JOINT DISSENTING OPINION OF JUDGES ONYEAMA, DILLARD, JIMÉNEZ DE ARÉCHAGA AND SIR HUMPHREY WALDOCK

1. In its Judgment the Court decides, *ex proprio motu*, that the claim of the Applicant no longer has any object. We respectfully, but vigorously dissent. In registering the reasons for our dissent we propose first to make a number of observations designed to explain why, in our view, it is not justifiable to say that the claim of the Applicant no longer has any object. We shall then take up the issues of jurisdiction and admissibility which are not examined in the Judgment but which appear to us to be of cardinal importance to the Court's treatment of the matters decided in the Judgment. It is also to these two issues, not touched in the Judgment, to which the Applicant was specifically directed to address itself in the Court's Order of 22 June 1973.

PART I. REASONS FOR OUR DISSENT

2. Basically, the Judgment is grounded on the premise that the sole object of the claim of New Zealand is "to obtain a termination of" the "atmospheric nuclear tests conducted by France in the South Pacific region" (para. 31).

In our view the basic premise of the Judgment, which limits the Applicant's submissions to a single purpose, and narrowly circumscribes its objective in pursing the present proceedings, is untenable. In consequence the Court's chain of reasoning leads to an erroneous conclusion. This occurs, we think, partly because the Judgment fails to take account of the purpose and utility of a request for a declaratory judgment and even more because its basic premise fails to correspond to and even changes the nature and scope of New Zealand's formal submission as presented in the Application.

3. In the Application New Zealand:

> ". . . asks the Court to adjudge and declare: That the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests".

4. As appears from the initial words of the actual submission, it unequivocally requests from the Court a judicial declaration on the

illegality of nuclear tests conducted by France in the South Pacific region and giving rise to radio-active fall-out.

This is made abundantly clear in paragraph 10 of the Application where it is stated:

> "The New Zealand Government will seek a *declaration* that the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests." (Emphasis added).

This request is described in the Applicant's Memorial (para. 5) as "the principal issue before the Court"

5. It has to be asked what are the reasons given in the Judgment as justifying the setting aside of the request for a declaration presented by the Applicant? In the present case it is not asserted, as it was in the parallel case of *Australia* v. *France*, that the judgment requested from the Court is not a declaratory judgment for that could evidently not be maintained in view of the actual terms of New Zealand's submission. Nor is it stated in the present Judgment that the request for a declaration is merely a means to an end and not an end in itself. However, without adopting those lines of reasoning, the Judgment ignores no less completely the formal request for a declaration of illegality made by New Zealand, and this is apparently done on the basis of three arguments.

6. The first argument appears to take as a starting point the following observation:

> "The Court is asked to adjudge and declare that French atmospheric nuclear tests are illegal, but at the same time it is requested to adjuge and declare that the rights of New Zealand 'will be violated by any further such tests'. The Application thus contains a submission requesting a definition of the rights and obligations of the Parties." (Para. 31 of the Judgment.)

This cannot however be accepted as a valid ground for not dealing with the request for a declaration. A submission asking for a judicial declaration may be formulated either as a request to the Court to decide that the conduct of a State is not in accordance or is contrary to the applicable rules of international law or as a request to declare that a party possesses a certain right or is subject to a certain obligation. In both cases, what is requested from the Court is a definition of the legal situation existing between the Parties, expressed either in terms of objective rules of law or of subjective rights and obligations resulting from those rules. In the *Interhandel* case, for instance, a submission which in fact requested a definition of the rights and obligations of the Parties was considered by the Court as "relating to a request for a declaratory judgment" (*I.C.J.*

Reports 1959, p. 20). In the *Right of Passage over Indian Territory* case the Applicant's first submission also asked for a definition of the rights and obligations of the Parties. As the Court said in that case: "Thus formulated, the claim reveals both the right claimed by Portugal and the correlative obligation binding upon India" (*I.C.J. Reports 1960*, p. 28). Yet the Court did not set that submission aside but on the contrary dealt with it as the basic and essential claim upon which it had the duty to adjudicate.

7. The second argument hinges upon an invocation of the Court's "power to exclude, when necessary, certain contentions or arguments which were advanced by a party as part of the submissions, but which were regarded by the Court, not as indications of what the Party was asking the Court to decide, but as reasons advanced why the Court should decide in the sense contended for by that party" (para. 30).

This power undoubtedly exists, but it cannot be applied to set aside either part of the New Zealand submission. A bare declaration that the conduct of nuclear tests "constitutes a violation of New Zealand's rights under international law" cannot conceivably be described as constituting merely a reason advanced in support of the decision requested. The legal reasons invoked by the Applicant relate *inter alia*, to the alleged violation by France of certain rules said to be generally accepted as customary law concerning atmospheric nuclear tests; and its alleged infringement of rights said to be inherent in the Applicant's own territorial sovereignty and rights derived from the character of the high seas as *res communis*. These reasons, designed to support the submission, are clearly distinguished in the pleadings from the specific decision which the Court is asked to make. Isolated from those reasons or legal propositions, the declaration that atmospheric nuclear tests "constitutes a violation of New Zealand's rights under international law" is the precise formulation of something that the Applicant is formally asking the Court to decide in *the operative part* of the Judgment.

While "it is no part of the judicial function of the Court to declare in the operative part of its Judgment that any of those arguments is or is not well founded [1]" it is yet of the essence of international adjudication, indeed the heart of the Court's judicial function, to decide and declare that the challenged conduct of a State does or does not constitute a violation of the Applicant's rights under international law.

8. The third argument advanced in the Judgment as justifying the setting aside of the request for a declaration is the assertion that:

> ". . . it is essential to consider whether the Government of New Zealand requests a judgment by the Court which would *only* state

[1] *Right of Passage over Indian Territory, I.C.J. Reports 1960*, p. 32.

> the legal relationship between the Applicant and the Respondent with regard to the matters in issue, *or* a judgment of a type which in terms requires one or both of the Parties to take, or refrain from taking, some action" (para. 30) (emphasis added).

The position taken with respect to New Zealand's submission seems to indicate that the Court finds that the judgment requested in this case belongs exclusively to the second part of the above assertion. But in what respect do the terms of New Zealand's submission require it or the Respondent to take or refrain from taking some action? We fail to detect any such requirement in the terms of the submission. The New Zealand submission is no different in this respect from any other request for a declaratory judgment. If the Parties may decide to take or refrain from taking some action it is because such a declaratory judgment is normally sufficient to bring about that effect. As Judge Hudson has said in his individual opinion in the *Diversion of Water from the Meuse* case:

> "In international jurisprudence, however, sanctions are of a different nature and they play a different role, with the result that a declaratory judgment will frequently have the same compulsive force as a mandatory judgment; States are disposed to respect the one not less than the other." (*P.C.I.J., Series A/B, No. 70*, p. 79.)

