did the General Act in relations between France and Norway. Now, it is clear that *this unilateral Declaration by the French Government could not modify, in this limitative sense, the law that was then in force between France and Norway.*

In a case in which it had been contended that not a unilateral declaration but a treaty between two States had limited the scope as between them of their previous declarations accepting compulsory jurisdiction, the Permanent Court rejected this contention and said in this connection:

> 'The multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out, with the ultimate result that no jurisdiction would remain' (*P.C.I.J., Series A/B, No. 77*, p. 76).

A way of access to the Court was opened up by the accession of the two Parties to the General Act of 1928. It could not be closed or cancelled out by the restrictive clause which the French Government, and not the Norwegian Government, added to its fresh acceptance of compulsory jurisdiction stated in its Declaration of 1949. This restrictive clause, emanating from only one of them, does not constitute the law as between France and Norway. The clause is not sufficient to set aside the juridical system existing between them on this point. It cannot close the way of access to the Court that was formerly open, or cancel it out with the result that no jurisdiction would remain." (Italics added.)

3. Reply to Specific French Contentions

366. Having thus indicated the extraordinarily direct and cogent strength of authority within the Permanent Court and the International Court in support of the Australian contention that the French declaration under Article 36 (2) does not adversely affect the terms of its acceptance of the General Act, it is necessary to say a few words about the specific contentions advanced in the concluding pages of the French Annex.

367. The French Government identifies the problem as being in its view one "of the relationship between two successive acts in the nature of agreements relating to the same matter". This French position is developed first in specific terms, by reference to Article 103 of the Charter, and then more generally on the basis that Article 103 is not applicable. In view of the subsidiary role thus attributed to Article 103, the Australian answer on that point will be left until the more general point has been dealt with.

(a) *The Problem of So-Called "Successive Treaties"*

368. The French Annex scarcely elaborates what it conceives to be the proper resolution of "the ordinary problem of a subsequent treaty relating to the same subject-matter as an earlier treaty as between the same countries". It is left to the imagination of the reader to suppose that, in the French view, where there is a conflict between two such provisions, the later in time should prevail.

369. Yet the French Annex immediately shies off the implications of such a conclusion, for it says:

> "It is not of course suggested that when any treaty whatsoever contains a clause conferring jurisdiction on the International Court of Justice, a State party to such a treaty may automatically free itself from that clause by modifying its reservations to the jurisdiction of the Court on the basis of Article 36, paragraph 2."

370. The French Government seeks to avoid this situation by distinguish-

ing between the case of the General Act, which is a treaty devoted wholly to peaceful settlement of disputes, and that of other treaties in which the presence of a jurisdictional clause is only an incidental element.

371. However, if the basic French argument were correct, every jurisdictional clause in any treaty to which France is a party should be read as subject to the changing content of the French declarations under the optional clause. The very apprehension of the French Government that this result may flow from its argument shows how destructive the consequence would be. France would not stand alone as the "beneficiary" of this proposition. The international community would be confronted by the essential worthlessness of every jurisdictional undertaking in the face of collision with a subsequent incompatible declaration under the optional clause. Indeed States would even be able to produce declarations hedged around with so many reservations aimed at pre-existing jurisdictional undertakings and containing so little in the way of new positive obligation that the structure of the Court's compulsory competence would soon crumble away entirely.

372. The central error of the French contention is the idea that when two States are tied by two bonds of compulsory jurisdiction, one established on the basis of the optional clause and the other by a treaty in force between them, the two must necessarily be made to coincide in their effects, and that, by applying the criterion that the later in time should override the earlier.

373. The Statute of the Court and the General Act are two general treaties each with its own independent life; neither is deemed to override the other.

374. The optional clause is a special provision of the Statute. It does not, by itself, create a link of compulsory jurisdiction between its parties, but it provides that they may issue unilateral declarations of acceptance of the jurisdiction of the Court, so that the joint effect of the various unilateral declarations will be the creation between them of an engagement. The extent of this will be determined on the basis of the limits freely indicated by each party. Moreover, the acceptance may be withdrawn or its limits changed.

375. The General Act is a treaty which by itself directly creates the engagement for compulsory jurisdiction among the States parties to it. These States may unilaterally place some limitations upon their engagement, but this only by referring to certain agreed categories of reservations; moreover, they may add new limitations to those originally indicated only at certain fixed times and following a fixed procedure.

376. The comparison between the two thus shows that any modification of the engagement respectively assumed under the optional clause and under the General Act can only be effected in the way and subject to the conditions provided for by the instruments which form their respective bases.

377. From this it clearly follows that agreements for compulsory jurisdiction created upon the two different bases between two States which are parties both to the Statute of the Court and to the General Act may not have the same scope. This result is in no way surprising, as the General Act is a treaty having a wider scope and is not confined to the creation of an engagement for the judicial settlement of legal disputes. As a consequence, it is quite possible that in a specific case the conclusion may be reached that the Court has jurisdiction only under one of the two different links.

378. The central element in this whole problem is an appreciation that any formal rules which may be cited, e.g., that the particular overrides the general or that the later overrides the earlier, are no more than presumptions about intention in the absence of specific or other indications of the will of the parties. The law relating to the independence of paragraphs 1 and 2 of Article

36 has always been so clear that there has never—until now—been any suggestion of the possibility of confusion between them.

(b) *The Irrelevance of Article 103 of the Charter*

379. It has been suggested in the French Annex that the French declaration of 1966 constitutes an obligation under the United Nations Charter which, by virtue of Article 103 of the Charter, must prevail over the General Act. Article 103 reads:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

Reference is made in the French Annex to the fact that the Statute of the Court is declared by Article 92 of the Charter to be an integral part thereof.

380. In the submission of the Government of Australia there are three clear reasons why Article 103 does not apply to the situation.

381. First, there is no "conflict" within the meaning of Article 103, between the French declaration and the General Act. The two instruments clearly can stand together; they are compatible ways of dealing with similar subject-matters. Any other conclusion would be surprising in view of the fact that the Charter itself, in the Chapter dealing with the Pacific Settlement of Disputes, makes it clear that judicial settlement is an appropriate means for settling disputes; that consideration is to be given to procedures for the settlement of disputes already adopted by the parties; and that consideration should also be given to the desirability that legal disputes should as a general rule be referred by the parties to the International Court of Justice (Charter, Arts. 33 and 36).

382. The second reason is that it is not correct to suggest, as the French Annex does by implication, that the obligations assumed by States which have made declarations under the optional clause have the same status as "obligations of the Members of the United Nations" under the Charter. It is, of course, quite true that the Statute is, under Article 92, an integral part of the Charter. But it does not follow that the relationships created between States which make declarations under Article 36 (2) of the Statute are themselves to be assimilated to obligations under the Charter.

383. This Court in the *Rights of Passage* case (*I.C.J. Reports 1957*, at p. 146) clearly regarded the relationship between parties to the optional clause as a distinct contractual relationship arising from the fact that they have both made declarations within the framework of the optional clause. Thus, the Court said:

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

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

384. It is clear of course that the bond is not created by the Charter itself;

it is not, in that sense, a Charter relationship. Nor is it the relationship created by the Statute, for all Members of the United Nations are bound by that relationship, while only some are bound by the optional clause. To say that the relationship exists within the framework of the Statute is not to say that the obligation thus established is an obligation under the Charter. All the obligations under the Charter and the Statute, as such, are already spelled out and are equal for all parties. Obligations under the optional clause are extra commitments which originate from outside and, it should be noted, are in some cases even assumed by States who are not members of the United Nations and are not bound by the Charter. This, for example, was the case with Liechtenstein in the *Nottebohm* case (*I.C.J. Reports 1955*, at p. 4).

385. It is submitted therefore that the optional clause declaration is not an "obligation of the Members of the United Nations" under the Charter within the meaning of Article 103.

386. The third reason why the French contention relating to Article 103 must be rejected is that there is no conflict of "obligations" within the meaning of the Article. This aspect was developed in the speech of the Solicitor-General *before the Court on 22 May 1973* (pp. 203-204, *supra*). The Solicitor-General referred to, among other things, the nature of the obligation owed by France to Australia under the General Act. It is the obligation to submit to the jurisdiction of the Court under the General Act if Australia invokes it. It may be asked, what obligation has France accepted under the optional clause? It is to accept the jurisdiction of the Court as defendant if Australia chooses to invoke it. It is only heavier if France's reservations under the optional clause are less restrictive than those attached by France to its acceptance of the General Act. But in this case the reservation upon which France appears to be relying—the reservation of national defence—is not less restrictive but more restrictive than its reservation under the General Act. There is no conflict of obligations.

(c) *The French Declaration of 1966 Cannot Be Regarded as a Reservation Made Under the General Act to Take Effect at the End of the Five-Year Period*

387. In the closing paragraphs of the French Annex, the suggestion is made that, upon the hypothesis that the General Act is in force, the reservation of activities connected with national defence in the declaration made in 1966 under Article 36 (2) of the Statute of the Court should be interpreted as a suspended addition of a reservation under the General Act to take effect in 1969, the end of the current five-year period during which the General Act would not be abrogated or amended.

388. It is not believed by the Australian Government that the Court could take seriously the proposition that a declaration under the optional clause can have the automatic effect of operating as a suspended notice under other treaties—quite unspecified—of termination or amendment, when the treaties themselves contain quite precise provisions for amendment.

389. For reasons upon which the Australian Government need not speculate, the French Government has *not* made use of the possibility open to it under Article 44 (4) of the General Act of a denunciation consisting of notification of reservations not previously made. The result can only be that the French Government is still bound by the General Act on the conditions previously indicated by the said Government.

PART TWO

ADMISSIBILITY

A. Introduction

1. Preliminary Observations

390. In this part of the Memorial the Government of Australia will address itself to the question of admissibility of the Application. This is in accordance with the requirements of the operative part of the Court's Order of 22 June 1973, with which the Government of Australia will seek to comply as constructively as possible.

391. The Australian Government notes first of all that there is no generally established or accepted concept of admissibility. This has, indeed, been acknowledged by the Court. In the *Northern Cameroons* case, the Court said:

> "The arguments of the Parties have at times been at cross-purposes because of the absence of a common meaning ascribed to such terms as 'interest' and 'admissibility'. The Court recognizes that these words in differing contexts may have varying connotations but it does not find it necessary in the present case to explore the meaning of these terms." (*I.C.J. Reports 1963*, at p. 28.)

392. The word "admissibility" itself does not appear in the Statute of the Court. Nor was it to be found in the Rules of Court prior to its inclusion in Article 67 of the revised Rules of 1972. The jurisprudence of the Court on the point is relatively small. Whenever questions of this kind have been raised in the past, it has been at the instance of a respondent State which has raised some specific issue identified and accepted as one of "admissibility". So far as the Government of Australia is aware, this is the first occasion on which the Court has ordered an applicant State to address itself generally to the question of the admissibility of an Application.

393. Such being the case, the Government of Australia deems it useful to review briefly in chronological order the cases in which admissibility has been mentioned.

394. The experience of the Permanent Court with the question of admissibility was so slender that the concept appears not even to have attracted the attention of Judge Hudson in his work on the Court. That tribunal, it seems, gave specific consideration to the question of admissibility only twice. First, in the case of *Certain German Interests in Polish Upper Silesia (P.C.I.J., Series A, No. 6)*, Poland, in addition to raising preliminary objections to the jurisdiction, raised a question of admissibility. It contended that the Court could not proceed with the case because proceedings on a similar matter were pending before the German-Polish Mixed Arbitral Tribunal. The Court decided that the objection could be considered at the preliminary objection stage, and then rejected it. Secondly, in the *Pajzs, Csaky and Esterhazy* case the Court held that the appeal of the Hungarian Government against the three judgments rendered by the Hungarian-Yugoslav Mixed Arbitral Tribunal on 22 July 1935 could not be entertained because the conditions prescribed for appeals under the relevant treaty had not been satisfied *(P.C.I.J., Series A/B, No. 68)*.

395. The present Court has been presented with questions of admissibility more frequently. In the *Nottebohm* case *(Second Phase)* (*I.C.J. Reports 1955*, p. 4), the Court held that the claim submitted by the Government of Liechtenstein was inadmissible on the ground that Nottebohm's Liechtenstein nationality could not be relied upon against Guatemala. The Court did not examine two other grounds of inadmissibility which were invoked by Guatemala: insufficiency of diplomatic negotiations to reveal the existence of a dispute between the parties and failure to exhaust local remedies.

396. In the *Interhandel* case (*I.C.J. Reports 1959*, at p. 6) the Court held the application of the Swiss Government inadmissible on the ground of non-exhaustion of local remedies.

397. In the *Aerial Incident* case *(Israel* v. *Bulgaria)* (*I.C.J. Reports 1959*, at p. 127), Bulgaria raised two issues which it described as ones of admissibility, namely, non-exhaustion of local remedies and nationality of claims; but the Court decided the case upon an exclusively jurisdictional ground, namely, the lapse of the Bulgarian declarations under the optional clause.

398. In the *Northern Cameroons* case the Court in effect treated the grounds upon which it held that it could not proceed with the case as relating to "admissibility" rather than jurisdiction. It concluded "that the proper limits of its judicial functions do not permit it to entertain the claims submitted to it" (*I.C.J. Reports 1963*, at p. 38).

399. In the *Barcelona Traction* case (*I.C.J. Reports 1964*, at p. 3), in addition to the question of jurisdiction which was dealt with as a preliminary objection, two questions of admissibility were raised by the Government of Spain: an objection to the *locus standi* of Belgium and an objection that local remedies had not been exhausted. Both these objections were joined to the merits, and ultimately in its judgment of 1970 (*I.C.J. Reports 1970*, at p. 3), the Court, after hearing the whole case on its merits, rejected the Belgian claim on the ground that Belgium had no *locus standi*.

400. In the *South West Africa* cases *(Preliminary Objections)*, 1962, the South African Government raised a number of issues which it described as objections to jurisdiction, though they all depended upon an allegation of the lack of *locus standi* of Ethiopia and Liberia (see *I.C.J. Reports 1962*, at p. 326). These were rejected by the Court. In the *South West Africa* cases *(Second Phase)*, 1966, the Court held, by the President's casting vote, the votes being equally divided, that Ethiopia and Liberia had not established any legal right or interest appertaining to them in the subject-matter of the claims (*I.C.J. Reports 1966*, at p. 3). The Court did not feel it essential to treat the question of "interest" as one of admissibility, but by way of what it described as "a digression", it did state that "looking at the matter from the point of view of the capacity of the Applicants to advance their present claim, the Court would hold that they had not got such capacity, and hence that the claim was inadmissible" (*ibid.*, at p. 43).

401. This survey of the jurisprudence of the Court, as can readily be seen, confirms the statement made earlier to the effect that there is no single established meaning of the word "admissibility".

2. The Terms of the Court's Order

402. On turning now to the Order of the Court in the present case, the Government of Australia notes that it contains a reference which clearly indicates what was meant by the Court itself when asking the Australian Government to demonstrate the "admissibility" of its Application. At para-

graph 23 the Order reads: "Whereas it cannot be assumed *a priori* that . . . the Government of Australia may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application." Clearly the Court is not asking the Australian Government to engage in an examination of all theoretically imaginable questions of admissibility, but to concentrate its attention on one specific aspect: the existence of a legal interest of its own in the case it has brought to the Court.

403. The accuracy of this interpretation is confirmed by a reading of the commentary made by one of the Judges who participated in the adoption of the Order. In his declaration, Judge Jiménez de Aréchaga commented upon this sentence in the following terms (at p. 107):

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

Judge Jiménez de Aréchaga later said:

> "At the preliminary stage it would seem . . . sufficient to determine whether the parties are in conflict as to their respective rights. It would not appear necessary to enter at that stage into questions which really pertain to the merits and constitute the heart of the eventual substantive decisions such as for instance the establishment of the rights of the parties or the extent of the damage resulting from radio-active fall-out" (at p. 108).

3. Position and Task of the Government of Australia

404. The Government of Australia has indicated that in this part of its Memorial it will examine, quite separately, the question of Australia's legal interest in its claim.

405. In dealing with the specific requirements of Article 17 of the General Act, the Australian Government has already had occasion to emphasize that the dispute between it and France is undoubtedly a dispute of a legal nature, i.e., a dispute as to the "respective rights" of the parties. It has recalled that when in its Application it asserts the unlawfulness in international law of the nuclear atmospheric tests conducted by France in the South Pacific area, Australia puts its case exclusively in terms of existing legal rights and more particularly alleges the infraction by France of its obligations under international law. On its side, the French Government has expressed the view that its nuclear tests do not violate any existing rule of international law. The Australian Government therefore concludes that it could not be more explicitly acknowledged by both parties that the present dispute only concerns their respective rights and obligations and that these legal aspects only are now at issue before the Court.

406. The Australian Government does not really see how it could be maintained that it has not a legal interest in its Application. When it asserts that France, by executing its nuclear tests, infringes its international legal

obligations towards it, and France on its side contests the existence of such obligations, how could it be denied that Australia has a legal interest in obtaining a judicial decision on those essential points of difference in law?

407. Nonetheless, the Australian Government, wishing fully to comply with the Court's Order, will now devote itself to explaining its position in greater detail, in order to eliminate any possible residual doubts as to the admissibility of its Application.

B. The Meaning of "Legal Interest"

408. On the basis, then, that its sole task in connection with admissibility is to establish that it has a legal interest in respect of its claims, the Government of Australia thinks it will be useful to examine first of all the way in which the Court has in the past treated the concept of "legal interest". As will be seen, little in the way of positive definition will emerge. However, certain indications of what the Court has in the past had in mind in using this expression will appear; and for that reason a review of the relevant cases seems to be justified.

409. It appears to be commonly accepted that an applicant State must have a legal interest in the subject-matter of the claim which it is bringing. On this, as a general proposition, there was basic agreement amongst the Members of the Court at both stages of the *South West Africa* cases in 1962 and 1966—the deep division in the Court in those cases being related, at least in part, to differences of opinion as to what amounted to a legal interest. More recently in the *Barcelona Traction* case *(Second Phase) (I.C.J. Reports 1970*, at p. 3), the Court again adverted to the need for an applicant State to show an appropriate legal interest.

410. Concern to identify the legal interest of an applicant has marked the Court's judgments from its earliest days. In the *Wimbledon* case, the Court's first judgment, the Court said:

> "It will suffice to observe for the purposes of this case that each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags. They are, therefore, even though they may be unable to adduce a prejudice to any pecuniary interest, covered by the terms of Article 386, paragraph 1 . . ." (*P.C.I.J., Series A, No. 1*, at p. 20.)

It is therefore to be noted that since the beginning the Court thought it necessary to emphasize that the requirement that a State show the existence of a legal interest of its own in a specific case was not at all to be understood as a requirement to show the existence of an actual prejudice or of a pecuniary interest.

411. A more positive definition of the concept of a "legal interest" than this, in a way, negative one, may be difficult to find, even though the concept has often been mentioned. An examination can however be made as to how, in the various cases, the Court has satisfied itself whether or not a legal interest exists.

412. In practice, the Court and individual judges have mainly tended to draw a distinction between two categories of legal interest, material and non-material, though both have been regarded as a sufficient basis for the institution of proceedings.

413. In the *South West Africa* cases *(Preliminary Objections)* (*I.C.J. Reports 1962*, at p. 319), South Africa raised a preliminary objection, amongst others, to the effect that the cases did not involve a "dispute", as envisaged in Article 7 of the Mandate,

> "more particularly in that no material interests of the Governments of Ethiopia and/or Liberia or of their nationals are involved therein or affected thereby" (*I.C.J. Reports 1962*, at p. 327).

The Court's treatment of the subject of "interest" was relatively brief. It stated that—

> "the manifest scope and purport of the provisions of this article [Article 7 of the Mandate] indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members" (*ibid.*, at p. 343).

Later the Court said of Article 7:

> "Protection of the material interests of the Members or their nationals is of course included within its compass, but the well-being and development of the inhabitants of the Mandated Territory are not less important" (*ibid.*, at p. 344).

414. The question of legal interest was more fully examined by Judge Jessup in his separate opinion. There he said:

> "International law has long recognized that States may have legal interests in matters which do not affect their financial, economic, or other 'material', or, say, 'physical' or 'tangible' interests" (*ibid.*, at p. 425).

He gave several illustrations of this principle.

415. First, he spoke of the right of a State to concern itself, "on general humanitarian grounds, with atrocities affecting human beings in another country" (*ibid.*, at p. 425).

416. Next he referred to the assertion by States of "a legal interest in the general observance of the rules of international law" *(idem)*. He gave two illustrations of this point. The first was provided by the claims made by France against Italy in the cases of the *Carthage* and the *Manouba* (Scott, *Hague Court Reports*, at pp. 329 and 343), decided by the Permanent Court of Arbitration in 1913. They arose from the interference by Italy with French ships on the high seas in circumstances which the Court found to be illegal. The French Government claimed in each case damages under two heads: first,

> "as reparation for the moral and political injury resulting from the failure to observe international common law and the conventions which are mutually binding upon both Italy and France";

and, secondly, as indemnity to the private individuals interested in the ships. The Court awarded damages under the second head, and in relation to the first head it held:

> "that in case a Power has failed to fulfil its obligations, whether general or special, to another Power, the establishment of this fact, especially in an arbitral award, constitutes in itself a severe penalty". (Scott, *Hague Court Reports*, at p. 349.)

417. These observations clearly justify the conclusion drawn from the cases by Judge Jessup. France was asserting that it had a general legal interest in the observance by other countries of their obligations under international law quite separate and distinct from that concerning the protection of the specific material interest of its nationals. This general legal interest was recognized by the Court and was identified by Judge Jessup as a legal interest of a non-material character.

418. Judge Jessup's other illustration was the decision of the Arbitral Tribunal in the case of the *I'm Alone*. This case arose out of the sinking on the high seas by the United States of a Canadian-registered vessel. The sinking was held unlawful; and the Commissioners recommended that the United States should pay to Canada $25,000 "as a material amend in respect of the wrong". This sum was independent of the sums recommended to be paid as compensation to the injured members of the crew. (UN *Reports of International Arbitral Awards*, Vol. III, at p. 1618.)

419. The next category of example provided by Judge Jessup for his proposition that States can have a legal interest in matters not affecting their economic interests is drawn from treaties which "for over a century . . . have specifically recognized the legal interests of States in general humanitarian causes . . ." (*I.C.J. Reports 1962*, at p. 425). The specific instances mentioned by Judge Jessup were the Minorities Treaties, the Genocide Convention, the Constitution of the International Labour Organisation and the conventions concluded within that Organisation.

420. The Government of Australia has referred to the views of Judge Jessup in such detail, not only because of the eminence of their author, but also because they may represent the origin of certain observations made by the Court itself in its judgment in the *Barcelona Traction* case *(Second Phase)* (*I.C.J. Reports 1970*, at p. 4). There, in considering whether a right of Belgium had been affected by measures taken against a Canadian company in which Belgian nationals owned the majority of shares, the Court said:

> ". . . 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.
>
> Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so . . ." (*ibid.*, at p. 32).

421. Comparable observations were made by Judge (now Vice-President)

Ammoun. First, he recognized the possibility that a State might bring an action "based on a general interest, or on an international or human interest of an objective nature" (*ibid.*, at p. 326). He then continued as follows:

> "If, on the other hand, the applicant State is not acting to protect a collective interest, but is complaining of an injury it has suffered as an individual subject of law, it goes without saying that it will only have access to an international tribunal to claim a subjective right on the basis of a personal and direct interest" (*ibid.*, at p. 327).

422. It appears from what precedes that the Court, while not expressly defining the concept of "legal interest", has had specially in mind the distinction between it and a purely political or merely equitable interest; neither of which would be advanced on the basis of a legal right. It has, moreover, acknowledged as legal interests entitled to protection both a "general" or "collective" one and a "particular", "individual", "specific" or "material" one. The former can exist in situations where treaties have established rights clearly intended to be enforceable at the instance of any party. These are usually in the humanitarian sphere. But this category is not restricted to rights created by treaties. There can exist a general or even collective legal interest in claiming the observance of obligations arising out of a customary rule of international law, which is quite distinct from the specific interest which a State may advance in, for example, seeking to protect its nationals.

423. The individual or specific interests of States have been spoken of as affected when injury is done to the national of a State, but such interests are clearly not limited to such situations. For example, it may be recalled that when the United Kingdom brought proceedings against Albania in the *Corfu Channel* case (*I.C.J. Reports 1947-1948*, at p. 15 and *1949*, at p. 4), no doubt was expressed in any quarter that the United Kingdom had an interest in making a claim arising out of infringements of the rights of passage of British warships in international straits or out of the damage done to such warships. Nor was it ever doubted that Albania had an interest in asserting the inviolability of her territorial waters against trespass by British warships sweeping mines.

424. It is also appropriate to bring to the notice of the Court, as bearing on the question of legal interest, the work which the International Law Commission has recently been doing on the subject of "State Responsibility". At its twenty-fifth session in 1973 the Commission prepared a draft which contained, *inter alia*, Article I entitled "Responsibility of a State for its internationally wrongful acts". The text reads as follows: "Every internationally wrongful act of a State entails the international responsibility of that State." The commentary to this Article, in reviewing the opinion of the various writers, observes:

> "Some of the internationalists, on the other hand, hold today that in addition to these relations [between the wrongdoing State and the injured State] others may be created in certain cases either between the offending State and an international organization *or between the offending State and other States.*" *(Report of the International Law Commission on the Work of its 25th Session.)* (Italics added.)

A footnote to this passage reads as follows:

> "In connexion with this last point, attention must be drawn to the growing tendency of a group of writers to single out, within the general category of internationally wrongful acts, certain kinds of acts which are

> so grave and so injurious, not only to one State but to all States, that a State committing them ought to be automatically held responsible to all States. It is tempting to relate this view to the recent affirmation of the International Court of Justice in its judgment of 8 February 1970 in the case concerning the *Barcelona Traction, Light and Power Company Limited* that there are certain international obligations of States which are obligations *erga omnes*, that is to say, obligations to the international community as a whole. (*I.C.J. Reports 1970*, p. 32.)"

It would appear from these passages that in the view of the International Law Commission every State is entitled to seek the respect by another State of certain international legal obligations, even if (which is not the case here) the violation by that State of one of those obligations is not directly or materially causing damage to it.

C. Australia's Legal Interest in Its Claims

1. Factual Premises

425. The Australian Government will not repeat in the present Memorial the statements of fact already included in the Application, the request for interim measures of protection and in the oral hearings before the Court on 21 and 23 May 1973 (pp. 164-228, *supra*). The relevant passages are hereby formally incorporated in this Memorial and the Court is respectfully referred to them. In some respects, however, they require supplementation referring to more recent events.

426. First, the French Government has, in breach of the Court's Order of 22 June 1973, conducted a series of five tests in the course of July and August 1973. These tests have led to fall-out of radio-active material on Australian territory. The Court was informed of these breaches by a letter from the Australian Government dated 19 September 1973.

427. Secondly, the French Government has given no indication of any intention of departing from the programme of testing planned for 1974 and 1975, to which reference is made in paragraph 3 of the Application. Instead, the French Government, having no regard to the Order of the Court, has clearly indicated that the programme will continue. Thus, on 30 August 1973, in the course of a visit to Papeete, Tahiti, the Minister for the Armed Forces M. Galley, is reported as having said:

> "Je peux vous dire que jamais le gouvernement français ne prendra l'engagement de cesser les essais aériens." (*Journal de Tahiti*, 31 August 1973.)

428. Thirdly, the French Government has continued and extended its practice of closing areas of the high seas and of the superjacent airspace to sea and air navigation. On 4 July 1973 Ministry of Defence Decree No. 73-618 (Annex 7) established a security zone of 60 nautical miles contiguous to the territorial sea round Mururoa Atoll. In this the French Government reserved the right temporarily to suspend navigation. This power was exercised by the Minister for the Armed Forces in a decree dated 4 July 1973 suspending maritime navigation in the security zone as from 11 July 1973 (Annex 8). A further decree dated 11 September stated that the suspension was to cease to be effective from midnight 13 September 1973.

429. Fourthly, there has been continued demonstration of international concern at the conduct of the French tests. Important though this material is,

its bulk is such that if presented at this point it would unduly delay the development of the legal argument. It has therefore been printed as Annex 9 below, to which the Court is respectfully invited to refer.

2. General Remarks on the Main Elements of Australia's Legal Case

430. As reference to the main prayer in the Application shows, the Government of Australia asks the Court to adjudge and declare that the carrying out of atmospheric nuclear tests in the South Pacific area is not consistent with obligations imposed on France by applicable rules of international law.

431. These obligations include, first of all, the general one of abstaining from any kind of atmospheric nuclear tests. In the opinion of the Australian Government this obligation is clearly imposed on every State by a rule of general international law and it is clearly one owed by each State towards every other State; Australia, like any other country, is entitled to claim respect of that legal prohibition.

432. Australia also alleges that France's activities in the South Pacific area are inconsistent with its obligation under general international law to respect the sovereignty of Australia over and in respect of its territory and thus to abstain from producing alterations of any kind in the Australian environment (atmosphere, soil, waters) by the deposit on its territory and the dispersion in its airspace of radio-active fall-out.

433. Finally—and this list is by no means meant to be exhaustive—French nuclear tests in the South Pacific area represent a violation by France of its obligations towards other States, and particularly towards a country of the Pacific like Australia, concerning respect for the freedom of the high seas: this by interference with sea and air navigation and by pollution.

434. The Government of Australia will, therefore, now turn to show in more detail how it has a legal interest in respect of each of these elements in the claim. In so doing, the Government of Australia again emphasizes that at the present stage of the case it is not necessary for it, nor is it invited, to prove its substantive case. This is not in issue at this juncture. The Government of Australia will give such a detailed demonstration in the next phase of the proceedings, the one dedicated to the substance of the case. At present, the Government of Australia is required to show that it has a legal interest in its Application; and since this is to be treated as a preliminary question, the Court can only proceed on the basis of the presumed correctness of the Australian contentions on the merits.

435. It is, in passing, hardly necessary for the Government of Australia to make the point that the existence of its legal interest is in no way affected by the fact that the Government of Australia does not seek an award of damages but a declaratory judgment. As the Court will have appreciated from the arguments advanced on behalf of the Government of Australia in connection with the application for interim measures of protection and from the final prayer in the Application, the essential purpose of instituting the present proceedings was to achieve the termination of illegal atmospheric nuclear testing by France, and this before further damage is done. At the present time, although it is quite possible for the Australian Government to identify the type of damage which flows and will flow from the French tests, it is not the intention of the Australian Government to seek pecuniary damages. Indeed, as the Application indicates, for the Australian Government the only acceptable remedy in this case consists of *(a)* the recognition by the Court of the

prohibition under existing international law of the atmospheric nuclear tests conducted by France in the South Pacific area, *(b)* the assertion by the Court of the legal obligation of France to abstain from this testing activity and *(c)* the acknowledgement by the Court of the legal right of Australia to claim from France that it conform with that duty of abstention.

436. The Australian Government will now proceed to show that it clearly has a legal interest in each one of the above-indicated principal elements of its case.

3. The Legal Interest of Australia to Obtain a Judgment that under Existing General International Law France Is Obliged Towards Every State—and Therefore Towards Australia—to Abstain from Conducting Atmospheric Nuclear Tests

(a) *The Basis of the Australian Contention*

437. The first main element in Australia's claim is that atmospheric nuclear testing is unlawful under a general rule of international law and that every State, including Australia, has a right to claim that France refrain from conducting such testing activity.

438. It was more or less about the middle of the fifties that world opinion began to be alarmed by the danger of atmospheric nuclear tests as such. If one wishes to mark the starting point of this new tendency, one can say that it began at the time of the thermonuclear test executed by the United States in the Bikini Atoll in 1954. Fall-out from this test was unexpectedly widespread and affected in particular the crew of the Japanese fishing boat *Fukurya Maru*. The effects of the Bikini explosion made public opinion aware of the fact that nuclear tests had in themselves a growing degree of dangerousness which must be a source of direct concern. Some member States first expressed their new anxieties at the Tenth Session of the United Nations General Assembly, where resolution 914 (X) adopted on 16 December 1955 suggested that account should be taken of the proposal of the Government of India regarding the suspension of experimental explosions of nuclear weapons.