And, as Charles De Visscher has stated:

> "The essential tasks of the Court, as emerges both from the submissions of the parties and from the operative parts of its judgments, normally amounts to no more than defining the legal relationships between the parties, without indicating any specific requirements of conduct. Broadly speaking, the Court refrains from pronouncing condemnations and leaves it to the States parties to the case to draw the conclusions flowing from its decisions [1]." *[Translation.]*

9. It appears from the terms of the submission that New Zealand seeks a declaration which is not limited to a general finding on the violation of its rights by nuclear tests in the South Pacific region giving rise to radio-active fall-out. It also requests that such declaration include the pronouncement "that these rights will be violated by any further such tests". Both parts of New Zealand's submission are, in terms, and with all deliberation express requests for a judicial declaration.

It is possible to find other examples of formal submissions in which an applicant has asked not only for a declaration of illegality concerning the

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[1] Ch. De Visscher, *Aspects récents du droit procédural de la Cour internationale de Justice*, Paris, 1966, p. 54.

respondent's conduct, but also for a complementary declaration to the effect that the continuation of such conduct would violate the rights of the applicant or, what amounts to the same, that the respondent is under an obligation to put an end to the conduct alleged to be unlawful, e.g., the case concerning *Guardianship of Infants* (*I.C.J. Reports 1958*, pp. 61 and 71).

This type of submission has been considered by the Court as containing two independent requests, the first one being treated as a true submission, as an end in itself, and not merely as part of the reasoning or as a means for obtaining the cessation of the alleged unlawful activity. The Court has first analysed the request for a declaration of illegality before taking up the consequential request for a declaration concerning the continuation of the impugned conduct.

The fact that consequential declarations of this nature are made, as they were made in the above-mentioned case, was not then considered and cannot be accepted as a sufficient reason to ignore or put aside the Applicant's primary submission or to dispose of it as part of the reasoning.

10. In a case brought to the Court by means of an application the formal submissions of the parties define the subject of the dispute, as is recognized in paragraph 24 of the Judgment. Those submissions must therefore be considered as indicating the objectives which are pursued by an applicant through the judicial proceedings.

While the Court is entitled to interpret the submissions of the parties, it is not authorized to introduce into them radical alterations. The Permanent Court said in this respect: ". . . though it can construe the submissions of the Parties, it cannot substitute itself for them and formulate new submissions simply on the basis of the arguments and facts advanced" (*P.C.I.J., Series A, No. 7*, p. 35, case concerning *Certain German Interests in Polish Upper Silesia*). The Judgment (para. 30) refers to this as a limitation on the power of the Court to interpret the submissions "when the claim is not properly formulated because the submissions of the parties are inadequate". If, however, the Court lacks the power to reformulate inadequate submissions, *a fortiori* it cannot reformulate submissions as clear and specific as those in this case.

11. In any event, the cases cited in paragraph 30 of the Judgment to justify the setting aside in the present instance of the Applicant's first submission do not, in our view, provide any warrant for such a summary disposal of the "main prayer in the Application". In those cases the submissions held by the Court not to be true submissions were specific propositions advanced merely to furnish reasons in support of the decision requested of the Court in the "true" final submission. Thus, in the *Fisheries* case the Applicant had summarized in the form of submissions a whole series of legal propositions, some not even contested, merely as steps logically leading to its true final submissions (*I.C.J. Reports 1951*, at

pp. 121-123 and 126). In the *Minquiers and Ecrehos* case the "true" final submission was stated first and two legal propositions then adduced by way of furnishing alternative grounds on which the Court might uphold it (*I.C.J. Reports 1953*, at p. 52); and in the *Nottebohm* case a submission regarding the naturalization of Nottebohm in Liechtenstein was considered by the Court to be merely "a reason advanced for a decision by the Court in favour of Liechtenstein" on the "real issue" of the admissibility of the claim (*I.C.J. Reports 1955*, at p. 16). In the present case, as we have indicated, the situation is quite otherwise. The legality or illegality of the carrying out by France of atmospheric nuclear tests in the South Pacific Ocean is the basic issue submitted to the Court's decision, and it seems to us wholly unjustifiable to treat the Applicant's request for a declaration of illegality merely as reasoning advanced in support of what the Judgment considers to be the Applicant's objective. This objective it determined in complete detachment from the formal submission.

12. In accordance with the above-mentioned basic principles, the true nature of New Zealand's claim, and of the objectives sought by the Applicant, ought to have been determined on the basis of the clear and natural meaning of the text of its formal submission. The interpretation of that submission made by the Court constitutes in our view not an interpretation but a complete revision of the text, which ends in eliminating what constitutes the essence of that submission, namely the request for a declaration of illegality of nuclear tests in the South Pacific Ocean giving rise to radio-active fall-out. A radical alteration of an applicant's submission under the guise of interpretation has serious consequences because it constitutes a frustration of a party's legitimate expectations that the case which it has put before the Court will be examined and decided. In this instance the serious consequences have an irrevocable character because the Applicant is now prevented from resubmitting its Application and seising the Court again by reason of France's denunciation of the instruments on which it is sought to base the Court's jurisdiction in the present dispute.

13. The Judgment revises, we think, the Applicant's submission by bringing in other materials such as diplomatic communications and statements made in the course of the hearings and governmental press statements which are no part of the judicial proceedings. These materials do not justify, however, the interpretation arrived at in the Judgment. They refer to requests made repeatedly by the Applicant for an assurance from France as to the cessation of tests. But these requests for an assurance cannot have the effect attributed to them by the Judgment. While litigation is in progress an applicant may address requests to a respondent to give an assurance that it will not pursue the contested activity, but such requests cannot by themselves support the inference that an unqualified assurance, if received, would satisfy *all* the objectives the applicant is seeking through the judicial proceedings; still less can they restrict or

amend the claims formally submitted to the Court. According to the Rules of Court, this can only result from a clear indication by the applicant to that effect, through a withdrawal of the case, a modification of its submissions or an equivalent action. It is not for nothing that the submissions are required to be presented in writing and bear the signature of the Agent. It is a *non sequitur*, therefore, to interpret such requests for an assurance as constituting an implied renunciation, a modification or a withdrawal of the claim which is still maintained before the Court, asking for a judicial declaration of illegality of atmospheric tests. At the very least, since the Judgment attributes intentions and implied waivers to the Applicant, that Party should have been given an opportunity to explain its real intentions and objectives, instead of proceeding to such a determination *inaudita parte*.

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14. The Judgment, while it reiterates that the Applicant's objective has been to bring about the termination of atmospheric nuclear tests, fails to examine a crucial question, namely from what date the Applicant sought to achieve this objective. To answer this point it is necessary to take into account the date from which, according to New Zealand's submission, the legality of the French atmospheric tests is brought into question.

New Zealand's submission refers, in general terms, to nuclear tests "that give rise to radio-active fall-out". In making a declaration like the one requested, the Court might have had to pronounce generally on the legality of tests conducted by France in the South Pacific region, which gave rise to radio-active fall-out. The judicial declaration of illegality asked for in the submission would thus have implications not merely for future, but also for past tests, in respect of which the New Zealand Government reserved the right to hold the French Government responsible for any damage or losses. This would certainly include the tests conducted in 1973 and 1974 in disregard of the Court's interim order. There is not only occasion, but a duty of the Court, to pronounce on the legality of the tests which have taken place, since a request for a declaration of illegality covering atmospheric tests conducted in the past, could not be deprived of its object by statements of intention limited to tests to be conducted in 1975 or thereafter.