439. The concern of the peoples and of the countries for the urgent elimination of the risks connected with experimental explosions then progressively developed [1]. The greater level of activity in nuclear testing by the United Kingdom, the United States and the Soviet Union in 1957-1958 provoked increasing world-wide concern at the effect of the fall-out. A petition signed by 9,000 scientists from 43 countries was presented on 13 January 1958 to the Secretary-General, urging that "*an international agreement to stop the testing of nuclear bombs be made now*". *(Italics added.)* The appeal of the United Nations Scientific Committee on the Effects of Atomic Radiation for "*the cessation of contamination of the environment by explosions of nuclear weapons* [2]" (italics added), brought the General Assembly to adopt on

[1] On 13 July 1956, India placed a proposal before the Disarmament Commission, pointing out that:

> "While there may be certain authorities who may not feel fully convinced that experimental explosions on the present scale will cause serious danger to humanity, it is evident that no risk should be taken when the health, well-being and survival of the human race are at stake. *The responsible opinion of those who believe that nuclear tests do constitute a serious danger to human welfare and survival must, therefore, be decisive in such a contest.*" (UN, *The U.N. and Disarmament 1945-1970* (New York, 1970), at p. 196.) (Italics added.)

[2] A/3838, para. 54, set forth in Annex 3 of the request for interim measures.

4 November 1958 resolution 1252 (XIII) urging an early agreement on the ending of testing. The concern of countries, and particularly of African countries, was then increased by the first three nuclear test explosions conducted by France in the Sahara in 1960. It took them until 1963 to arrive, on 25 July of that year, after a period in which increasingly alarmed public opinion helped to produce temporary unilateral suspensions of nuclear testing, at the signing of the Moscow Test Ban Treaty, banning nuclear weapon tests in the atmosphere, in outer space and under water. In addition, the parties undertook not to carry out such tests in any other environment if such explosion causes radio-active debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted.

440. France is not a party to the 1963 Treaty, while Australia is. But in the opinion of the Government of Australia the prohibition of nuclear tests stated in the Treaty is a prohibition that general international law makes now its own, and which therefore rests on all members of the international community, whether or not they have adhered to its text. The Government of Australia will provide at the merits stage of this case all the elements which combine to prove that the content of this Treaty must now properly be regarded as forming part of customary law: the point need not be developed now in too great detail. It will be sufficient to put in clear terms the Australian contention in this respect and to state that, according to it, it would be a mistake to believe that the 1963 Treaty gave birth merely to a contractual engagement concerning, ultimately, the three nuclear powers which have promoted the agreement. The 116 States, big and small, which by 1966 had hastened to sign or accede to that instrument [1] definitely contributed, in so doing, to the establishment of the validity as a general principle of international law of the prohibition of the carrying out of atmospheric nuclear tests recorded in that written document. They demonstrated with the utmost clarity the necessarily universal character of the concept of the liberation of humanity from the anxiety which those repeated tests had till then been spreading.

441. To put it differently the Government of Australia is deeply convinced that the prohibition contained in Article 1 of the 1963 Treaty has become the expression of a general principle of customary international law, now definitively received into the *opinio juris* of the members of the international community. The actual possibility of such a process of evolution from treaty into customary law was expressly recognized by the Court in its Judgment in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, at p. 41). And Judge (now President) Lachs observed on that occasion:

> "It is generally recognized that provisions of international instruments may acquire the status of general rules of international law. Even unratified treaties may constitute a point of departure for a legal practice. Treaties binding many States are, *a fortiori*, capable of producing this effect, a phenomenon not unknown in international relations." (*Ibid.*, at p. 225.)

442. Furthermore, with reference to the relationship between the banning of atmospheric nuclear tests and the 1963 Treaty, the Australian Government can specially appeal to the opinion expressed by Judge Sir Humphrey Waldock during the discussion at the International Law Commission of his third report on the Law of Treaties. He then expressly mentioned the "nuclear test ban" as a typical case "of a customary rule whose development had its genesis in a

[1] *The U.N. and Disarmament 1945-1970* (New York, 1970), p. 232.

particular treaty" and also expressed his conviction that the principle of international law which forbids such tests "was fast acquiring *jus cogens* force" (*Yearbook of the I.L.C.*, 1964, Vol. I, at p. 78).

443. Moreover, it would be absurd to claim that no rule of general customary law was able to emerge simply because two States, latecomers among nuclear powers, have declined to subscribe to the 1963 Treaty, have shown their opposition to it and have continued to carry on nuclear experiments, unmindful of the prohibition that the Treaty contains.

444. Moreover, the reactions of other members of the international community to the dissenting behaviour of one or of some of them can be a very efficient and valid element of proof of the *opinio juris* which is at the basis of that norm. Now, the reactions to the conduct of the French nuclear tests in the Southern Pacific could not possibly have been more numerous, more constant, or firmer. On every occasion several governments have sent to the French Government diplomatic notes of protest. Resolutions by the General Assembly condemning the tests conducted in violation of the banning of atmospheric tests are set out in Annexes 9, 11-18 and 21 to the request for interim measures, and the relevant passages of the Declaration and of resolution 3 (1) adopted at the Stockholm Conference on the Human Environment are to be found in Annexes 19 and 20 of the request. Other bodies, among them the Asian-African Legal Consultative Committee [1], have clearly joined their voice in that chorus.

445. It will thus be evident that there is ample justification for a finding by the Court that there now exists a rule of customary international law to the effect that atmospheric nuclear testing is unlawful.

446. In addition, the Court will wish to recall the relevance in this connection of international concern for the protection of fundamental human rights. This concern has now progressed to the stage at which it is impossible to deny that the observance of such rights is a matter of international obligation. Atmospheric nuclear testing violates such rights in a number of important and specific respects. Because analysis of the subject in question necessarily involves some detailed reference to various texts, the Government of Australia would invite the Court's attention to the development of this aspect of the matter in Annex 10.

(b) *Conclusion as to Australia's Legal Interest in this Element of Its Claims*

447. In the light of the above-mentioned considerations, the Australian Government believes that the existence of a legal interest of its own in this element of its claims could hardly be contested. How could Australia be denied a *locus standi* to seek judicial confirmation of the existence of this rule prohibiting atmospheric nuclear testing and a judicial determination that French action in the past and comparable French action in the future is in breach of it and should be ordered to stop? The submission of the Australian Government is that this question could only be answered in the affirmative.

448. The feature common to all the specific expressions and confirmations of the rule as indicated above is that they are couched in terms of an *erga omnes* obligation and not in terms of an obligation owed to particular States. The duty to refrain from atmospheric nuclear testing is stated in absolute

[1] See *Asian-African Legal Consultative Committee: The Legality of Nuclear Tests*, New Delhi, referred to in para. 11 of Annex 10.

terms, rather than in terms relative to the incidence of the effect of nuclear testing upon particular States. The duty is thus owed to the international community; it is a duty of every State towards every other State. For this reason and—to use the very language of the Court in the *Barcelona Traction* case—because "of the importance of the rights involved, *all States can be held to have a legal interest in their protection*" (*I.C.J. Reports 1970*, at p. 33) (italics added).

449. The Australian Government therefore submits that it undoubtedly has a legal interest in the protection of its right to claim from the French Government the observance of the obligation to abstain from conducting atmospheric nuclear tests; that it has *locus standi* to obtain a declaratory judgment to this effect; and that its Application is already, under this heading, fully admissible.

450. In making this statement, the Government of Australia cannot refrain from also observing that, if it must be recognized that every State possesses a legal interest in the protection of the right involved in the present case, Australia has a higher title than most States to claim such protection, since by reason of its geographical situation and the deposit of fall-out from French tests in the southern hemisphere, Australia is more directly affected than many other States by the harmful effects that the rule of general international law prohibiting atmospheric nuclear tests is designed precisely to prevent. If Australia is not entitled to protect the right here in question, what other State would be entitled to do so? And one of the most essential general rules of today's international law would become devoid of any effective content.

4. The Legal Interest of Australia to Obtain a Judgment that Its Sovereignty Over and in Respect of Its Territory Is Violated by the Deposit on Its Territory and the Dispersion in Its Airspace of Radio-Active Fall-Out from the French Nuclear Tests

451. The last paragraph of the preceding section brings the Government of Australia to the second main element of its claim. The special interest which Australia possesses in the preservation of both its territorial integrity and all the rights associated with sovereignty over that territory has in effect already been recognized by the Court in the operative part of the Order of 22 June 1973. For there the Court indicated that "in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on Australian territory" (*I.C.J. Reports 1973*, at p. 106). The Government of Australia appreciates, however, that in strict law an order indicating interim measures of protection cannot prejudice the legal position of either party and for this reason it now reverts once again to this aspect of its claim.

(a) *The Basis of the Australian Contention*

452. The Court is here confronted with a dispute regarding the right of a State to the protection of its territory (atmosphere, soil, waters) from external acts. The issue is simply one of the extent to which States, in the assertion of their right of sovereignty, can refuse to be exposed to the consequences arising from nuclear tests carried out by other States.

453. Now, as already stated, there is no need in this Memorial to pursue the substance of this argument. It is sufficient if the legal issue is identified to the Court. And that such an issue is a real one there can be no room for

doubt. It is, perhaps, worthwhile emphasizing a fact, which has been recognized in many quarters, that when a State conducts a nuclear test it initiates a process of cause and effect in relation to radio-active fall-out as direct and certain as does an individual who pulls the trigger of a loaded firearm. In both cases, the impact of the projectile upon a destination—radio-active fall-out in the case of the nuclear test, a bullet in the case of the firearm—follows inexorably. The destination may be distant; attempts may be made to reduce the consequences: but in both cases, as a matter of fact, the relationship of cause and effect is quite inescapable.

454. The question remains, of course, of the legal consequences of the effect. The Government of Australia has already, in the course of the oral hearings on interim measures (21 May 1973, pp. 186-188, *supra*), given some indication of the factors which establish that French conduct leading to nuclear fall-out on Australian soil is internationally unlawful. The Government of Australia repeats that its case rests upon several bases: on the mere fact of trespass, on the harmful effects associated with trespass, and on the impairment of its independent right to determine what acts shall take place within its territory. In this connection, the Government of Australia wants to emphasize that the mere fact of trespass, the harmful effects which flow from such fall-out and the impairment of its independence, each clearly constitute a violation of the affected State's sovereignty over and in respect of its territory. Of course, the harmful effects from the fall-out may not be identifiable in the same way as, say, the damage to an individual who loses an arm as a result of a bullet fired from an identifiable source. But that radio-active fall-out contributes in a measurable degree to the sum total of human ill in any given territory there can scarcely be any doubt, or that those who add to the amount of radioactivity add to the amount of ill. The fact that the Court is here faced by what, for it, is a novel claim that harmful effects are occurring and will continue to occur must not be allowed to obscure the fact that scientific knowledge for a long time has recognized the existence of such effects.

455. These, then, are amongst the principal substantive legal issues which arise in connection with Australia's claim that its rights are violated when radio-active fall-out is deposited on its soil and waters and dispersed in its airspace. These questions are manifestly not ones to be considered at this stage of the case; but in the opinion of the Government of Australia their existence cannot be denied.

(b) *Conclusion as to Australia's Legal Interest in this Element of Its Claims*

456. The evident character of Australia's legal interest in a claim alleging violation of its sovereignty over and in respect of its territory is such as to make any extended argument upon this point superfluous. It is, indeed, quite obvious that a State possesses a legal interest in the protection of its territory from any form of external harmful action, as well as in the defence of the well-being of its population and in the protection of national integrity and independence. It would indeed be positively absurd to suggest otherwise. If a State did not possess a legal interest in such matters, how could Portugal have brought the *Naulilaa* case against Germany (*Annual Digest*, 1927-1928, Case No. 360); how could Albania have brought against the United Kingdom in the *Corfu Channel* case (*I.C.J. Reports 1949*, at p. 4) the claim arising out of the sweeping of mines in Albanian territorial waters? The point does not require elaboration.

5. The Legal Interest of Australia to Obtain a Judgment that French Nuclear Tests in the South Pacific Area Represent a Violation by France of Its Obligations Towards Australia and Other States, Concerning Respect for the Freedom of the High Seas

(a) *The Basis of the Australian Contention*

457. The Government of Australia in paragraph 49 of the Application claims, *inter alia*, that "the interference with ships and aircraft on the high seas and in the superjacent airspace, and the pollution of the high seas by radio-active fall-out, constitute infringements of the freedom of the high seas". Some of the facts relating to the closure by the French Government of areas of the high seas are set out in paragraph 45 of the Application. There have, of course, been further instances of interference with ships and aircraft on and over the high seas in connection with the series of tests conducted by the French Government in the summer of 1973. However, at the present juncture, it is not necessary to burden the Court with a fuller statement of these additional facts. Reference is simply made to paragraph 428 above mentioning in particular the security zone of 60 miles established round the territorial sea of Mururoa Atoll, in which navigation was "suspended" from 11 July to 13 September 1973.

458. In approaching the present situation, it is necessary to say that the test of an actual breach of the freedom of the high seas is not, e.g., whether a specific ship or aircraft has been contaminated by radioactivity arising from nuclear tests. The real question in relation to the assertion of an infringement of the freedom of the high seas is whether the conduct of France is likely to affect adversely the general right possessed by other States to use and enjoy the sea and its resources.

459. There is an additional point of particular cogency which relates especially to the pollution of the high seas. Leaving aside any question regarding contiguous or other comparable zones of exclusive fishing rights, it must be accepted as beyond need of argument or proof that every State is entitled to fish freely in the high seas. It would clearly be contrary to all common sense to suggest that a particular State is free to pollute the high seas because no other State can show that at that moment the area of pollution is one in which that or other States are active. The sea is not static; its life-systems are complex and closely interrelated. It is evident, therefore, that no one can say that pollution—especially pollution involving radioactivity—in one place cannot eventually have consequences in another. It would, indeed, be quite out of keeping with the function of the Court to protect by judicial means the interests of the international community, if it were to disregard considerations of this character.

460. In the light of what has already been said, this is not the stage of the proceedings at which to enter into any detailed consideration of Australia's maritime and marine interests in the Pacific Ocean. But there is one matter which, though virtually self-evident, requires nonetheless to be expressly recalled. It is that geographically Australia is a State in the Pacific Ocean and that the tests which are the subject of the present proceedings are taking place in that ocean. True, it is a great ocean and the distances involved are large. But distance is a highly relative concept; and what may in bare terms of mileage appear far away can in terms of scientific cause and effect prove to be relatively close. Of this general consideration, the Court, it is submitted,

cannot fail to take note. Apart from its general right as a maritime State to assert a right shared by all maritime States, Australia is a Pacific Ocean State with a special interest in matters affecting the Pacific Ocean.

461. This said, the Australian Government will proceed in the remainder of this section to develop the proposition that every State has an enforceable legal interest in asserting the freedom of the seas, especially in relation to nuclear testing.

(b) *The Interest of All States in the Maintenance of the Freedom of the High Seas Is Inherent in the Concept Itself*

462. To start at the highest level of generality, it can properly be said that every State has a legal interest in safeguarding the respect by other States of the freedom of the seas. Or, to put the point the other way round, it cannot be said that any State lacks a legal interest in asserting so fundamental a concept. This proposition flows, first, from the idea, so widely accepted, that the high seas are *res communis*, that they belong to all. It follows that any interference with the freedom of the seas affects all who share in the common object. There is no need to establish any additional interest.

463. In the second place, the proposition is directly supported by modern authority. It is clearly appropriate to examine in this connection the terms of Article 2 of the Geneva Convention on the High Seas. This Convention is largely codifying in character—and certainly so in Article 2. This provides as follows:

> "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:
>
> (1) freedom of navigation;
> (2) freedom of fishing;
> (3) freedom to lay submarine cables and pipelines;
> (4) freedom to fly over the high seas.
>
> These freedoms and others which are recognized by international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."

464. This text reflects in large part the wording of Article 27 of the draft articles on the law of the sea completed by the International Law Commission in 1956. These were in a slightly shorter form:

> "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas comprises, *inter alia*:
>
> (1) freedom of navigation;
> (2) freedom of fishing;
> (3) freedom to lay submarine cables and pipelines;
> (4) freedom to fly over the high seas."
>
> (Report of the International Law Commission covering the work of its eighth session, *Yearbook of the I.L.C.*, 1956, Vol. II, at p. 278.)

465. This formulation, which was intended to be declaratory of customary international law, was accompanied by a commentary, two passages of which indicate very clearly that the understanding of the Commission was that every State has a right to assert the freedoms here listed.

466. First, the Commission said: "States are bound to refrain from any acts which *might* adversely affect the use of the high seas by nationals of other States" (*ibid.*, at p. 278, italics added). Attention is drawn to the word "might". The Commission did not express the restraint in terms of acts which *would* affect the use of the seas by other States. This use of language is significant, for it shows that the existence of the obligation is independent of any specific damage which might flow from its breach. The obligation is an absolute and a general one; and would appear to have been regarded as enforceable by any State.

467. The second relevant observation of the Commission is even more explicit:

> "Any freedom that is to be exercised *in the interests of all entitled to enjoy it*, must be regulated. Hence the law of the high seas contains certain rules, most of them already recognized in positive international law, which are designed not to limit or restrict the freedom of the high seas, but to safeguard its exercise *in the interests of the entire international community* . . ." (*ibid.*, at p. 278, italics added).

The repeated reference here to the interests of the community is an express recognition of the possession by all States of an individual legal interest in safeguarding the freedom of the high seas.

(c) *The Practice of States Demonstrates the Irrelevance of the Possession of a Specific Material Interest*

468. A second reflection of the interest of all States in the maintenance of the freedom of the seas is to be found in various protests made by States on maritime questions. While, of course, for diplomatic reasons most protests against encroachments upon the freedom of the seas indicate the specific interests which the protesting State regards as affected, this is by no means an invariable practice. As the Court well knows, it is impossible to know the contents of all diplomatic protests, but the Government of Australia has been able to find instances in which the protest has clearly been founded upon the view that all States possess a legal interest in maintaining the freedom of the high seas.

469. One of the earlier ones which may be mentioned is the British and American protests against the Russian Ukase of 1821. In that year the Russian Government sought by Ukase to exclude the shipping of other nations from an area of water extending 100 Italian miles from the coast of north-west America as far south as the 51st degree north latitude. Both the British and United States Governments protested promptly. Although the United States protest initially referred to the interests of United States shipping, the British protests were framed in more general terms of broad principle (18 January 1822):

> ". . . His Britannic Majesty . . . not being prepared to admit . . . that the ships of friendly Powers . . ., could, by the acknowledged law of nations

be excluded from navigating within the distance of 100 Italian miles . . . from the coast." (*Behring Sea Arbitration* (U.S. No. 1 (1893), at p. 41).)

Or again (28 November 1822):

"We cannot admit the right of any Power possessing the sovereignty of a country to exclude the vessels of others from the seas on its coasts to the distance of 100 Italian miles." (*Ibid.*, at p. 42.)

Or yet again (28 November 1822):

"We contend that no Power whatever can exclude another from the use of the open sea." (*Ibid.*, at p. 43.)

470. Two points may be noted about the correspondence between the parties: First, the British Government never indicated that specific British vessels had been or would be affected by the Russian action; the protest was lodged on grounds of principle, coupled with the general interest of the United Kingdom in the freedom of navigation in the area.

471. Secondly, no suggestion was made on the part of the Russian Government that the British Government had to show that some specific material interest was affected by the measure.

472. Another example is provided by the French correspondence of 1869-1870 with Norway and Sweden. In December 1869 the French Minister in Stockholm raised with the Ministry of Foreign Affairs of Norway and Sweden, a question which was of interest "from the point of view of the general principles of international law", and would concern other governments besides the French. This related to the correct interpretation of a decree which reserved to the Swedes certain exclusive fishery rights. In the correspondence which followed, although France referred to the activities of her fishermen, there was no apparent disposition on the part of Norway-Sweden to question the existence of a general interest of maritime States in the legislation in question (*I.C.J. Pleadings, Fisheries*, Vol. II, at pp. 66-73).

473. An illustration of special interest because of the explicit wording of one of the notes of protest relates to the Soviet closure of the Peter the Great Bay in 1957. On 26 July 1957 the USSR claimed the bay of Peter the Great as internal waters of the Soviet Union. Protests have been made against this claim by a number of States. One of the protesting States, Japan, clearly had a fishing interest in the affected area. But the same does not appear to be true of the United States which protested on 12 August 1957 (see *Department of State Bulletin*, Vol. 37, p. 388) and again on 6 March 1958 (*ibid.*, Vol. 38, p. 461). The second note contains the important statement that "encroachments on the high seas are of concern to the entire world". The United Kingdom protested in September 1957 without asserting any specific interest (see E. Lauterpacht, "Contemporary Practice of the United Kingdom, V", in *International and Comparative Law Quarterly*, Vol. 7 (1958), at p. 112). France, Canada and Sweden are also reported to have protested (see *Japanese Annual of International Law*, No. 2 (1958), at p. 15 and pp. 213-218).

(d) *Recognition of this General Interest in Connection with Nuclear Tests*

474. The considerations which establish the legal interest of all States in safeguarding the freedom of the seas are made even stronger when the specific situation to which they are material involves nuclear testing. It is scarcely possible to overemphasize the special character of this activity and the degree of attention which it has attracted to itself during the past two decades. And

nowhere is this more apparent than in connection with the evolution of the law of the sea.

475. Thus, the International Law Commission in 1956, in what at first might have appeared the relatively innocuous context of a discussion regarding the freedom to conduct scientific research on the high seas, showed considerable concern lest recognition of this freedom should in any way be regarded as acknowledgement of the legality of nuclear testing (see *Yearbook of the I.L.C., 1956*, Vol. I, at pp. 11-14, 29-32 and 261). Thus Mr. Pal said that—

> "The Commission could not ignore the fact that in recent years powerful weapons of mass destruction had been invented and tested on the high seas and that, although political considerations were involved, some provision should be inserted in the draft prohibiting the use of the high seas, which were *res communis*, in a manner which might be injurious to mankind." (*Ibid.*, at p. 11.)

Mr. Krylov observed that—

> ". . . it was widely held that such tests should not be carried out on the high seas at all" (*ibid.*, at p. 12).

Mr. Zourek said:

> "Experiments on the high seas with atomic or hydrogen bombs must be considered as a violation of the principle of freedom of the high seas" (*ibid.*, at p. 12).

476. Ultimately, in its Report (*Year Book of the I.L.C.*, 1956, Vol. II, at pp. 2-6) the Commission said:

> "Nor did the Commission make any express pronouncement on the freedom to undertake nuclear weapon development tests on the high seas. In this connexion the general principle enunciated in the third sentence of paragraph 1 of this commentary is applicable. In addition, the Commission draws attention to Article 48, paragraphs 2 and 3, of these articles. The Commission did not, however, wish to prejudice the findings of the Scientific Committee set up under General Assembly resolution 913 (X) of 3 December 1955 to study the effects of atomic radiation."

477. Although the Commission did not expressly hold that nuclear testing on the high seas was illegal, the fact remains that it was an item to which the Commission gave special attention and in which, so it would appear, the members regarded all States as having an interest.

478. The existence of a universal legal interest of States, to be recognized as appertaining to each one of them, in maintaining and protecting the freedom of the seas from nuclear testing is demonstrated in clear and specific terms by the proceedings of the Geneva Conference on the Law of the Sea 1958. The relevant passages will be found in Annex 11 below.

479. To this indication of the attitude of States, it is necessary to add the one illustration of judicial consideration of the matter which the Government of Australia has been able to find. It would appear that in the *Fisheries* case the International Court recognized that, in assessing the effect of State practice on the law of the sea, and in judging the effect of protest in this area, the concept of "interest" in the sense of a specific material interest has never played a role.

480. Thus the Court spoke of the Norwegian conduct as "constituting a system . . . which would reap the benefit of *general* toleration" (*I.C.J. Reports 1951*, at p. 138). The Court continued:

> "The *general* toleration of foreign States with regard to the Norwegian practice is an unchallenged fact" *(ibid.)*.

Now, the Government of Australia reads these words as an indication that in the opinion of the Court "general toleration" is an element in the identification of the content of the law of the sea. There is no suggestion there that the States which tolerated a situation must be shown to have been States which had a specific material interest in doing so. It would seem that any maritime State minded to oppose the Norwegian claims might have done so and its protests could not have been dismissed for want of *locus standi*.

481. This assessment of the sense of the Court's words is confirmed by a passage which follows shortly afterwards:

> "The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. As a coastal State on the North Sea greatly interested in the fisheries in this area, *as a maritime power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas*, the United Kingdom could not have been ignorant of the Decree . . ." (*Ibid.*, at p. 139, italics added.)

482. If the last sentence had not included the words which have been italicized, then it could have been said that the Court was employing a relatively narrow concept of interest in identifying the States which had an interest in protesting. But the presence of the italicized words quite alters the picture. The use of those words manifestly expands the category of States whom the Court regarded as having a sufficient interest in the Norwegian action to warrant some display of reaction on their part.

483. The point is made even clearer by consideration of another passage, a few lines later:

> "The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, *her own interest in the question*, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom." (*Ibid.*, italics added.)

484. The Court appears to have regarded the United Kingdom as having an "interest" in the Norwegian system. What was it? In the earlier passage it is identified as having two elements: a narrow and more precise one, an interest in fisheries; and a broader and more general side, a traditional concern with the law of the sea and a particular concern to defend the freedom of the seas.

485. It is this broader element—the protection of the freedom of the seas—which constitutes in large part the Australian interest in the present case and gives to Australia a sufficient *locus standi* to allege a breach of the fundamental freedoms of the sea by the French nuclear activities in the South Pacific area.

6. Conclusions on Admissibility

486. By way of conclusion to this part, the Government of Australia will very briefly recapitulate the main elements in its argument.

487. As no question of admissibility has been raised by the Government of France, the Government of Australia has looked exclusively to the Court's Order of 22 June 1973 for guidance on the points to be covered in this connection. It appears that under the heading of "admissibility" the Court is exclusively concerned with the identification of Australia's legal interest in the subject-matter of its Application.

488. Accordingly, the Government of Australia, using the standards laid down by the Court itself, and particularly in the *Barcelona Traction* case, has first identified its clear legal interest in establishing the illegality in general international law of atmospheric nuclear testing *per se*. It has, further, indicated that the issue is also one affecting its sovereignty over and in respect of its territory—a matter in which it also has an undeniable legal interest. Finally, it has shown that Australia, in common with every State, has a legal interest in the protection of the freedom of the high seas.

489. The Government of Australia submits therefore that its Application against the French Government is admissible.

PART THREE

SUBMISSIONS OF THE GOVERNMENT OF AUSTRALIA

490. Accordingly, the Government of Australia submits to the Court that it is entitled to a declaration and judgment that:

(a) the Court has jurisdiction to entertain the dispute, the subject of the Application filed by the Government of Australia on 9 May 1973; and

(b) the Application is admissible.

(Signed) P. BRAZIL,
Agent for the Government of Australia

23 November 1973

ANNEXES TO THE MEMORIAL

Annex 1

AUSTRALIAN ACCESSION TO THE GENERAL ACT FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

"The undersigned, His Majesty's Principal Secretary of State for Foreign Affairs, at the instance of His Majesty's Government in the Commonwealth of Australia, hereby notifies the accession of His Majesty in respect of the Commonwealth of Australia to Chapters I, II, III and IV of the General Act for the Pacific Settlement of International Disputes, annexed to the resolution adopted by the Assembly of the League of Nations on the 26th September, 1928. His Majesty's said accession is made subject to the following conditions:

(1) That the following disputes are excluded from the procedure described in the General Act, including the procedure of conciliation:

(i) Disputes arising prior to the accession of His Majesty to the said General Act or relating to situations or facts prior to the said accession;

(ii) Disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;

(iii) Disputes between His Majesty's Government in the Commonwealth of Australia and the Government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree;

(iv) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States; and

(v) Disputes with any Party to the General Act who is not a Member of the League of Nations.

(2) That His Majesty reserves the right, in relation to the disputes mentioned in Article 17 of the General Act, to require that the procedure described in Chapter II of the said Act shall be suspended in respect of any dispute which has been submitted to, and is under consideration by, the Council of the League of Nations, provided that notice to suspend is given after the dispute has been submitted to the Council and is given within ten days of the notification of the initiation of the procedure, and provided also that such suspension shall be limited to a period of 12 months or such longer period as may be agreed by the parties to the dispute, or determined by a decision of all the Members of the Council other than the parties to the dispute.

(3) (i) That, in the case of a dispute, not being a dispute mentioned in Article 17 of the General Act, which is brought before the Council of the League of Nations in accordance with the provisions of the Covenant, the procedure described in Chapter I of the General Act shall not be applied, and, if already commenced, shall be suspended, unless the Council determines that the said procedure shall be adopted.

(ii) That in the case of such a dispute the procedure described in Chapter III of the General Act shall not be applied unless the Council has failed to effect a settlement of the dispute within 12 months from the date on which it was first submitted to the Council, or, in a case where the procedure prescribed in Chapter I has been adopted without producing an agreement between the

parties, within six months from the termination of the work of the Conciliation Commission. The Council may extend either of the above periods by a decision of all its Members other than the parties to the dispute."

(Signed) ARTHUR HENDERSON.

(Seal)

On 7 September 1939 the following telegram was sent to the Secretary-General of the League of Nations:

"His Majesty's Government in the Commonwealth of Australia has found it necessary to consider problem in existing circumstances of its accession to General Act for Pacific Settlement of International Disputes.

Taking into account considerations referred to in my telegram of even date concerning Optional Clause of Statute of Permanent Court of International Justice which apply with equal force in case of General Act His Majesty's Government in Commonwealth of Australia now notifies you that it will not regard its accession to General Act as covering or relating to any dispute arising out of events occurring during present crisis. Please inform all States parties to General Act.

Prime Minister
Commonwealth of Australia."

Annex 2

French Accession to the General Act for the Pacific Settlement of International Disputes

"Acte d'adhésion du Président de la République Française
Sur l'Acte Général d'Arbitrage approuvé par la Neuvième Assemblée de la Société des Nations le 26 septembre 1928

Gaston Doumergue,
Président de la République Française

A tous ceux qui ces présentes lettres verront

Salut:

Ayant vu et examiné l'Acte Général pour le Règlement Pacifique des Différends Internationaux, adopté le 26 septembre 1928, par l'Assemblée de la Société des Nations, et dont la teneur suit:

Acte

En vertu des dispositions de la loi votée par le Sénat et par la Chambre des Députés,

Déclarons adhérer audit Acte, ladite adhésion concernant tous les différends qui s'élèveraient après ladite adhésion au sujet de *situations ou de faits* postérieurs à elle, autres que ceux que la Cour Permanente de Justice Internationale reconnaîtrait comme portant sur une question que le droit international laisse à la compétence exclusive de l'État, étant entendu que, par application de l'Article 39 dudit Acte, *les différends que les parties ou l'une* d'entre elles auraient déférés au Conseil de la Société des Nations ne seraient soumis aux procédures décrites par cet Acte que si le Conseil n'était pas parvenu à statuer dans les conditions prévues à l'Article 15, alinéa 6, du Pacte.

Déclarons en outre que, conformément à la Résolution adoptée par l'Assemblée de la Société des Nations "pour la présentation et la recommandation de l'Acte Général" l'Article 28 de cet Acte est interprété par le Gouvernement français comme signifiant notamment que "le respect des droits établis par les Traités ou résultant du droit des gens" est obligatoire pour les Tribunaux Arbitraux constitués en application du Chapitre 3 dudit Acte Général.

Promettons que ledit Acte sera inviolablement observé.

En foi de quoi, nous avons donné les présentes, revêtues du Sceau de la République.