15. Such a view of the matter takes no account of the possibility of New Zealand seeking to claim compensation, particularly in respect of the tests conducted in 1973 and 1974. It is true that the Applicant has not asked for compensation for damage in the proceedings which are now before the Court. However, the New Zealand Government has since

1966 consistently reserved "the right to hold the French Government responsible for any damages or losses incurred as a result of the tests by New Zealand or the Pacific Islands for which New Zealand has special responsibility or concern". Such a reservation should have been taken into consideration in determining the Applicant's objectives in the proceedings. Account should also have been taken of the fact that counsel for the Applicant stated at the hearings that with respect to some of the damages allegedly caused, its Government intended to bring at a subsequent stage a claim related to the dispute before the Court but distinct from it (CR 74/10, p. 23). The possibility cannot therefore be excluded that the Applicant may intend to claim damages, at a later date, through the diplomatic channel or otherwise, in the event of a favourable decision furnishing it with a declaration of illegality. Such a procedure, which has been followed in previous cases before international tribunals, would have been particularly understandable in a case involving radio-active fall-out in which the existence and extent of damage may not readily be ascertained before some time has elapsed.

16. In one of the instances in which damages have been claimed in a subsequent Application on the basis of a previous declaratory Judgment, the Permanent Court endorsed this use of the declaratory Judgment, stating that it was designed:

> ". . . to ensure recognition of a situation at law, once and for all, and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20).

17. Furthermore, quite apart from any claim to compensation for damage, a request for a declaration of the illegality of France's atmospheric nuclear weapon tests cannot be said to be without object in relation to the numerous tests carried out from 1966 to 1974. The declaration, if obtained, would characterize those tests as a violation of New Zealand's rights under international law. As the Court's Judgment in the *Corfu Channel* case clearly confirms (*I.C.J. Reports 1949*, at p. 35), such a declaration is a form of "satisfaction" which the Applicant might have legitimately demanded when it presented its final submissions in the present proceedings, independently of any claim to compensation. Indeed in that case the Court in the operative part of the Judgment pronounced such a declaration as constituting "in itself appropriate satisfaction" (*ibid.*, p. 36).

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18. The Judgment implies that there was a dispute between the Parties but asserts that such a dispute has now disappeared because "the final objective which the Applicant has maintained throughout has been achieved by other means" (para. 58).

We cannot agree with this finding, which is based on the premise that the sole purpose of the Application was to obtain a cessation of tests as from the date of the Judgment. In our view the dispute between the Parties has not disappeared since it has concerned, from its origin, the question of the legality of the tests. In a letter of 9 May 1973, accompanying the Application, the Agent for New Zealand stated that his Government was "instituting proceedings on behalf of New Zealand against France in respect of a *dispute concerning the legality of nuclear testing in the Pacific region* . . ." (emphasis added). In its Memorial (para. 5) New Zealand states that:

> "The core of the legal dispute between New Zealand and France is disagreement as to whether the atmospheric testing of nuclear weapons undertaken by France in the South Pacific region involves violation of international law."

Such a definition of the core of the dispute made in the pleadings presented to the Court by the New Zealand Government cannot be altered by what may have been said by the Prime Minister of New Zealand in the press statement referred to in paragraph 28 of the Judgment. Whatever may be the political significance of that statement it should not be interpreted as overriding the submissions or formal communications presented to the Court by the Agent of the New Zealand Government. Moreover, if account is taken of the circumstances in which such declarations were made, and the context of the whole statement, it cannot be considered as intending to constitute a definition of the "subject of the dispute" different from that advanced in the pleadings and other documents. If any doubt were to remain in this respect, the Applicant should have been asked to give further explanations on this matter. The conclusion therefore is that, while from a factual point of view the extent of the dispute is reduced if no further atmospheric tests are conducted in 1975 and thereafter, from a legal piont of view the question which remains in dispute is whether the atmospheric nuclear tests which were in fact conducted from 1966 to 1974 were consistent with the rules of international law.

There has been no change in the position of the Parties as to that issue. New Zealand continues to ask the Court to declare that atmospheric nuclear tests are contrary to international law and is prepared to argue and develop that point. France, on its part, as recognized in the Judgment (para. 53), maintains the view that "its nuclear experiments do not contravene any subsisting provision of international law". In announcing the cessation of the tests in 1975 the French Government, according to

the Judgment, did not recognize that France was bound by any rule of international law to terminate its tests *(ibid.)*.

Consequently, the legal dispute between the Parties, far from having disappeared, still persists. A judgment by the Court on the legality of nuclear atmospheric tests in the South Pacific region would thus pronounce on a legal question in which the Parties are in conflict as to their respective rights.

19. We cannot accept the view that the decision of such a dispute would be a judgment *in abstracto*, devoid of object or having no *raison d'être*. On the contrary, as has been already shown, it would affect existing legal rights and obligations of the Parties. In case of the success of the Applicant, it would ensure for it advantages on the legal plane. In the event, on the other hand, of the Respondent being successful, it would benefit that Party by removing the threat of an unfounded claim. Thus, a judgment on the legality of atmospheric nuclear tests would, as stated by the Court in the *Northern Cameroons* case:

> ". . . have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations" (*I.C.J. Reports 1963*, p. 34).

In the light of this statement, a declaratory judgment defining the legal position applicable between the Parties—as would the one pronouncing on the Applicant's submission—would have given the Parties certainty as to their legal relations. This desired result is not satisfied by a finding by the Court of the existence of a unilateral engagement based on a series of declarations which are somewhat divergent and are not accompanied by an acceptance of the Applicant's legal contentions. Moreover, the Court's finding as to that unilateral engagement regarding the recurrence of atmospheric nuclear tests cannot, we think, be considered as affording the Applicant legal security of the same kind or degree as would result from a declaration by the Court specifying that such tests contravened general rules of international law applicable between France and New Zealand. This is shown by the very fact that the Court was able to go only so far as to show that the French Government's unilateral undertaking "cannot be interpreted as having been made in implicit reliance *on an arbitrary power of reconsideration*" (emphasis added); and that the obligation undertaken is one "the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed".

20. Whatever may be thought of the Judgment in the *Northern Cameroons* case, the Court in that case recognized a critically significant distinction between holding a declaratory judgment to be "without effect", the subject of which (as in that case) was a treaty which was no longer in force and one which "interprets a treaty that *remains* in force"

(emphasis added) or "*expounds a rule of customary law*" (emphasis added). As to both the latter, the Court said that the declaratory judgment would have a "continuing applicability" (*I.C.J. Reports 1963*, p. 37). In other words, according to the *Northern Cameroons* case a judgment cannot be said to be "without effect" or an issue moot when it concerns an analysis of the continuing applicability of a treaty in force or of customary international law. That is precisely the situation in the present case.

The present case, as submitted by the Applicant, concerns the continuing applicability of a potentially evolving customary international law, elaborated at numerous points in the Memorial and oral arguments. Whether all or any of the contentions of the Applicant could or would not be vindicated at the stage of the merits is irrelevant to the central issue that they are not manifestly frivolous or vexatious but are attended by legal consequences in which the Applicant has a legal interest. In the language of the *Northern Cameroons* case, a judgment dealing with them would have "continuing applicability". Issues of both fact and law remain to be clarified and resolved.

The distinction drawn in the *Northern Cameroons* case is thus in keeping with the fundamental purpose of a declaratory judgment which is designed, in contentious proceedings involving a genuine dispute, to clarify and stabilize the legal relations of the parties. By foreclosing any argument on the merits in the present stage of the proceedings the Court has precluded this possibility. Accordingly, the Court, in our view, has not only wrongly interpreted the thrust of the Applicant's submissions, it has also failed to recognize the valid role which a declaratory judgment may play in reducing uncertainties in the legal relations of the parties and in composing potential discord.

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21. In paragraph 23 the Judgment states that the Court has "inherent" jurisdiction enabling it to take such action as may be required. It asserts that it must "ensure" the observance of the "inherent limitations on the exercise of the judicial function of the Court" and "maintain its judicial character". It cites the *Northern Cameroons* case in support of these very general statements.

Without pausing to analyse the meaning of the adjective "inherent", it is our view that there is nothing whatever in the concept of the integrity of the judicial process ("inherent" or otherwise) which suggests, much less

compels, the conclusion that the present case has become "without object". Quite the contrary, due regard for the judicial function, properly understood, dictates the reverse.

The Court, "whose function is to decide in accordance with international law such disputes as are submitted to it" (Art. 38, para. 1, of the Statute), has the duty to hear and determine the cases it is seised of and is competent to examine. It has not the discretionary power of choosing those contentious cases it will decide and those it will not. Not merely requirements of judicial propriety, but statutory provisions governing the Court's constitution and functions impose upon it the primary obligation to adjudicate upon cases brought before it with respect to which it possesses jurisdiction and finds no ground of inadmissibility. In our view, for the Court to discharge itself from carrying out that primary obligation must be considered as highly exceptional and a step to be taken only when the most cogent considerations of judicial propriety so require. In the present case we are very far from thinking that any such considerations exist.

22. Furthermore, any powers which may attach to "the inherent jurisdiction" of the Court and its duty "to maintain its judicial character" invoked in the Judgment would, in our view, require it at least to give a hearing to the Parties or to request their written observations on the questions dealt with and determined by the Judgment. This applies in particular to the objectives the Applicant was pursuing in the proceedings, and to the question of the status and scope of the French declarations concerning future tests. Those questions could not be examined fully and substantially in the pleadings and hearings, since the Parties had received definite directions from the Court that the proceedings should "first be addressed to the questions of the jurisdiction of the Court to entertain the dispute, and of the admissibility of the Application". No intimation or suggestion was ever given to the Parties that this direction was no longer in effect or that the Court would go into other issues which were neither pleaded nor argued but which now form the basis for the final disposal of the case.

It is true that counsel for the Applicant alluded to the first French declaration of intention during one of the hearings, but he did so only as a prelude to his treatment of the issues of jurisdiction and admissibility and in the context of a review of developments in relation to the proceedings. He was moreover then acting under formal directions from the Court to deal exclusively with the questions of jurisdiction and admissibility of the Application. Consequently, counsel for the Applicant could not and did not address himself to the specific issues now decided in the Judgment, namely what were the objectives sought by the Applicant by the judicial proceedings and whether the French declarations and statements had the effect of rendering the claim of New Zealand without object.

The situation is in this respect entirely different from that arising in the *Northern Cameroons* case where the Parties had full opportunity to plead,

both orally and in writing, the question whether the claim of the Applicant had an object or had become "moot" before this was decided by the Court.

Accordingly, there is a basic contradiction when the Court invokes its "inherent jurisdiction" and its "judicial character" to justify its disposal of the case, while, at the same time, failing to accord the Applicant any opportunity whatever to present a countervailing argument.

No-one doubts that the Court has the power in its discretion to decide issues *ex proprio motu*. The real question is not one of power, but whether the exercise of power in a given case is consonant with the due administration of justice. For all the reasons noted above, we are of the view that, in this case, to decide the issue of "mootness" without affording the Applicant any opportunity to submit counter-arguments is not consonant with the due administration of justice.

In addition, we think that the Respondent should at least have been notified that the Court was proposing to consider the possible effect on the present proceedings of declarations of the French Government relating to its policy in regard to the conduct of atmospheric tests in the future. This was essential, we think, since it might, and did in fact lead the Court to pronounce upon nothing less than France's obligations, said to have been unilaterally undertaken, with respect to the conduct of such tests.

23. The conclusions above are reinforced when consideration is paid to the relationship between the issue of mootness and the requirements of the judicial process.

It is worth observing that a finding that the Applicant's claim no longer has any object is only another way of saying that the Applicant no longer has any stake in the outcome. Located in the context of an adversary proceeding, the implication is significant.

If the Applicant no longer has a stake in the outcome, i.e., if the case is really moot, then the judicial process tends to be weakened, inasmuch as the prime incentive for the Applicant to argue the law and facts with sufficient vigour and thoroughness is diluted. This is one of the reasons which justifies declaring a case moot, since the integrity of the judicial process presupposes the existence of conflicting interests and requires not only that the parties be accorded a full opportunity to explore and expose the law and facts bearing on the controversy but that they have the incentive to do so.

Applied to the present case, it is immediately apparent that this reason for declaring a case moot or without object is totally missing, a conclusion which is not nullified by the absence of the Respondent in this particular instance.

The Applicant, with industry and skill, has already argued the nature of its continuing legal interest in the dispute and has urged upon the

Court the need to explore the matter more fully at the stage of the merits. The inducement to do so is hardly lacking in light of the Applicant's submissions and the nature and purposes of a declaratory judgment.

24. Furthermore the Applicant's continued interest is manifested by its conduct. If, as the Judgment asserts, all the Applicant's objectives have been met, it would have been natural for the Applicant to have requested a discontinuance of the proceedings under Article 74 of the Rules. This it has not done. Yet this Article, together with Article 73 on settlement, provides for the orderly regulation of the termination of proceedings once these have been instituted. Both Articles require formal procedural actions by agents, in writing, so as to avoid misunderstandings, protect the interests of each of the two parties and provide the Court with the certainty and security necessary in judicial proceedings.

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25. Finally, we believe the Court should have proceeded, under Article 36 (6) and Article 53 of the Statute, to determine its own jurisdiction with respect to the present dispute. This is particularly important in this case because the French Government has challenged the existence of jurisdiction at the time the Application was filed, and, consequently, the proper seising of the Court, alleging that the 1928 General Act is not a treaty in force and that the French reservation concerning matters of national defence made the Court manifestly incompetent in this dispute. In the *Northern Cameroons* case, invoked in paragraph 23 of the Judgment, while the Respondent had raised objections to the jurisdiction of the Court, it recognized that the Trusteeship Agreement was a convention in force at the time of the filing of the Application. There was no question then that the Court had been regularly seised by way of application.