A Paris, le 12 mai 1931

(Signé)
Par le Président de la République

Le Ministre des Affaires Etrangères
(Signé)"

On 13 February 1939 the following further declaration was notified to the Secretary-General of the League of Nations:

"Monsieur le Secrétaire Général,

J'ai l'honneur de porter à votre connaissance que le Gouvernement de la République française, au moment où l'Acte Général d'Arbitrage est sur le point d'entrer dans une nouvelle période de cinq ans, conformément à l'Article 45 dudit Acte, a pris en considération la situation telle qu'elle se présente pour lui à cet égard.

Le Gouvernement de la République entend maintenir l'adhésion qu'il a donnée audit Acte. Il lui faut toutefois tenir compte de la situation nouvelle qui résulte tant de la sortie de certains Etats de la Société des Nations que de l'interprétation que certains membres de la Société ont donnée de leurs obligations résultant du Pacte. D'autre part, il ne saurait perdre de vue que selon le principe admis par les Conventions de La Haye, les Etats belligérants doivent, en temps de guerre, être tous soumis aux mêmes règles.

En raison de ces considérations et me référant aux Articles 39, alinéa 2, et 45, alinéa 4, dudit Acte, j'ai l'honneur de vous adresser la Déclaration suivante:

Le Gouvernement de la République française déclare ajouter à l'instrument d'adhésion a l'Acte Général d'Arbitrage déposé, en son nom, le 21 mai 1931, la réserve que désormais ladite adhésion ne s'étendra pas aux différends relatifs à des événements qui viendraient à se produire au cours d'une guerre dans laquelle il serait impliqué.

Veuillez agréer, Monsieur le Secrétaire Général, les assurances de ma haute considération."

(Signé)

Annex 3

LETTER OF 10 APRIL 1931 TO THE SECRETARY-GENERAL OF THE LEAGUE OF NATIONS FROM THE MINISTER FOR FOREIGN AFFAIRS OF THE FRENCH REPUBLIC REGARDING THE ACCESSION OF THE GOVERNMENT OF THE FRENCH REPUBLIC TO THE GENERAL ACT FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

Paris,
April 10th, 1931.

Sir,

I have the honour to inform you that, after the Chamber of Deputies, the Senate at its meeting of March 5th unanimously approved the draft law authorizing the President of the French Republic to accede to the General Act for the Pacific Settlement of International Disputes, adopted on September 26th, 1928 by the Assembly of the League of Nations.

The French Government is now in a position to deposit its definitive accession with the Secretariat of the League of Nations. However, taking account of the wishes of Parliament, and in order to emphasize the importance French opinion attaches to this Act, I intend to deposit our accession myself during the next session of the Council of the League.

I should be very much obliged if you would bring the above information to the notice of the Governments Members of the League.

(Signed) A. BRIAND.

(L. of N. translation, taken from a communication from the Secretary-General of 17 April 1931: ref. No. C.242.M.108.1931.V.)

Annex 4

TREATIES UNDER THE AUSPICES OF THE LEAGUE OF NATIONS

(a) *The Application of resolution 24 (I) to the General Act*

1. Resolution 24 (I) adopted by the General Assembly of the United Nations on 12 February 1946, whereby the United Nations accepted the custody and secretarial functions of League treaties read in part as follows:

"I

FUNCTIONS AND POWERS BELONGING TO THE LEAGUE OF NATIONS UNDER INTERNATIONAL AGREEMENTS

Under various treaties and international conventions, agreements and other instruments, the League of Nations and its organs exercise, or may be requested to exercise, numerous functions or powers for the continuance of which, after the dissolution of the League, it is, or may be, desirable that the United Nations should provide.

Certain Members of the United Nations, which are parties to some of these instruments and are Members of the League of Nations, have informed the General Assembly that, at the forthcoming session of the Assembly of the League, they intend to move a resolution whereby the Members of the League would, so far as this is necessary, assent and give effect to the steps contemplated below.

THEREFORE:

1. THE GENERAL ASSEMBLY reserves the right to decide, after due examination, not to assume any particular function or power, and to determine which organ of the United Nations or which specialized agency brought into relationship with the United Nations should exercise each particular function or power assumed.

2. THE GENERAL ASSEMBLY records that those Members of the United Nations which are parties to the instruments referred to above assent by this resolution to the steps contemplated below and express their resolve to use their good offices to secure the co-operation of the other parties to the instruments so far as this may be necessary.

3. THE GENERAL ASSEMBLY declares that the United Nations is willing in principle, and subject to the provisions of this resolution and of the Charter of the United Nations, to assume the exercise of certain functions and powers previously entrusted to the League of Nations, and adopts the following decisions, set forth in A, B, and C below.

A. Functions pertaining to a Secretariat

Under certain of the instruments referred to at the beginning of this resolution, the League of Nations has, for the general convenience of the parties, undertaken to act as custodian of the original signed texts of the

instruments, and to perform certain functions, pertaining to a secretariat, which do not affect the operation of the instruments and do not relate to the substantive rights and obligations of the parties. These functions include: The receipt of additional signatures and of instruments of ratification, accession and denunciation; receipt of notice of extension of the instruments to colonies or possessions of a party or to protectorates or territories for which it holds a mandate; notification of such acts to other parties and other interested States; the issue of certified copies; and the circulation of information or documents which the parties have undertaken to communicate to each other. Any interruption in the performance of these functions would be contrary to the interests of all the parties. It would be convenient for the United Nations to have the custody of those instruments which are connected with activities of the League of Nations and which the United Nations is likely to continue.

THEREFORE:

THE GENERAL ASSEMBLY declares that the United Nations is willing to accept the custody of the instruments and to charge the Secretariat of the United Nations with the task of performing for the parties the functions, pertaining to a secretariat, formerly entrusted to the League of Nations.

B. Functions and Powers of a Technical and Non-Political Character

Among the instruments referred to at the beginning of this resolution are some of a technical and non-political character which contain provisions, relating to the substance of the instruments, whose due execution is dependent on the exercise, by the League of Nations or particular organs of the League, of functions or powers conferred by the instruments. Certain of these instruments are intimately connected with activities which the United Nations will or may continue.

It is necessary, however, to examine carefully which of the organs of the United Nations or which of the specialized agencies brought into relationship with the United Nations should, in the future, exercise the functions and powers in question, in so far as they are maintained.

THEREFORE:

THE GENERAL ASSEMBLY is willing, subject to these reservations, to take the necessary measures to ensure the continued exercise of these functions and powers, and refers the matter to the Economic and Social Council.

C. Functions and Powers under Treaties, International Conventions, Agreements and Other Instruments Having a Political Character

THE GENERAL ASSEMBLY will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character.

II

NON-POLITICAL FUNCTIONS AND ACTIVITIES OF THE LEAGUE OF NATIONS OTHER THAN THOSE MENTIONED IN SECTION I

1. THE GENERAL ASSEMBLY requests the Economic and Social Council to survey the functions and activities of a non-political character which have hitherto been performed by the League of Nations in order to determine which of them should, with such modifications as are desirable, be assumed by organs of the United Nations or be entrusted to specialized agencies which have been brought into relationship with the United Nations. Pending the adoption of the measures decided upon as the result of this examination, the Council should on or before the dissolution of the League, assume and continue provisionally the work hitherto done by the following League departments: the Economic, Financial and Transit Department, particularly the research and statistical work; the Health Section, particularly the epidemiological service; the Opium Section and the secretariats of the Permanent Central Opium Board and Supervisory Body.

2. THE GENERAL ASSEMBLY requests the Secretary-General to make provision for taking over and maintaining in operation the Library and Archives and for completing the League of Nations treaty series.

3. THE GENERAL ASSEMBLY considers that it would also be desirable for the Secretary-General to engage for the work referred to in paragraphs 1 and 2 above, on appropriate terms, such members of the experienced personnel by whom it is at present being performed as the Secretary-General may select."

2. On 18 April 1946, the Assembly of the League of Nations adopted the following resolution on the assumption by the United Nations of functions and powers hitherto exercised by the League under international agreements[1]:

"The Assembly of the League of Nations,

Having considered the resolution on the assumption by the United Nations of functions and powers hitherto exercised by the League of Nations under international agreements, which was adopted by the General Assembly of the United Nations on February 16th, 1946,

Adopts the following resolutions:

1. *Custody of the Original Texts of International Agreements*

The Assembly directs that the Secretary-General of the League of Nations shall, on a date to be fixed in agreement with the Secretary-General of the United Nations, transfer to the Secretariat of the United Nations, for safe custody and performance of the functions hitherto performed by the Secretariat of the League, all the original signed texts of treaties and international conventions, agreements and other instruments, which are deposited with the Secretariat of the League of Nations, with the exception of the Conventions of the International Labour Organisation, the originals of which and other related documents shall be placed at the disposal of that Organisation.

[1] *Official Journal, Special Supplement No. 194*, p. 278.

2. *Functions and Powers Arising out of International Agreements of a Technical and Non-political Character*

The Assembly recommends the Governments of the Members of the League to facilitate in every way the assumption without interruption by the United Nations, or by specialised agencies brought into relationship with that organisation, of functions and powers which have been entrusted to the League of Nations, under international agreements of a technical and non-political character, and which the United Nations is willing to maintain."

[Resolution adopted on April 18th, 1946 (afternoon).]

3. As indicated in the main text, in the 1949 list of *Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in Respect of which the Secretary-General acts as Depositary*, the United Nations Secretary-General listed both the General Act (at p. 25) and the Revised General Act (at p. 23).

4. At the fifteenth session of the Economic and Social Council the question was raised as to the authority of the Secretary-General to perform, without specific agreement of the parties to the Slavery Conventions of 1926, the functions originally entrusted thereunder to the Secretary-General of the League. The representative of the Secretary-General of the United Nations said:

"[The Secretary-General] had unquestionably been given the authority [to perform these functions] by resolution 24 (I) of the General Assembly, which had listed the functions formerly entrusted to the Secretary-General of the League of Nations to be transferred to the Secretary-General of the United Nations. Those functions did not affect the operation of the instruments and did not relate to the substantive rights and obligations of the Parties thereto, but were simply those customarily performed by a depositary. The Secretary-General had performed such functions as the receipt of instruments of ratification from States not originally Parties to a convention or denunciations by those who had been Parties in respect of other League Conventions, notably in the case of the withdrawals from the International Relief Convention pursuant to a resolution by the Economic and Social Council.

The authority of the Secretary-General under resolution 24 (I) had never been questioned . . . No government was bound to make use of the Secretary-General's services in that connexion; but the Secretary-General was bound to take action when required to do so. No agreement was necessary for the transfer of the Secretary-General's responsibilities, since they were solely depositary." (ST/LEG/7 of 7 August 1959, p. 66.)

5. In the *Summary of Practice* the Secretary-General has explained his practice as depositary of League treaties as follows:

"The Secretary-General has received signatures and instruments of ratification, accession and denunciation concerning agreements concluded under the auspices of the League of Nations; he has also transmitted certified copies when requested to do so, and has continued to communicate the information provided for in those agreements. The relevant circular letters have been addressed to the States parties and to States Members of the United Nations.

The Secretary-General has received notifications supplementing information published by the League of Nations; he has accordingly added that information to the most recent League of Nations publications and communicated it to the States concerned." (ST/LEG/7 of 7 August, 1959, p. 67.)

6. On 3 December 1971 the Secretary-General addressed a Note Verbale to the Permanent Representative of a Member of the United Nations on the subject of the procedure he proposed to adopt when receiving an accession to a League Treaty (the Convention concerning the Use of Broadcasting in the Cause of Peace, signed at Geneva on 23 September 1936) which was accompanied by reservations. In this Note Verbale [1] the Secretary-General made the following points:

(a) "The Secretary-General acts as depositary of conventions concluded under the auspices of the League of Nations in accordance with a resolution adopted by the Assembly of that organization at its last session and a resolution [24 (I)] of the United Nations General Assembly."

(b) The Secretary-General, in exercising these depositary functions, received reservations attaching to accessions to League treaties.

(c) Notwithstanding General Assembly resolution 1452B (XV) of 7 December 1959 on the subject of the procedure to be adopted by him in the matter of reservations to multilateral treaties made under the auspices of the United Nations, he proposed to adhere in the case of reservations to League conventions to the procedure of the Secretary-General of the League, since he, "acting as depositary, cannot infringe upon the rights of the parties".

7. Within the restricted limits of his competence under resolution 24 (I), the Secretary-General was clearly empowered to exercise depositary functions in relation to the General Act, as in relation to all other League of Nations conventions which had designated the Secretary-General of the League as depositary; and to act in respect of its Article 39 as the Secretary-General of the League might have acted. As stated in the text, the General Act was one of the 72 listed conventions. It was not excepted from this framework, so that it was clearly regarded as in force at the date of resolution 24 (I).

8. It would appear that, at least on one occasion, the Secretary-General has exercised secretarial functions in respect of the General Act. This was when he received a notification dated 14 July 1971 from Barbados [2] advising him that the Government of Barbados had been considering the General Act in connection with its review of treaties applying to it by virtue of United Kingdom adherence before independence, in order to determine its succession thereto. It advised that it did not consider itself bound by the General Act and asked that the notification be circularized to all the parties to the General Act.

(b) *United Nations Practice Shows that Other League Treaties Were not Regarded as no Longer in Force Merely Because of the Demise of the League*

9. The General Act was one of 72 treaties concluded under the auspices of the League of Nations which were the subject of General Assembly resolution 24 (I).

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[1] UN *Juridical Yearbook*, 1971, p. 224.

[2] A copy of the correspondence will be lodged with the Registrar (II, p. 403).

10. The participation clauses of many of these treaties raised questions of interpretation. Some of the treaties restricted adherence to Members of the League of Nations or to non-members who might be invited to accede by the Council of the League, or were invited to attend the drafting conference, or were expressly nominated. Others, such as the Protocol on Arbitration Clauses of 24 September 1923, were open for signature by all States, giving rise to the question whether this meant States that were in existence at that date.

11. The question of new States (that is, States which did not exist at the time of the League), and of other States that did not qualify under the participation clauses being accorded the possibility of adhering to these treaties arose in the Sixth Committee of the General Assembly at its Seventeenth Session in 1962, in connection with consideration of the draft articles on the conclusion, entry into force and registration of treaties submitted by the International Law Commission.

12. In its Commentary to draft Article 9 the Commission had pointed out the technical difficulties involved in opening up these treaties to further participation, in the absence of protocols to which all the parties would subscribe (*Yearbook of the International Law Commission*, 1962, Vol. 2, p. 169, para. 10).

13. The Sixth Committee thought that it would be desirable to study separately the problems arising from treaties concluded in the past, and more particularly those concluded under the auspices of the League of Nations. Several solutions were proposed, but when the difficulties of the matter were discussed a number of representatives submitted a draft resolution (A/C.6/L. 508), which was subsequently revised (A/C.6/L.508/Rev.1), requesting the International Law Commission to study the problem further; and upon the recommendation of the Sixth Committee the General Assembly adopted on 20 November 1962 resolution 1766 (XVII) requesting the International Law Commission to study the question of extending participation of new States "in general multilateral treaties" of a technical nature.

14. At its meeting on 2 July 1963 the International Law Commission considered a Report of Sir Humphrey Waldock, the Special Rapporteur on the question (A/CN.4/162). This Report was confined to 26 treaties actually in force, which appeared in a document prepared by the Secretary-General in response to a request from the Sixth Committee to list treaties "of a technical and non-political" character requiring consideration from the point of view of extended participation.

15. The General Act was not included among these 26 treaties, but this is of no significance considering the purpose for which the list was drawn up. That purpose was to open League treaties to new States, and since the Revised General Act was in existance and new States were encouraged to participate in it, naturally the General Act of 1928 was not included in the list, and it would have been anomalous for it to have appeared there. Also, the Secretary-General was directed by the General Assembly to prepare a list of treaties of a "technical and non-political" character which would be suitable for extended participation. Obviously this direction excluded the General Act, for it could not be said to be a treaty of a "technical and non-political" character.

16. The Special Rapporteur found that five of these 26 treaties had been deliberately closed to additional States, and that the remaining 21 all contained clauses, framed in virtually identical terms, extending participation to

any State not represented at the negotiating conference, to which a copy of the treaty might be communicated by the Council of the League.