26. In our view, for the reasons developed in the second part of this opinion, the Court undoubtedly possesses jurisdiction in this dispute. The Judgment, however, avoids the jurisdictional issue, asserting that questions related to the observance of "the inherent limitations on the exercise of the Court's judicial function" require to be examined in priority to matters of jurisdiction (paras. 22 and 23). We cannot agree with this assertion. The existence or lack of jurisdiction with respect to a specific dispute is a basic statutory limitation on the exercise of the Court's judicial function and should therefore have been determined in the Judgment as Article 67, paragraph 6, of the Rules of Court seems clearly to expect.

27. It is difficult for us to understand the basis upon which the Court

could reach substantive findings of fact and law such as those imposing on France an international obligation to refrain from further nuclear tests in the Pacific, from which the Court deduces that the case "no longer has any object", without any prior finding that the Court is properly seised of the dispute and has jurisdiction to entertain it. The present Judgment by implication concedes that a dispute existed at the time of the Application. That differentiates this case from those in which the issue centres on the existence *ab initio* of any dispute whatever. The findings made by the Court in other cases as to the existence of a dispute at the time of the Application were based on the Court's jurisdiction to determine its own competence under the Statute. But in the present case the Judgment disclaims any exercise of that statutory jurisdiction. According to the Judgment the dispute has disappeared or has been resolved by engagements resulting from unilateral statements in respect of which the Court "holds that they constitute an undertaking possessing legal effect" (para. 53), and "finds that the French Government has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific" (para. 55). In order to make such a series of findings the Court must possess jurisdiction enabling it to examine and determine the legal effect of certain statements and declarations which it deems relevant and connected to the original dispute. The invocation of an alleged "inherent jurisdiction . . . to provide for the orderly settlement of all matters in dispute" in paragraph 23 cannot provide a basis to support the conclusions reached in the present Judgment which pronounce upon the substantive rights and obligations of the Parties. An extensive interpretation appears to be given in the Judgment to that "inherent jurisdiction" "on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purpose of" providing "for the orderly settlement of all matters in dispute" (para. 23). But such an extensive interpretation of the alleged "inherent jurisdiction" would blur the line between the jurisdiction conferred to the Court by the Statute and the jurisdiction resulting from the agreement of States. In consequence, it would provide an easy and unacceptable way to bypass a fundamental requirement firmly established in the jurisprudence of the Court and international law in general, namely that the jurisdiction of the Court is based on the consent of States.

28. The conclusion thus seems to us unavoidable that the Court in the process of rendering the present Judgment has exercised substantive jurisdiction without having first made a determination of its existence and the legal ground upon which that jurisdiction rests. Indeed, there seems to us to be a manifest contradiction in the jurisdictional position taken up by the Court in the Judgment. If the so-called "inherent jurisdiction" is considered by the Court to authorize it to decide that France is now under a legal obligation to terminate atmospheric nuclear tests in the South Pacific Ocean, why does the "inherent jurisdiction" not also authorize it to decide, on the basis of that same international obligation, that New Zealand's rights under international law "will be violated by any

further such tests"? In other words, if the Court may pronounce upon France's legal obligations with respect to atmospheric nuclear tests, why does it not draw from this pronouncement the appropriate conclusions in relation to the Applicant's submissions instead of finding them no longer to have any object?

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Since we consider a finding both as to the Court's jurisdiction and as to the admissibility of the Application to be an essential basis for the conclusions reached in the Judgment as well as for our reasons for dissenting from those conclusions, we now proceed to examine in turn the issues of jurisdiction and admissibility which confront the Court in the present case.

PART II. JURISDICTION

29. The bases on which, in paragraph 11 of her Application, New Zealand seeks to found the jurisdiction of the Court in the present case are, for present purposes, precisely the same as those invoked by Australia in the other *Nuclear Tests* case now before the Court, namely:

(a) Article 17 of the General Act of Geneva for the Pacific Settlement of International Disputes of 1928, in combination with Articles 36 (1) and 37 of the Statute of the Court, and
(b) the declarations respectively of New Zealand and France under Article 36 (2)—the optional clause—of the Statute, in combination with paragraph 5 of the same Article.

True, there are some differences in the reservations made by New Zealand and Australia to their respective declarations under the optional clause. But these differences are immaterial in the context of the *Nuclear Tests* cases, while their reservations to their accessions to the 1928 Act are identical. The only other difference is that New Zealand's declaration under the optional clause, unlike that of Australia, was made prior to the dissolution of the Permanent Court of International Justice and therefore requires the operation of Article 36 (5) of the Statute to make it applicable with respect to this Court. Again, however, this difference is immaterial in the present context.

30. Our views on the question whether the bases of jurisdiction invoked by New Zealand suffice to invest the Court with jurisdiction in the present case are the same as those which we have expressed in full in our joint dissenting opinion in the *Nuclear Tests* case brought against France by

Australia. Since for present purposes there is no material difference between the bases of jurisdiction invoked in the two cases, we think it sufficient to say here that, subject to one exception, the observations which we have made in the *Nuclear Tests* case brought by Australia against France also apply, *mutatis mutandis*, in the present case. The one exception is that paragraphs 92-93 of our observations in that case, relating to an alleged breach of the General Act of 1928 by Australia in September 1939 are not applicable with respect to New Zealand. Unlike that of Australia, New Zealand's reservation to the Act, designed to exclude disputes in regard to matters arising out of a war in which she might be engaged, was notified in February 1939 at the same time as that of France herself and in conformity with Article 39 of the Act; and, in consequence, no question of an alleged breach of the Act could even be suggested in the case of New Zealand.

Accordingly, as in the *Nuclear Tests* case brought by Australia against France, we conclude that Article 17 of the 1928 Act provides in itself a valid and sufficient basis for the Applicant to establish the jurisdiction of the Court. It follows that, as was said by the Court in the *Appeal Relating to the Jurisdiction of the ICAO Council* case, "it becomes irrelevant to consider the objections to other possible bases of jurisdiction" (*I.C.J. Reports 1972*, at p. 60).

PART III. THE REQUIREMENTS OF ARTICLE 17 OF THE 1928 ACT AND THE ADMISSIBILITY OF THE APPLICATION

31. In our view, it is clear that there are no grounds on which the Applicant's claim might be considered inadmissible. The extent to which any such proposed grounds are linked to the jurisdictional issue or are considered apart from that issue will be developed in this part of our opinion. At the outset we affirm that there is nothing in the concept of admissibility which should have precluded the Applicant from being given the opportunity of proceeding to the merits. This observation applies, in particular, to the contention that the claim of the Applicant reveals no legal dispute, or, put differently, that the dispute is exclusively of a political character and thus non-justiciable.

32. Under the terms of Article 17 of the 1928 Act, the jurisdiction which it confers on the Court is over "all disputes with regard to which the parties are in conflict as to their respective rights" (subject, of course, to any reservations made under Article 39 of the Act). Article 17 goes on to provide: "It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court . . ." The disputes "mentioned in Article 36 of the Statute of the Permanent Court" are the four classes of legal disputes listed in the optional clause of that Statute and of the present Statute. Moreover,

subject to one possible point which does not arise in the present case [1], it is generally accepted that these four classes of "legal disputes" and the earlier expression in Article 17 "all disputes with regard to which the parties are in conflict as to their respective rights" have to all intents and purposes the same scope. It follows that what is a dispute "with regard to which the parties are in conflict as to their respective rights" will also be a dispute which falls within one of the four categories of legal disputes mentioned in the optional clause and vice versa.

33. In the present proceedings New Zealand has described the subject of the dispute in paragraphs 2-10 of her Application. *Inter alia*, she states that, in a series of diplomatic Notes beginning in 1963, she repeatedly voiced to the French Government her opposition to France's conduct of atmospheric nuclear tests in the South Pacific region; that in a letter of 9 March 1973 from the New Zealand Prime Minister to the French Foreign Minister she made known her view that France's conduct of such tests was a violation of New Zealand's rights under international law, including its rights in respect of areas over which it has sovereignty; that the French Government in turn made it plain that it did not accept that view; and that, accordingly, there is a dispute between the two Governments "as to the legality of atmospheric nuclear tests in the South Pacific region". After various observations on the facts and the law, New Zealand sets out, *seriatim*, in the concluding paragraph of her Application five separate categories of rights which she claims to be violated by France's atmospheric nuclear tests. In her submission she then asks the Court to adjudge and declare:

> ". . . that the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests".

34. Prime facie, it is difficult to imagine a dispute which in its subject-matter and in its formulation is more clearly a "legal dispute" than the one submitted to the Court in the New Zealand Application. Indeed, in the Court's Order of 22 June 1973, it was characterized as "a dispute as to the legality of atmospheric tests in the South Pacific region". The French Government itself seems to have placed the dispute on a legal plane when, in the French Ambassador's letter of 19 February 1973 addressed to the New Zealand Prime Minister, it expressed the hope that

[1] Cf. the different opinions of Judges Badawi and Lauterpacht in the *Certain Norwegian Loans* case on the question whether a dispute essentially concerning the application of municipal law falls within the classes of legal disputes listed in Article 36 (2) of the Statute; *I.C.J. Reports 1957*, at pp. 29-33 and 36-38.

the Government of New Zealand would "refrain from any act which might infringe the fundamental rights and interests of France". Moreover, neither in its letter of 16 May 1973, addressed to the Court, nor in the Annex enclosed with that letter, did the French Government for a moment suggest that the dispute is not a dispute "with regard to which the parties are in conflict as to their respective rights" or that it is not a "legal dispute". Although in that letter and Annex the French Government advanced a whole series of arguments for the purpose of justifying its contention that the jurisdiction of the Court cannot be founded in the present case on the General Act of 1928, it did not question the character of the dispute as a "legal dispute" for the purposes of Article 17 of the Act.

35. In the *Livre blanc sur les expériences nucléaires* published in June 1973, however, the French Government did take the stand that the dispute is not a legal dispute. Chapter II, entitled "Questions juridiques" concludes with a section on the question of the Court's jurisdiction, the final paragraph of which reads:

> "La Cour n'est pas compétente, enfin, parce que l'affaire qui lui est soumise n'est pas fondamentalement un différend d'ordre juridique. Elle se trouve, en fait et par divers biais, invitée à prendre position sur un problème purement politique et militaire. Ce n'est, selon le Gouvernement français, ni son rôle ni sa vocation." (P. 23.)

This clearly is an assertion that the dispute is one concerned with matters other than legal and, therefore, not justiciable by the Court.

36. Complying with the Court's Order of 22 June 1973, New Zealand submitted her observations on the questions of the jurisdiction of the Court and the admissibility of the Application. In doing so, she expressed her views on the question of the political or legal nature of the dispute; and under the rubric of "admissibility" she furnished further explanations concerning "the nature of the claim which is the subject of the dispute" and "the legal rights for which New Zealand seeks protection". In these connections she restated, in the same terms as in the Application and request for interim measures of protection, the five different heads of legal rights by reference to which she asks the Court to characterize France's nuclear atmospheric tests as illegal. These are as follows:

> "*(a)* the rights of all members of the international community, including New Zealand, that no nuclear tests that give rise to radio-active fall-out be conducted;
> *(b)* the rights of all members of the international community, including New Zealand, to the preservation from unjustified artificial radio-active contamination of the terrestrial, maritime

and aerial environment and, in particular, of the environment of the region in which the tests are conducted and in which New Zealand, the Cook Islands, Niue and the Tokelau Islands are situated;

(c) the right of New Zealand that no radio-active material enter the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands, including their air space and territorial waters, as a result of nuclear testing;

(d) the right of New Zealand that no radio-active material, having entered the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands, including their air space and territorial waters, as a result of nuclear testing, cause harm, including apprehension, anxiety and concern, to the people and Government of New Zealand and of the Cook Islands, Niue and the Tokelau Islands;

(e) the right of New Zealand to freedom of the high seas, including freedom of navigation and overflight and the freedom to explore and exploit the resources of the sea and the seabed, without interference or detriment resulting from nuclear testing."

At the same time, she characterized the rights which she asserts under heads *(a)* and *(b)* as "shared", in the sense that they are held in common with other members of the international community and the corresponding obligation is one owed *erga omnes*; but stressed that the rights which she asserts under heads *(c)*, *(d)* and *(e)* are not "shared" rights in that sense.

37. In a written reply to questions from a Member of the Court the Agent for New Zealand also presented certain explanations regarding: (i) the elements which she considers to constitute the right asserted under head *(c)* that no radio-active material enter the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands and, in particular, regarding the relevance or otherwise of harm or potential harm as an element in the violation of that right; and (ii) the basis upon which she considers that a distinction may be drawn between a lawful and unlawful interference with the freedom of the high seas by the declaration of a zone of the high seas reserved for military purposes in time of peace.