17. In its Report to the General Assembly on the subject in 1963, the International Law Commission adverted to the possible "out-of-dateness" of some of the 26 treaties due to their having been "overtaken by modern treaties" or as having "lost much of their interest for States with lapse of time" (*Yearbook of the International Law Commission*, 1963, Vol. 2, p. 218, para. 22). And it concluded its Report by saying that even a superficial examination of the 26 treaties indicated that a number of them held no interest for States (*ibid.*, p. 223, para. 50 *(d)*). It recommended a study of this aspect, but in fact no such study was carried out.

18. The Report, in considering the methods available for extending participation, recognized that this would involve a change in the substantive rules in the treaties themselves. What is significant for the present Case is that the International Law Commission did not consider that the fact that it was the Council of the League that was to issue invitations for participation in the case of 21 of the 26 treaties meant that the participation clauses had lost any of their viability. It was only a question of bridging the gap caused by the disappearance of the Council of the League.

19. Obviously, then, that disappearance was in no sense vital to the operation of the treaty clauses. The Report proposed that except in the case of the five treaties, which were intended to be closed, the treaties could be opened by a procedure analogous to resolution 24 (I) (*ibid.*, p. 223, para. 49).

20. The Report of the International Law Commission was discussed by the Sixth Committee at the Eighteenth Session of the General Assembly, when a draft resolution based upon the conclusions reached by the Commission was submitted by nine countries which would designate the General Assembly as the appropriate organ of the United Nations to exercise the powers conferred by multilateral treaties of a technical and non-political character on the Council of the League of Nations to invite States to accede to those treaties; and would request the Secretary-General as the depositary of those treaties to take certain administrative actions with a view to seeking adherence.

21. Although it was urged that the only correct legal procedure would be by way of amending protocol, and although there were differences of opinion as to whether participation should be restricted to United Nations Members, the Sixth Committee's text was adopted by the General Assembly as resolution 1903 (XVIII).

22. It will be noted that that resolution concerned 21 general multilateral treaties of a technical and non-political character out of the 72 treaties listed in the last publication of the League, 10 of which had been brought within the scope of the United Nations by protocol.

23. Acting pursuant to resolution 1903 (XVIII), the Secretary-General consulted both Members of the United Nations and non-members who were parties to the treaties as to whether any of the 21 treaties had, in their opinion, ceased to be in force, been superseded, or otherwise ceased to be of interest for accession by additional States, or required action to adapt them to contemporary conditions.

24. The Secretary-General issued a Report on these consultations on 25 February 1965 (UN doc. A/5759) and a supplementary report on 7 October 1965 (A/5759/Add.1). He stated that, since sufficient evidence existed that the Convention for the Suppression of Counterfeiting Currency and the Optional Protocol Concerning the Suppression of Counterfeiting Currency were fully

operative (the question had first been raised by a new State seeking means to adhere to these), he had not consulted parties and had invited States covered by the resolution to accede to these two treaties.

25. The replies received by the Secretary-General from governments and international and regional organizations which he consulted are very significant. No reply suggested that any of the treaties was not technically in force, although the replies did indicate that some treaties had been largely superseded or were of little interest from the point of view of extended participation.

26. This enabled the Secretary-General to reach a conclusion, in which he divided the treaties concerned into five categories:

(i) Treaties still in force, not superseded, not requiring adaptation to contemporary conditions, and of interest for accession by additional States.
(ii) Treaties still in force, not superseded, of interest for accession by additional States, but possibly requiring some adaptation to contemporary conditions.
(iii) Treaties still in force, not superseded, of interest for accession by additional States, but clearly requiring adaptation to contemporary conditions.
(iv) Treaties still in force but having ceased to be of interest for accession by additional States.
(v) Treaties which had been replaced or had otherwise ceased to be of interest for accession by additional States (Replies received on these treaties for the most part said they were technically in force. No reply denied that they were in force).

27. The Secretary-General proposed that, if invitations to participate were to be issued, they should be restricted to the treaties in the first three categories, and the question of revision could be left to a possibly expanded number of parties or to the international organizations within whose respective competence their subject-matters fell.

28. The Secretary-General's Report was considered by the General Assembly at its Twentieth Session. A recommendation of the Sixth Committee that the nine treaties listed in the first three categories of the Secretary-General's conclusions should be the subject of invitations was adopted in resolution 2021 (XX) of 5 November 1965.

29. In December 1965 invitations were issued respecting these nine treaties.

30. All of these nine treaties appear in Part II of *Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions.* In fact there are now 27 treaties in that list. Sixteen of these appeared in the list which was prepared by the Secretary-General and were included in the International Law Commission's Report on extended participation. Eleven were not included in that Report.

31. The Secretary-General began listing League of Nations treaties not covered by protocol in the edition which followed resolution 2021 (XX). At that time he listed 26 treaties which had been the subject of accessions, declarations of succession or denunciations since resolution 24 (I). In 1969 he added the Convention and Statute on the International Régime of Railways of 9 December 1923, which up to that date had been the subject of no activity on the part of any State, but which was the subject of a declaration of succession on the part of Malawi on 7 January 1969. It was one of the 12 treaties which had been excluded from resolution 2021 (XX) as being of no further interest.

32. Of the *21* treaties covered by General Assembly resolution 1903 (XVIII),

five have been the subject of no communication with the Secretary-General of the United Nations whatever, except in reply to his enquiry pursuant to that resolution.

33. One treaty, the Special Protocol concerning Statelessness (12 April 1930), which was not included in any of the lists connected with extended participation nonetheless appeared in Part II because in 1946 Pakistan had declared its succession to it. Although not then in force, the Secretary-General, in 1972, indicated that he was empowered by resolution 24 (I) to receive a declaration of succession from Fiji in respect of this Treaty which would bring it into force, although he was not empowered to accept an instrument of accession [1]. Other treaties in Part II have been subject to equally minimal activity.

34. In the case of several treaties which the Secretary-General in 1965 reported were considered by the parties to be of no further interest, his enquiry appears to have had the effect of stimulating denunciations. Because it was necessary for him to record these changes in the state of the parties to the treaties in question, the Secretary-General listed them in Part. II.

35. The most striking example of a treaty which had long been inactive, had been excluded from resolution 2021 (XX) as of no further interest and from Part II, but which was suddenly activated is the Convention and Statute on the International Régime of Railways of 9 December 1923. In 1969 the Secretary-General for the first time included it in Part II because in that year he accepted the notification of succession respecting it from Malawi.

36. The catalogue of treaties in Part II is therefore not closed. The Secretary-General adds to it treaties in respect of which he has been obliged in the exercise of his depositary functions to indicate changes in the state of the parties. Until he is obliged to take such steps he does not include League treaties in Part II.

37. *He has not included the General Act in Part II because* he has not been obliged to indicate changes in the parties listed in the last publication of the League of Nations which has earlier been referred to. If a party should address a notice of termination to him at the expiry of a current quinquennial period, there is no reason to assume that the Secretary-General would not then include the General Act in Part II, because he would certainly be obliged pursuant to resolution 24 (I) to accept such communications and to notify the change in the list of parties.

38. Also, it would be hazardous to suppose that a treaty is not in force merely because there is, for a time, no interest in it. The Secretary-General in his Report of 25 February 1965 included in category (v) as having ceased to be of interest for accession by additional States, the Convention on the Taxation of Foreign Motor Vehicles of 30 March 1931. As a result, this was not included in resolution 2021 (XX). Nonetheless, seven countries have since taken the precaution formally to denounce the Convention, which the Secretary-General as a result lists as in force *inter se* the other parties.

39. Again, the Convention for the Campaign against Contagious Diseases of Animals of 20 February 1935 was included by the Secretary-General in category (v) and exempted from resolution 2021 (XX). Yet the Secretary-General on 8 February 1967 accepted an instrument of accession respecting it from Yugoslavia. The same is true of two other similar Conventions.

40. One of the 19 treaties which were thought not to require extended participation, the Convention relating to Gases (Asphyxiating, Poisonous or

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[1] A copy of the correspondence will be lodged with the Registrar (II, p. 403).

Other) and Bacteriological Methods of Warfare, 1925, has been the subject of much activity and consideration in recent years. No one has considered that its omission from the Secretary-General's list of treaties requiring extended participation means that it is not in force.

41. The Government of Australia therefore submits that a consideration of the practice of the United Nations in relation to League treaties indicates quite clearly that other multilateral League treaties were not treated by it as no longer in force merely because of the demise of the League.

Annex 5

DECLARATION OF AUSTRALIA UNDER ARTICLE 36 (2) OF THE STATUTE

6 II 54.

Whereas by paragraph 5 of Article 36 of the Statute of the International Court of Justice a declaration made under Article 36 of the Statute of the Permanent Court of International Justice and still in force at the coming into operation of the Statute of the International Court of Justice is deemed, as between the parties to the latter Statute, to be an acceptance of the compulsory jurisdiction of the International Court of Justice for the period which it still has to run and in accordance with its terms;

And whereas on the coming into operation of the Statute of the International Court of Justice there was still in force in respect of Australia a declaration made on 21 August 1940 under Article 36 of the Statute of the Permanent Court of International Justice;

And whereas that declaration accepted as compulsory the jurisdiction of the Court in respect of certain disputes for a period of five years from the date thereof and thereafter until such time as notice might be given to terminate the acceptance;

And whereas the Government of Australia is desirous of terminating that acceptance and also of making a new declaration of acceptance in terms appropriate to contemporary circumstances;

Now therefore I, William Douglass Forsyth, Head of the Australian Mission to the United Nations, acting on behalf of the Government of Australia and in accordance with instructions in that regard from The Right Honourable Richard Gardiner Casey, Minister of State for External Affairs,

(1) give notice that I hereby terminate the acceptance by Australia of the compulsory jurisdiction of the International Court of Justice hitherto effective by virtue of the declaration made on 21 August 1940 under Article 36 of the Statute of the Permanent Court of International Justice and made applicable to the International Court of Justice by paragraph 5 of Article 36 of the Statute of that Court;

(2) declare, under paragraph 2 of Article 36 of the Statute of the International Court of Justice, that the Government of Australia recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice, from the date of this declaration and thereafter until notice is given to terminate this declaration, in all legal disputes arising after 18 August 1930 with regard to situations or facts subsequent to that date and concerning:

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation;

but this declaration does not apply to:

(i) disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;
(ii) disputes with the government of any other member of the British Commonwealth of Nations, all of which disputes will be settled in such manner as the parties have agreed or shall agree;
(iii) disputes with regard to questions which by international law fall exclusively within the jurisdiction of Australia;
(iv) disputes arising out of events occurring at a time when the Government of Australia was or is involved in hostilities; and
(v) disputes arising out of or concerning jurisdiction or rights claimed or exercised by Australia—

(a) in respect of the continental shelf of Australia and the Territories under the authority of Australia, as that continental shelf is described or delimited in the Australian Proclamations of 10 September 1953 or in or under the Australian Pearl Fisheries Acts;
(b) in respect of the natural resources of the sea-bed and subsoil of that continental shelf, including the products of sedentary fisheries; or
(c) in respect of Australian waters, within the meaning of the Australian Pearl Fisheries Acts, being jurisdiction or rights claimed or exercised in respect of those waters by or under those Acts,

except a dispute in relation to which the parties have first agreed upon a *modus vivendi* pending the final decision of the Court in the dispute;

And his declaration is subject to the condition that the Government of Australia reserves the right to require that proceedings in the Court shall be suspended in any dispute in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, provided that notice to suspend is given within ten days of the notification of the initiation of the proceedings in the Court, and provided also that the suspension shall be limited to a period of 12 months or such longer period as may be agreed by the parties to the dispute or determined by a decision of the Security Council.

Signed and sealed by the said William Douglass Forsyth this sixth day of February one thousand nine hundred and fifty-four.

(Signed) W. D. FORSYTH.

Annex 6

DECLARATION OF FRANCE UNDER ARTICLE 36 (2) OF THE STATUTE

[Translation from the French] 20 V 66.

On behalf of the Government of the French Republic, I declare that I recognize as compulsory *ipso facto* and without special agreement, in relation to other Members of the United Nations which accept the same obligation, that is to say on condition of reciprocity, the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute, until such time as notice may be given of the termination of this acceptance, in all disputes which may arise concerning facts or situations subsequent to this declaration, with the exception of:

(1) disputes with regard to which the parties may have agreed or may agree to have recourse to another mode of pacific settlement;
(2) disputes concerning questions which, according to international law, are exclusively within domestic jurisdiction;
(3) disputes arising out of a war or international hostilities, disputes arising out of a crisis affecting national security or out of any measure or action relating thereto, and disputes concerning activities connected with national defence;
(4) disputes with a State which, at the time of occurrence of the facts or situations giving rise to the dispute, had not accepted the compulsory jurisdiction of the International Court of Justice.

The Government of the French Republic also reserves the right to supplement, amend or withdraw at any time the reservations made above, or any other reservation which it may make hereafter, by giving notice to the Secretary-General of the United Nations; the new reservations, amendments or withdrawals shall take effect on the date of the said notice.

Paris, 16 May 1966. *(Signed)* M. COUVE DE MURVILLE.

Annex 7

FRENCH DECREE RELATING TO "SECURITY ZONE" AROUND MURUROA

1. Décret nº 73-618 du 4 juillet 1973 créant une zone de securité en Polynésie française

Le Président de la République
Sur le rapport du Premier ministre, du ministre des affaires étrangères, du ministre des armées, du ministre des transports et du ministre des départements et territoires d'outre-mer,
Vu l'ordonnance No. 59-147 du 7 janvier 1959 portant organisation générale de la défense,

Décrète:

Art. 1er — Il est créé autour de l'atoll de Mururoa une zone de sécurité d'une étendue de soixante milles marins, contiguë à la mer territoriale, dans laquelle la France se réserve le droit de suspendre temporairement la navigation maritime.
Art. 2 — le Premier ministre, le ministre des affaires étrangères, le ministre des armées, le ministre des transports et le ministre des départements et territoires d'outre-mer sont chargés, chacun en ce qui le concerne, de l'exécution du présent décret, qui sera publié au *Journal Officiel* de la République française.

Fait à Paris, le 4 juillet 1973.

par le Président de la République:
Georges POMPIDOU.
Le Premier ministre,
Pierre MESSMER
le ministre des armées,
Robert GALLEY
le ministre des affaires étrangères,
Michel JOBERT
le ministre des transports,
Yves GUÉNA
le ministre des départements et territoires d'outre-mer,
Bernard STASI.

Annex 8

DECREE SUSPENDING MARITIME NAVIGATION IN THE "SECURITY ZONE"

Suspension de la navigation maritime dans une zone de sécurité en Polynésie française

Le ministre des armées,

Vu le décret du 4 juillet 1973 créant une zone de sécurité en Polynésie française,

Arrête:

Art. 1er — En application de l'article 1er du décret susvisé, la navigation maritime est suspendue dans la zone de sécurité établie autour de l'atoll de Mururoa, à partir du 11 juillet 1973, à 0 heure T.U., et jusqu'à nouvel avis.
Art. 2 — L'amiral commandant le centre d'expérimentations du Pacifique est chargé de prendre à l'égard des navires contrevenants toutes les mesures nécessaires pour assurer leur sécurité et celle des personnes se trouvant à bord.
Art. 3 — Le présent arrêté sera publié au *Journal Officiel* de la République française.

Fait à Paris, le 4 juillet 1973.

Robert GALLEY.

Annex 9

Recent Statements of International Concern at Atmospheric Nuclear Testing

1. The continued demonstration of international condemnation of and concern at the conduct of the French tests at its Pacific Test Centre has taken a variety of forms. The following are recent significant instances, by no means exhaustive, of such expressions of condemnation and concern. (References to earlier resolutions of international organizations concerning nuclear testing are to be found in paras. 40-42 of the Application and in paras. 9-40 of the Request for Interim Measures of Protection, and in the Annexes referred to in those paragraphs. These include a series of United Nations General Assembly resolutions, and the Declaration and resolution 3 (I) adopted at the Stockholm Conference on the Human Environment.)