38. Under the rubric of admissibility New Zealand presented her views on the question, mentioned in paragraph 24 of the Order of 22 June 1973, of her "legal interest" in respect of the claims put forward in her Application. With regard to the rights under heads *(c)*, *(d)* and *(e)*, said to be based on obligations owed to New Zealand individually, she maintained that her legal interest is of a "direct, immediate and uncomplicated kind". She stated that each series of tests, including those carried out in 1973 and 1974 after the filing of the Application, has involved the entry of radio-active debris into the territory, territorial

waters and air space of New Zealand, the Cook Islands, Niue and Tokelau Islands. She further alleged that, in consequence, the citizens of these Territories have been subjected to the uncertain genetic and somatic effects of increases in levels of radio-activity; and that on each occasion anxiety, apprehension and concern have resulted. The New Zealand Government's concern with the health, both physical and mental, of her people constitutes, she contended, an interest which "would undoubtedly be sufficient to give it standing before any international tribunal". In the case of the freedoms of the high seas invoked under head *(e)* of her claims, New Zealand also referred to the fact that on 18 July and 15 August 1973 New Zealand citizens, on vessels not of French flag, had been apprehended by the French authorities on the high seas and taken against their will to French territory and detained for a period of days. With regard to the rights under heads *(a)* and *(b)* mentioned as shared with other members of the international community, New Zealand maintained that her legal interest in the judicial protection of these rights falls under the principle referred to by the Court in a passage in its Judgment in the *Barcelona Traction, Light and Power Company, Limited* case (*I.C.J. Reports 1970*, at p. 32). According to New Zealand, this passage and other legal material which she cited show that international law now recognizes certain categories of international obligations as owed *erga omnes* and as conferring on every State a corresponding right of judicial protection. She contended that the right "to inherit a world in which nuclear testing in the atmosphere does not take place" and the right "to the preservation of the environment from unjustified artificial radio-active contamination" are rights of this kind and that all States therefore have a legal interest in their observance. In this connection, she referred to successive resolutions of the General Assembly on atmospheric nuclear testing and the Declaration on the Environment adopted by the Stockholm Conference of 1972 on the Human Environment.

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39. In giving this very summary account of the legal contentions of the New Zealand Government, we are not to be taken to express any view as to whether any of them are well or ill founded. We give it for the sole purpose of indicating the context in which Article 17 of the 1928 Act has to be applied and the admissibility of New Zealand's Application determined. Before we draw any conclusions, however, from that account of New Zealand's legal contentions, we must also indicate our under-

standing of the principles which should govern our determination of these matters at the present stage of the proceedings.

* *

40. The matters raised by the issues of "legal or political dispute" and "legal interest", although intrinsically matters of admissibility, are at the same time matters which, under the terms of Article 17 of the 1928 Act, also go to the Court's jurisdiction in the present case. Accordingly, it would be pointless for us to characterize any particular issue as one of jurisdiction or of admissibility, more especially as the practice neither of the Permanent Court nor of this Court supports the drawing of a sharp distinction between preliminary objections to jurisdiction and admissibility. In the Court's practice the emphasis has been laid on the essentially preliminary or non-preliminary character of the particular objection rather than on its classification as a matter of jurisdiction or admissibility (cf. Art. 62 of the Rules of the Permanent Court, Art. 62 of the old Rules of this Court and Art. 67 of the new Rules). This is because, owing to the consensual nature of the jurisdiction of an international tribunal, an objection to jurisdiction no less than an objection to admissibility may involve matters which relate to the merits; and then the critical question is whether the objection can or cannot properly be decided in the preliminary proceedings without affording the Parties the opportunity to plead to the merits. The answer to this question necessarily depends on whether the objection is genuinely of a preliminary character or whether it is too closely linked to the merits to be susceptible of a just decision without first having pleadings on the merits. So it is that, in specifying the task of the Court when disposing of preliminary objections, Article 67, paragraph 7, of the Rules expressly provides, as one possibility, that the Court should "declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character". These principles clearly apply in the present case even although, owing to the absence of France from the proceedings, the issue of jurisdiction and admissibility now before the Court have not been raised in the form of preliminary objections, *stricto sensu*.

41. The French Government's assertion that the dispute is not fundamentally of a legal character and concerns a purely political and military question is, in essence, a contention that it is not a dispute in which the Parties are in conflict as to their legal rights; or that it does not fall within the categories of legal disputes mentioned in Article 36 (2) of the Statute. Or, again, the assertion may be viewed as a contention that international law imposes no legal obligations upon France in regard to the matters in dispute which, therefore, are to be considered as matters left by international law exclusively within her national jurisdiction; or, more simply, as a contention that France's nuclear experiments do not violate any existing rule of international law, as the point was put by the French

Government in its diplomatic Note to the Australian Government of 7 February 1973, which has been brought to the attention of the Court in the other *Nuclear Tests* case. Yet, however the contention is framed, it is manifestly and directly related to the legal merits of the Applicant's case. Indeed, in whatever way it is framed, such a contention, as was said of similar pleas by the Permanent Court in the *Electricity Company of Sofia and Bulgaria* case, "forms a part of the actual merits of the dispute" and "amounts not only to encroaching on the merits, but to coming to a decision in regard to one of the fundamental factors of the case" (*P.C.I.J., Series A/B, No. 77*, at pp. 78 and 82-83). In principle, therefore, such a contention cannot be considered as raising a truly preliminary question.

42. We say "in principle" because we recognize that, if an applicant were to dress up as a legal claim a case which to any informed legal mind could not be said to have any rational, that is, reasonably arguable, legal basis, an objection contesting the legal character of the dispute might be susceptible of decision *in limine* as a preliminary question. This means that in the preliminary phase of the proceedings, the Court may have to make a summary survey of the merits to the extent necessary to satisfy itself that the case discloses claims that are reasonably arguable or issues that are reasonably contestable; in other words, that these claims or issues are rationally grounded on one or more principles of law, the application of which may resolve the dispute. The essence of this preliminary survey of the merits is that the question of jurisdiction or admissibility under consideration is to be determined not on the basis of whether the Applicant's claim is right but exclusively on the basis whether it discloses a right to have the claim adjudicated. An indication on the merits of the Applicant's case may be necessary to disclose the rational and arguable character of the claim. But neither such a preliminary indication of the merits nor any finding of jurisdiction or admissibility made upon it may be taken to prejudge the merits. It is for this reason that, in investigating the merits for the purpose of deciding preliminary issues, the Court has always been careful to draw the line at the point where the investigation may begin to encroach upon the decision of the merits. This applies to disputed questions of law no less than to disputed questions of fact; the maxim *jura novit curia* does not mean that the Court may adjudicate on points of law in a case without hearing the legal arguments of the parties.

43. The precise test to be applied may not be easy to state in a single combination of words. But the consistent jurisprudence of the Permanent Court and of this Court seems to us clearly to show that, the moment a preliminary survey of the merits indicates that issues raised in preliminary proceedings cannot be determined without encroaching upon and pre-

judging the merits, they are not issues which may be decided without first having pleadings on the merits (cf. *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, P.C.I.J., Series B, No. 4*; *Right of Passage over Indian Territory* case, *I.C.J. Reports 1957*, at pp. 133-134; the *Interhandel* case, *I.C.J. Reports 1959*, pp. 23-25). We take as our general guide the observations of this Court in the *Interhandel* case when rejecting a plea of domestic jurisdiction which had been raised as a preliminary objection:

> "In order to determine whether the examination of the grounds thus invoked is excluded from the jurisdiction of the Court for the reason alleged by the United States, the Court will base itself on the course followed by the Permanent Court of International Justice in its Advisory Opinion concerning *Nationality Decrees Issued in Tunis and Morocco* (Series B, No. 4), when dealing with a similar divergence of view. Accordingly, the Court does not, at the present stage of the proceedings, intend to assess the validity of the grounds invoked by the Swiss Government or to give an opinion on their interpretation, since that would be to enter upon the merits of the dispute. The Court will confine itself to considering *whether the grounds invoked by the Swiss Government are such as to justify the provisional conclusion that they may be of relevance in this case and, if so, whether questions relating to the validity and interpretation of those grounds are questions of international law.*" (Emphasis added.)