Countries and Territories of the South West Pacific

2. In the area closest to the site of the French tests, the South West Pacific, the protests of the Australian, New Zealand and Fijian Governments, who have instituted proceedings in the International Court, have been joined by protests from nearly all the States and territories of that region, including some of the French overseas territories in the Pacific. In April 1973, the South Pacific Forum, attended by the President of Nauru and the Prime Ministers of Australia, New Zealand, Fiji, Western Samoa and Tonga, and the Premier of the Cook Islands, with the Chief Minister of Papua New Guinea and the leader of the Government of Niue present as observers, issued a Joint Declaration urging the Government of France "to heed the call of the United Nations General Assembly and its obligations under international law by bringing about an immediate halt to all testing in the area". The Declaration reads as follows:

> "Members recalled the expression of opposition at the meetings of the forum in 1971 and 1972 to atmospheric nuclear weapons testing conducted by France in the South Pacific.
>
> Members took note of the fact that their opposition was increasingly shared by world opinion.
>
> They welcomed the most recent resolution of the United Nations General Assembly calling, with renewed urgency, for a halt to all atmospheric testing of nuclear weapons in the Pacific and elsewhere in the world.
>
> Members were once again unanimous in expressing their deep concern at the apparent continuing failure of the French Government to comprehend the extent of opposition to the conduct by France of its tests in the Pacific area and to respect the wishes of the peoples of the area.
>
> They reaffirmed their strong opposition to these tests which exposed their people as well as their environment to radio-active fall-out, against their wishes and without benefit to them which demonstrated deplorable indifference to their future well-being. They urged the Government of France to heed the call of the United Nations General Assembly and its

obligations under international law by bringing about an immediate halt to all testing in the area.

Members expressed their determination to use all proper and practicable means open to them to bring an end to nuclear testing, particularly in the South Pacific.

The forum requested the Government of Western Samoa to transmit the views of the meeting to the French Government."

3. As regards the French Pacific Territories, the Territorial Assembly of New Caledonia and its dependencies voted on 13 June 1973 in favour of a resolution which declared the opposition of the Assembly to all tests. In its resolution, the Territorial Assembly noted that the French Government had imposed for years on the 120,000 French of French Polynesia, and in the name of 50 million Frenchmen of metropolitan France, a situation which the latter would not accept in their own land, since there was not an atomic bomb test centre in metropolitan France. The operative paragraphs of the resolution state:

"The Territorial Assembly of New Caledonia and Dependencies expresses its deep sympathy for and solidarity with the peoples subjected to the effects of nuclear explosions.

States its opposition to all nuclear tests whatever may be the countries which conduct them.

Condemns the Chinese position which proposes to make a zone free from nuclear testing of the Pacific Ocean *(sic)*.

Demands the convening of a conference of all the countries of the Pacific with a view to prohibiting in the future all testing (aerial or underground) in the Pacific Ocean, especially within that zone of fractures of the earth's crust which encircles the Pacific.

Thanks the Australian and New Zealand unions for their understanding of the situation of our peoples and for consequently having willingly spared New Caledonia from being boycotted.

Supports the interventions made by the parliamentary representatives of French Polynesia and their appeals to the French people and to international opinion [1]." *(Translation.)*

4. On 12 July 1973, the Western Samoan Legislative Assembly unanimously adopted the following motion, which condemned the tests and deplored the "irresponsible and high-handed disregard by France of the expressed opinion of the international community":

"That this Legislative Assembly, recalling the provisions and spirit of the United Nations Treaty banning nuclear weapons tests in the atmosphere, in outer space, and under water, of which Western Samoa is a signatory, and which has received almost universal support, being aware that nuclear tests in the atmosphere pose unknown hazards to human life and the environment, knowing also that a large number of countries including the South Pacific Forum countries have expressed objection to the continuation of nuclear tests in the Pacific by France, noting especially the Pacific region's grave concern about these tests and its total opposition to the explosions of nuclear devices in the Pacific as demonstrated by the actions brought against France by Australia and New Zealand in the International Court of Justice, and further noting that in

[1] A copy of the full text of the resolution will be lodged with the Registrar (**II**, p. 403).

spite of international protests and the determined opposition of the countries and peoples closest to the test site, indeed even in spite of the interim judgment of the International Court of Justice, France still intends to continue its programme of nuclear tests in the Pacific: now, therefore, this Legislative Assembly condemns the further explosions of nuclear devices in the Pacific which increase the level of nuclear pollution and the potential dangers from contamination, deplores the irresponsible and high-handed disregard by France of the expressed opinion of the international community and the continued protests of the governments and peoples of the South Pacific, and the interim judgment of the International Court of Justice, applauds and supports the actions taken by Australia and New Zealand and other members of the international community to dissuade France from continuing its nuclear testing programme in the Pacific, calls for more effective international measures to limit or totally ban the testing of nuclear weapons, and requires the Government to bring this Resolution to the attention of the Government of France."

Countries of Latin America

5. The Pacific countries of Latin America have also protested strongly and repeatedly about the French Pacific tests.

6. On 21 June 1973, the Governments of Chile, Ecuador and Peru issued a Joint Declaration, as follows:

"The Governments of Chile, Ecuador and Peru, noting current international action to oppose the resumption of nuclear tests in the atmosphere in the South Pacific area, reiterate their rejection of such explosions as expression of a policy contrary to the principles, resolutions and objectives of the United Nations." (UN doc. A/9084.)

7. On 24 July 1973, the Presidents of Colombia and Venezuela signed a Joint Declaration which registered their protest against the French nuclear tests:

"We register our frank protest regarding the nuclear tests in the Pacific which constitute a threat to the peoples and living resources in the area. These tests were carried out without regard for world public opinion and the principles of the United Nations which oppose the continuation of the arms race, particularly in the nuclear field. We invite the Latin American countries, especially those in the Andean area, to take joint action to implement the principles referred to above." (UN doc. A/9110.)

8. In addition to these Joint Declarations and to the important joint Communiqué by the Foreign Ministers of the six countries of the Andean Pact made on 3 August 1973 on French nuclear testing in the Pacific, protests have also been made by individual Latin American countries.

9. Thus, on 16 July 1973, the Chilean Foreign Ministry issued the following statement:

"In view of recent developments connected with further nuclear tests by France in the South Pacific, the Ministry of Foreign Affairs declares:

(1) Chile has constantly and energetically condemned these tests from their beginning in the various international forums. In the United Nations, it has intervened actively in discussion of the question and has co-sponsored various resolutions condemning such acts, especially

during the last General Assembly. It did likewise in the Environment Conference in Stockholm last year, and in the recent WHO Assembly.

(2) In the Latin-American context, it is appropriate to recall the joint declaration of the Andean Pact Foreign Ministers on 21 June 1973, in which the above tests were condemned in precise terms; the joint declaration of the Minister of Foreign Affairs of Chile and Colombia on 25 June 1972 and of Chile and Ecuador of 25 October of the same year, which reaffirm our Government's categoric opposition to such tests. Moreover, recently, on 21 June, the Governments of Chile, Ecuador and Peru, in view of the imminence of further nuclear tests in the South Pacific, repeated their opposition to such explosions as expressions of a policy contrary to the principles, resolutions and objectives of the United Nations.

(3) As regards the Chilean Government's attitude towards France, as soon as nuclear tests began at Mururoa in 1966 Chile, on many occasions, has presented protest notes to France, expressing its concern at the possibility of the danger of radioactive contamination, both of human beings and marine fauna, and has developed clear legal arguments in which it categorically maintains its position of open rejection of the above-mentioned tests. The same was done in June 1971 and April 1972.

In view of the announcement of further nuclear explosions, the Ministry of Foreign Affairs, two months ago, on 15 May of the current year, sent a further note in which it repeated 'its most forceful protest' at such an attitude on the part of the French Government. This note added that, 'in spite of all the precautions which may be taken, it has not been reliably demonstrated that the effects of nuclear explosions can be totally controlled, which involves evident danger for the South Pacific and, therefore, for Chilean territory and the waters under its jurisdiction'. 'It is because of this'—the note ended—'that the Chilean Government reserves the right to make claims for any damage that the aforementioned tests may cause to its inhabitants, to its territory, and to the waters under its jurisdiction or their marine life.'

(4) On the 6th of the present month, the President of the Republic, replying to a message from the Prime Minister of New Zealand, again expressed opposition to such tests and recalled the firm and constant attitude of the Government of Chile.

(5) Finally, on Friday last, the Minister of Foreign Relations, participating in a television programme, categorically reaffirmed the attitude of the Chilean Government as one of condemnation of such tests.

(6) On this occasion, the Ministry of Foreign Affairs wishes to repeat once again its deep concern at the fact that atomic tests are about to be begun again in the South Pacific. Chile considers that the high seas of the Pacific Ocean are a free sea, and therefore that no State may use them to carry out nuclear experiments nor prohibit the passage of vessels or aircraft of other States. For that reason the conduct of the nuclear tests announced by France is contrary to the norms of international law and they constitute internationally illegal acts." *(Translation.)*

10. On 22 July 1973, the Argentine Foreign Ministry issued the following statement:

"The Government of the people of the Argentine Republic is firmly convinced that international relations are passing through a period of deep transformation, in which the fundamental basis is affirmed to be the principle of co-operation as opposed to power politics.

It believes that it is the obligation of all States to contribute within their possibilities to accelerating this process through positive deeds and avoiding all acts that can be considered negative.

Likewise, the Government of the Argentine people considers that a predominant concern of our times should be to preserve man from the risk of environmental contamination that might eventually endanger its own existence.

In this context, the Argentine Government cannot but express its concern at the detonation of a nuclear device in the Pacific, ordered by the French Government.

The repetition of these experiments has created a great and growing anxiety among neighbouring Latin American countries and other affected regions, an anxiety which is shared by the Argentine people, and towards which they feel solidarity.

Moreover, this problem has been brought to the consideration of the International Court of Justice which has recently ruled against carrying out the tests.

For all these reasons the Argentine Government expresses its firm desire that all States should put an end to programmes of this nature, the consequences of which cannot be considered one way or another, as anything but negative elements in the attainment of the objectives of peace and universal co-operation in which we should all be engaged." *(Translation.)*

Africa

11. Condemnation of the French atmospheric tests has also come from many African countries. Thus, in Press Release 696 of the Nigerian Federal Ministry of Information issued on 19 June 1973 it was stated:

"General Gowon observed that as a signatory to the nuclear non-proliferation treaty and also as a result of our experience of a similar test in 1961, Nigeria does not support such nuclear tests particularly when such tests are conducted outside the boundaries of the State undertaking them."

12. Also in June 1973, the Tanzanian Government issued a statement condemning French nuclear tests. The statement, as reported in the *Daily News*, Dar-Es-Salaam, of 16 June 1973, included the following:

"The Government has issued a statement condemning French nuclear atmospheric tests in other people's lands and French military support to South Africa, the Ministry of Information and Broadcasting announced yesterday . . .

The statement says Tanzania condemns strongly such tests 'especially when they are done in utter disregard of world public opinion' and adds 'the matter becomes even more reprehensible when these tests are done in other people's lands where the French people are not directly affected'."

13. On 28 August 1973 during a meeting of the UNCTAD Trade and Development Board, the Kenyan representative, on behalf of the African

group of countries members of the "Group of 77", made a statement on atmospheric nuclear tests. The provisional summary record states:

> "The African Group also warned the international community against pollution caused by continued nuclear tests in the atmosphere. The fact that countries were taking care to conduct such tests far from their own territory did not encourage anyone to believe them when they stated that fall-out was not harmful to the population of the areas where these tests were taking place—areas which tended to be developing countries." (TD/B/SR. 371.)

Asia

14. In Asia, likewise, there have been many condemnations of the recent atmospheric nuclear tests. It will suffice to record only a few of them.

15. On 6 June 1973 the Prime Ministers of India and Australia issued a joint public communiqué in which they stated:

> "The Prime Minister of Australia informed the Indian Prime Minister of the strong opposition of the countries of the South Pacific to the current and proposed programme of atmospheric tests of nuclear weapons in the area. Both Prime Ministers, mindful of United Nations endorsement of the partial nuclear test ban treaty, the resolution of the United Nations Conference on the Human Environment held in Stockholm in June 1972, and the resolutions of the United Nations General Assembly, and of the World Health Assembly, in May 1973, on the harmful effects of ionizing atomic radiation, reiterated their opposition to the testing of nuclear weapons in all environments and in particular to atmospheric testing by whatever nation."

16. There have been a number of expressions of concern and opposition in Japan. Thus on 3 July 1973, the following resolution, protesting against China's nuclear tests and opposing the French tests, was adopted by the House of Representatives of Japan:

> "This House had resolved the following:
>
> This House, considering that Japan is the only atomic-bombed nation, opposes any nuclear test conducted by any State.
>
> This House strongly protests against China's nuclear test as it will bring about radio-active fall-out, pollute the atmosphere and ocean, and destroy the natural environment to a great extent.
>
> This House also opposes the proposed nuclear test in the Pacific by France.
>
> This House requests the Government that, in view of the expressions herein, it should oppose the production, testing, hoarding and the use of nuclear weapons by any State and that it should take a prompt action to the Governments of China and of France." *(Translation.)*

17. The Government of the Mongolian People's Republic issued the following statement on 4 Augusts 1973:

> "The conclusion of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water was a first step towards delivering mankind from the threat of thermonuclear war. In the ensuing years, the Treaty has not only played an important role in curbing the nuclear arms race and strengthening world peace and international security, but has contributed to the adoption of subsequent treaties and

agreements limiting nuclear armaments. The fact that more than 100 States are now parties to the Moscow Treaty is further evidence of its tremendous significance and importance.

The Ministry of Foreign Affairs of the Mongolian People's Republic expresses the hope that the favourable climate which now prevails in international relations will serve to promote early agreement on the banning by all States of all types of thermonuclear tests, including underground tests.

The Government and people of the Mongolian People's Republic are deeply concerned at the fact that certain nuclear States, in particular the People's Republic of China, are conducting atmospheric nuclear tests in violation of generally recognized treaty norms and the principles of international law, and in defiance of word-wide protests, thus contaminating the environment with dangerous radio-active substances and impeding the process of strengthening international peace and security.

On the tenth anniversary of the signing of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, the Mongolian People's Republic appeals to the Governments of all States that have not done so to accede without further delay to the Treaty, which is also in the vital interests of the peoples of those countries." (UN doc. A/9117.)

Commonwealth Heads of Government

18. On 5 August 1973 the 32 Commonwealth Heads of Government meeting in Ottawa [1] issued the following statement:

"On this, the tenth anniversary of the signing of the treaty banning nuclear weapon tests in the atmosphere, in outer space and under water, heads of Government of the Commonwealth, meeting in Ottawa, reaffirmed their unfailing support for the treaty and their concern to ensure its universal observance.

Recalling the terms of the preamble to the treaty,

Proclaiming as their principal aim the speediest possible achievement of an agreement on general and complete disarmament under strict international control in accordance with the objectives of the United Nations which would put an end to the armaments race and eliminate the incentive to the production and testing of all kinds of weapons, including nuclear weapons,

Seeking to achieve the discontinuance of all test explosions of nuclear weapons for all time, determined to continue negotiations to this end, and desiring to put an end to the contamination of man's environment by radioactive substances,

Commonwealth Heads of Government appealed to all powers, and in particular the nuclear powers, to take up as an urgent task the negotiation of a new agreement to bring about the total cessation of nuclear weapon tests in all environments."

[1] The following 32 countries were represented at the meeting: Britain, Canada, Australia, New Zealand, India, Sri Lanka, Ghana, Malaysia, Nigeria, Cyprus, Sierra Leone, Tanzania, Jamaica, Trinidad and Tobago, Uganda, Kenya, Malawi, Malta, Zambia, The Gambia, Singapore, Guyana, Botswana, Lesotho, Barbados, Mauritius, Swaziland, Tonga, Western Samoa, Fiji, Bangladesh, Bahamas.

Organization of African Unity

19. It is also worthy of note that on 25 May 1973 the Heads of State and Government of African countries assembled in Addis Ababa on the tenth anniversary of the Organization of African Unity adopted a "Declaration on Co-operation, Development and Economic Independence". This Declaration included the following paragraph:

> "Ensure that African countries are always guided by the principles adopted by the Stockholm Conference on Human Environment." (OAU doc. CM/ST121XXI.)

The Declaration was supported by 41 African States.

Conference of the Committee of Disarmament

20. In the Conference of the Committee of Disarmament, a number of statements by national representatives have been made criticizing the continuation of atmospheric tests and referring to their illegality. Thus, on 7 August 1973, during a special meeting to commemorate the Tenth Anniversary of the 1963 Partial Test Ban Treaty, the Mongolian representative read out a short statement issued by the Ministry of Foreign Affairs of the Mongolian People's Republic on 5 August 1973:

> "The Government and people of the Mongolian People's Republic are deeply concerned by the fact that some nuclear States, and in particular the People's Republic of China, are carrying out nuclear tests in the atmosphere, in violation of universally recognized treaty rules and principles of international law, and in defiance of protests by the entire world community thereby polluting the atmosphere with dangerous radio-active substances, and creating obstacles to disarmament and the strengthening of international security." (CCD/PV.619, p. 15.)

The Swedish delegate stated:

> "Two nuclear powers continue to test in the atmosphere in defiance of the purpose of the Moscow Treaty. The Swedish Government deplores this and joins in the world-wide protests." (*Ibid.*, p. 21.)

The Czechoslovak delegate said:

> "The recent nuclear tests in the atmosphere, which were rightly condemned throughout the world, remind us that if mankind is to be finally freed from the dangerous consequences of nuclear tests in the atmosphere, it is essential that all States which have not yet done so should accede to the Treaty Banning Nuclear Tests in the Atmosphere, in Outer Space and Under Water." (*Ibid.*, p. 23.)

The Canadian delegate said:

> "... the world is also witness to the fact that two nations continue to test in the atmosphere, despite widespread concern and despite the very treaty whose anniversary we are observing today ... My delegation continues to believe that the nuclear powers which have been carrying out tests in the atmosphere should stop this particular type of testing and associate themselves with the test ban." (*Ibid.*, p. 26.)

The British delegate said:

> "... *my Government* has repeatedly expressed its opposition to all nuclear tests in the atmosphere (as well as in outer space and under water)" (CCD/PV.619, p. 44).

World Health Assembly

21. The final important statement to which reference will be made in this short survey is the resolution on nuclear testing adopted this year by the World Health Assembly.

22. On 23 May 1973, the World Health Assembly adopted a resolution which expressed deep concern at the threat to the health of present and future generations and at the damage to the human environment which might be expected from any increase in the level of ionising radiation in the atmosphere, and urged the immediate cessation of the tests. The text reads as follows:

"*The Twenty-Sixth World Health Assembly:*

Conscious of the potentially harmful consequences for the health of present and succeeding generations from any contamination of the environment resulting from nuclear weapons testing,

Recognizing that fall-out from nuclear weapons tests is an uncontrolled and unjustified addition to the radiation hazards to which mankind is exposed,

Expressing serious concern that nuclear weapons testing in the atmosphere has continued in disregard of the spirit of the Treaty banning nuclear weapons tests in the atmosphere, in outer space and under water,

Recalling the constitution of the World Health Organization and in particular the following principles:

(1) that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic and social conditions; and
(2) that the health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States,

Conscious also of the special responsibility of members of the United Nations family of organizations to express their concern, in the areas coming within their respective competences, about the implications for present and future generations of mankind of continued nuclear weapons testing;

Further recalling that the World Health Assembly in resolution WHA19.39 of May 1966 called upon all countries to co-operate in preventing an increase in the level of background radiation in the interests of the health of the present and future generations of mankind,

Noting with regret that all States have not yet adhered to the Treaty banning nuclear weapons tests in the atmosphere in outer space and under water, signed in Moscow on 5 August 1963,

Further recalling resolution 2934 A-C (XXVII) of the United Nations General Assembly of 29 November 1972 and Principle No. 26 of the Declaration of the United Nations Conference on the human environment that man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction,

Further noting that certain member States of the World Health Organization have in several fora expressed their overwhelming opposition to nuclear weapons testing and especially to testing which exposed their peoples to radio-active fallout,

Further noting and endorsing the views expressed by such bodies as UNSCEAR and the ICRP that any avoidable increase in the level of ionizing radiation in the atmosphere is unjustifiable and constitutes a potential long-term danger to health,

(1) Expresses its deep concern at the threat to the health of present and future generations and at the damage to the human environment which might be expected from any increase in the level of ionizing radiation in the atmosphere, .

(2) Deplores, therefore, all nuclear weapons testing which results in such an increase in the level of ionizing radiation in the atmosphere and urges its immediate cessation,

(3) Invites the Director-General of the World Health Organization to bring this resolution to the attention of the Secretary-General of the United Nations with a request that he inform all member States of the United Nations of its contents."

Annex 10

HUMAN RIGHTS

1. The primary obligation of States in connection with human rights flows from Articles 55 and 56 of the Charter of the United Nations, which contains commitments binding for France as a Member of the United Nations. One starts from the obligation placed upon the United Nations generally in Article 55 to promote "universal respect for, and observance of, human rights and fundamental freedoms". Thence, one proceeds to the specific commitment for each Member of the United Nations in Article 56:

> "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."

2. As will presently be seen enough has happened within the framework of United Nations activity to dress this bare undertaking with a solid and identifiable vestment of legal commitment quite incompatible with continued atmospheric nuclear testing.

3. It is, indeed, nowadays almost impossible to distinguish this general obligation under the Charter from a concurrent obligation of comparable content existing under customary international law. Respect for human rights is now part of the fundamental structure of that law. It can indeed be regarded as one of the peremptory norms of international law to which reference is made in Article 53 of the Vienna Convention on the Law of Treaties. The Court is, therefore, both entitled and bound to assess the legality of State behaviour against not only the traditional content of international law but also against the emergent standards of international human rights; and if such conduct fails to meet these standards then it must be condemned as unlawful.

4. The continuance of atmospheric nuclear testing infringes fundamental human rights in a number of specific respects which can be enumerated by reference to some of the principal international texts bearing on the subject.

5. It will be convenient to begin with some reference to the Universal Declaration of Human Rights, 1948. Although the Declaration takes the form of a resolution of the General Assembly of the United Nations it has been described by one recent commentator in the following terms:

> ". . . some of its provisions either constitute general principles of law (see the Statute of the International Court of Justice, Art. 38 (1) *(c)*), or represent elementary considerations of humanity. More important is its status as an authoritative guide, produced by the General Assembly to the interpretation of the Charter. In this capacity, the Declaration has considerable indirect legal effect and it is regarded by the Assembly and by some jurists as part of the 'law of the United Nations'." (Brownlie, ed., *Basic Documents on Human Rights* (1971), p. 106.)

6. The Declaration contains the following material provisions:

Article 1. "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

Article 3. "Everyone has the right to life, liberty, and security of person."

Article 5. "No one shall be subjected to cruel, inhuman, or degrading treatment or punishment."

Article 16. "1. Men and woman of full age, without any limitation due to race, nationality or religion, have the right to marry and found a family . . ."

"3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

Article 22. "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

Article 25. "1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

Article 28. "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

7. It is virtually self-evident why atmospheric nuclear tests involve a breach of the rights set out above. In addition to the quite obvious physical consequences of fall-out, it is impossible to overlook the emotional and psychological reactions of populations which are or may be affected by fall-out. The physical effects of fall-out have been referred to in the Application, the request for interim measures and the Oral Hearings thereon. Mention was also made of the psychological effects. But what cannot be overlooked is the objective fact, readily apparent from even the most cursory perusal of the world press, that there is a great deal of public concern and anxiety about atmospheric nuclear testing. (There is some concern, too, about underground testing. But it is small in relation to the fear of atmospheric testing stemming from the manifestly greater risk involved in it.)

8. This combination of physical and psychological consequences clearly infringes the specific rights formulated in the Universal Declaration as set out above. To these rights must be added a number of others which are or have been elaborated in various international conventions. Although these conventions as such may not be directly binding upon the parties in this case, they incorporate standards of such manifest reasonableness that they cannot be neglected as elements in the law governing the conduct of States affecting individuals in the territory of others.

9. Thus the International Covenant on Economic, Social and Cultural Rights 1966, contains in addition to provisions which overlap with those in the Universal Declaration, the following:

Article 12. "1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

"2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) the provision for the reduction of the still-birth rate and of infant mortality and for the healthy development of the child;

(b) the improvement of all aspects of environmental and industrial hygiene;

(c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases . . ."

10. Comparable rights have also been recognized at the regional level. The European Convention on Human Rights 1953, drawing heavily upon the Universal Declaration, acknowledges the right to life and to security of the person. Similarly, the American Convention on Human Rights 1969 also provides for respect for life and specifically stated in Article 5 (1) that ". . . every person has the right to have his physical, mental and moral integrity respected".

11. The relationship between the protection of human rights and matters affecting the environment has been recognized on a number of occasions. As long ago as 1964 the Asian-African Legal Consultative Committee adopted at its Sixth Session a final report on the legality of nuclear tests which contained, *inter alia*, the following conclusions:

> "5. Test explosions of nuclear weapons are also contrary to the principles contained in the United Nations Charter and the Declaration of Human Rights." *(Asian-African Legal Consultative Committee, The Legality of Nuclear Tests*, New Delhi, p. 244.)

The same relationship was emphasized in the Declaration of the United Nations Conference on the Human Environment adopted at Stockholm on 16 June 1972 (Annex 20 to the request). Thus the last paragraph of Part I proclaimed, *inter alia*, that ". . . both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself".

12. Again, in the Principles set out in Part II, the Declaration stated:

> Principle 1. Man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations . . .
>
> Principle 2. The natural resources of the earth including the air, water, land, flora and fauna, and expecially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

13. Doctrinal opinion is also coming to recognize the close link between the protection of the environment and the law of human rights. Thus Professor Paul De Visscher in a study in "La protection de l'atmosphère en droit international" said, even seven years ago:

> "Dans la mesure où la communauté internationale prendra plus nettement conscience de la primauté de la personne humaine, le problème de la protection internationale de l'atmosphère devra être envisagé plus sous l'angle du respect des droits de l'Homme que sous l'angle du respect des souverainetés étatiques. La reconnaissance du droit à la vie et à la santé par des instruments internationaux tels que la Déclaration universelle des Droits de l'Homme et, plus encore, la Convention européenne de sauvegarde des Droits de l'Homme et des Libertés fondamentales, appelle logiquement et nécessairement un ensemble de mesures de prévention, de protection et de contrôle destinées à assurer, sur le plan international, une protection plus coordonnée et plus efficace de l'atmosphère." (*General Report submitted to the 7th International Congress of Comparative Law*, Uppsala, 1966, at p. 359.)

Annex 11

GENEVA CONFERENCE ON THE LAW OF THE SEA 1958

1. Article 27 of the draft articles prepared by the International Law Commission sought to elaborate the concept of the freedom of the seas. This Article fell to be discussed by the Second Committee of the 1958 Geneva Conference on the Law of the Sea.

2. On 21 March 1958, Czechoslovakia, Poland, the USSR and Yugoslavia tabled a proposal as follows:

> "*Article 27.* After Article 27 insert a new article worded as follows:
>
> 'States are bound to refrain from testing nuclear weapons on the high seas'."

(Doc. A/CONF. 13/C.2/L.30, United Nations, Conference on the Law of the Sea, *Official Records*, Vol. IV, at p. 124.)

3. On 26 March 1958 India tabled the following draft resolution:

> "*The Committee,*
>
> *Recalling* that the Conference on the Law of the Sea has been convened by the General Assembly of the United Nations in accordance with resolution A/RES/478 of 22 February 1951,
>
> *Recognizing* that there is a serious and genuine apprehension on the part of many States that nuclear explosions on the high seas constitute an infringement of the freedom of the seas,
>
> *Recognizing* that the question of nuclear tests and production is still under review by the General Assembly under various resolutions on the subject and by the Disarmament Commission and is at present under constant review and discussion by the governments concerned,
>
> *Considers* that it is not necessary to prescribe any rule relating to nuclear tests on the high seas and that this matter should be left to the decision of the General Assembly." (United Nations doc. A/CONF/13/C.2/L.71, *Official Records*, Vol. IV, at p. 134.)

4. On the following day, India submitted a revised draft resolution which—

(i) altered the reference to the General Assembly resolution in the first paragraph to the General Assembly resolution 1105 (XI) of 21 February 1957, and

(ii) deleted from the last paragraph the words "considers that it is not necessary to prescribe any rule relating to nuclear tests on the high seas", *leaving instead* and amending the remaining words to read: "*Decides* to refer this matter to the General Assembly for appropriate action."

5. On 28 March 1958 these proposals came before the Second Committee of the Conference, which decided to put them to the vote before Articles 26 and 27 of the Commission's draft. The Indian proposal was voted on first and was adopted by 51 votes to 1 with 14 abstentions. It was then decided that the four-power proposal should not be put to the vote.

6. The Polish delegate explained why his delegation had abstained from voting on the Indian draft resolution, saying (as reported in the summary record):

"that the attitude of his Government in the matter—namely, that nuclear tests should be prohibited—was generally known. The Conference should, however, establish the fact that nuclear tests were not in conformity with international law, and should not refer the problem back to the General Assembly" (*ibid.*, at p. 52).

The Czechoslovak, Bulgarian, Romanian and Soviet delegates also explained their abstentions, the first power in terms which made it quite clear that it regarded nuclear testing on the high seas as contrary to international law.

7. The Indian delegate, in explanation of his vote said:

"It was well known that the Indian Government and Parliament were in favour of complete cessation of nuclear explosions, which were a crime against humanity." (*Ibid.*, at p. 45.)

8. The Soviet delegate, Professor Tunkin, said that the Soviet delegation—

"believed that the Conference should deal with the question of nuclear tests and should adopt a positive rule, arising from the principle of the freedom of the high seas, which would prohibit such tests. Mere statements were not enough, and the U.S.S.R. had always advocated taking concrete steps." (*Ibid.*, at pp. 52-53.)

9. The four-power proposal was re-introduced at the tenth plenary meeting of the Conference on 23 April 1958.

10. On that occasion the Soviet delegate, Professor Tunkin said:

"that his delegation had joined with others in submitting the proposal in the belief that such a proposal was a logical consequence of the definition adopted in Article 27" (*ibid.*, at p. 22).

11. In supporting the proposal, the Czechoslovak delegate, Mr. Zourek, said that his delegation had joined in sponsoring the proposal because nuclear tests were the most dangerous threat to the freedom of the high seas since that principle had received general recognition. There could be no doubt that such tests were a flagrant violation of the freedom enunciated in Article 27, that they closed vast areas to navigation and fishing and would, according to the experts, endanger neighbouring populations, seafarers and the living resources of the sea (*ibid.*, p. 23).

12. The delegate of Poland (Mr. Ocioszyinsky), who also supported the proposal, stated that—

"obviously, nuclear tests on the high seas and the institution of prohibited zones were a violation of the freedom of the seas and a threat to seafarers and the living resources of the sea" (*ibid.*, pp. 23-24).

13. Other speakers, who also expressed the view that nuclear testing on the high seas was unlawful, were the representatives of India, Ceylon and the United Arab Republic (*ibid.*, pp. 23 and 24).

14. The four-power proposal was not put to the vote. The draft resolution submitted by the Second Committee was adopted by 58 to 0 with 13 abstentions.

15. This episode can be looked at in a number of ways which individually and cumulatively convey the strongest impression that every maritime nation has a sufficient interest and right to assert the illegality of nuclear testing as a violation of the freedom of the seas.

16. The resolution was adopted in connection with and in the context of a provision in the High Seas Convention which was manifestly intended to

codify a basic right of all States regarding the permissible user of the high seas.

17. There is absolutely nothing in the record of the discussion to suggest that there was in the mind of any State the idea that freedom of the high seas from nuclear testing was a right which could only be asserted by a State specifically and directly affected by such testing; and this is especially true of the speeches of those who opposed the four-power proposal.

18. Furthermore, the very wording of the resolution runs counter to any assertion of the relevance of a narrow concept of interest. It recognizes expressly "that there is a serious and genuine apprehension on the part of many States that nuclear explosions constitute an infringement of the freedom of the seas". If this apprehension "on the part of many States" is sufficient to justify the adoption of a resolution of this character, *a fortiori*, each of the States concerned has a sufficient individual interest to assert its interest in the freedom of the seas.