In the *Interhandel* case, after a summary consideration of the grounds invoked by Switzerland, the Court concluded that they both involved questions of international law and therefore declined to entertain the preliminary objection.

44. The summary account which we have given above of the grounds invoked by New Zealand in support of her claims appears to us amply sufficient, in the language of the Court on the *Interhandel* case, "to justify the provisional conclusion that they may be of relevance in this case" and that "questions relating to the validity and interpretation of those grounds are questions of international law". It is not for us "to assess the validity of those grounds" at the present stage of the proceedings since that would be to "enter upon the merits of the dispute". But our summary examination of them satisfies us that they cannot fairly be regarded as frivolous or vexatious or as a mere attorney's mantle artfully displayed to cover an essentially political dispute. On the contrary, the claims submitted to the Court in the present case and the legal contentions advanced in support of them appear to us to be based on rational and reasonably arguable grounds. Those claims and legal contentions are rejected by the French Government on legal grounds. In our view, these circumstances in themselves suffice to qualify the present dispute as a "dispute in regard to which the parties are in conflict as to their legal rights" and as a "legal dispute" within the meaning of Article 17 of the 1928 Act.

45. The conclusion just stated conforms to what we believe to be the accepted view of the distinction between disputes as to rights and disputes as to so-called conflicts of interests. According to that view, a dispute is political, and therefore non-justiciable, where the claim is demonstrably rested on other than legal considerations, e.g., on political, economic or military considerations. In such disputes one, at least, of the parties is not content to demand its legal rights, but asks for the satisfaction of some interest of its own even although this may require a change in the legal situation existing between them. In the present case, however, the Applicant invokes legal rights and does not merely pursue its political interest; it expressly asks the Court to determine and apply what it contends are existing rules of international law. In short, it asks for the settlement of the dispute "on the basis of respect for law", which is the very hall-mark of a request for judicial, not political settlement of an international dispute (cf. *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, P.C.I.J., Series B, No. 12,* at p. 26). France also, in contesting the Applicant's claims, is not merely invoking its vital political or military interests but is alleging that the rules of international law invoked by the Applicant do not exist or do not warrant the import given to them by the Applicant. The attitudes of the Parties with reference to the dispute, therefore, appear to us to show conclusively its character as a "legal" and justiciable dispute.

46. This conclusion cannot, in our view, be affected by any suggestion or supposition that, in bringing the case to the Court, the Applicant may have been activated by political motives or considerations. Few indeed would be the cases justiciable before the Court if a legal dispute were to be regarded as deprived of its legal character by reason of one or both parties being also influenced by political considerations. Neither in contentious cases nor in requests for advisory opinions has the Permanent Court or this Court ever at any time admitted the idea that an intrinsically legal issue could lose its legal character by reason of political considerations surrounding it.

47. Nor is our conclusion in any way affected by the suggestion that in the present case the Court, in order to give effect to New Zealand's claims, would have to modify rather than apply the existing law. Quite apart from the fact that the Applicant explicitly asks the Court to apply the existing law, it does not seem to us that the Court is here called upon to do anything other than exercise its normal function of deciding the dispute by applying the law in accordance with the express directions given to the Court in Article 38 of the Statute. We fully recognize that, as was emphasized by the Court recently in the *Fisheries Jurisdiction*

cases, "the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down" (*I.C.J. Reports 1974*, at pp. 23-24 and 192). That pronouncement was, however, made only after full consideration of the merits in those cases. It can in no way mean that the Court should determine *in limine litis* the character, as *lex lata* or *lex ferenda*, of an alleged rule of customary law and adjudicate upon its existence or non-existence in preliminary proceedings without having first afforded the parties the opportunity to plead the legal merits of the case. In the present case, the Court is asked to perform its perfectly normal function of assessing the various elements of State practice and legal opinion adduced by the Applicant as indicating the development of a rule of customary law. This function the Court performed in the *Fisheries Jurisdiction* cases, and if in the present case the Court had proceeded to the merits and upheld the Applicant's contentions in the present case, it could only have done so on the basis that the alleged rule had indeed acquired the character of *lex lata*.

48. Apart from these fundamental considerations, we cannot fail to observe that, in alleging violations of its territorial sovereignty and of rights derived from the principle of the freedom of the high seas, the Applicant also rests its case on long-established—indeed elemental—rights, the character of which as *lex lata* is beyond question. In regard to these rights the task which the Court is called upon to perform is that of determining their scope and limits vis-à-vis the rights of other States, a task inherent in the function entrusted to the Court by Article 38 of the Statute.

49. These observations also apply to the suggestion that the Applicant is in no position to claim the existence of a rule of customary international law operative against France inasmuch as the Applicant did not object to, and even endorsed, the conduct of atmospheric nuclear tests in the Pacific Ocean region prior to 1963. Clearly this is a matter involving the whole concept of the evolutionary character of customary international law upon which the Court should not pronounce in these preliminary proceedings. The very basis of the Applicant's legal position, as presented to the Court, is that after the tests in question there developed a growing awareness of the dangers of nuclear fall-out and a climate of public opinion strongly opposed to atmospheric tests; and that the conclusion of the Moscow Test Ban Treaty in 1963 led to the development of a rule of customary law prohibiting such tests. The Applicant has also drawn attention to its own constant opposition to atmospheric tests from 1963 onwards. Consequently, although the earlier conduct of the Applicant is no doubt one of the elements which would have had to be taken into account by the Court, it would have been upon the evidence of State practice as a whole that the Court would have had to make its determination of the existence or non-existence of the alleged rule. In short, however relevant, this point appears to us to belong essentially to the

legal merits of the case, and not to be one appropriate for determination in the present preliminary proceedings.

50. We are, moreover, unable to see how the fact that there is a sharp conflict of view between the Applicant and the French Government concerning the materiality of the damage or potential risk of damage resulting from nuclear fall-out could either affect the legal character of the dispute or call for the Application to be adjudged inadmissible here and now. This question again appears to us to belong to the stage of the merits. On the one side, the New Zealand Government has given its view of the facts regarding atmospheric nuclear explosions in the Pacific Ocean region and of the dangers of radio-active fall-out attendant upon them (paras. 12-22 of the Application). In presenting its arguments concerning the development of international law on this matter, it also has cited a series of General Assembly resolutions, the reports on atomic radiation of UNSCEAR and of the International Commission on Radiological Protection, the Test Ban Treaty itself, the Treaty for the Prohibition of Nuclear Weapons in Latin America, the Treaty on the Non-Proliferation of Nuclear Weapons, and a resolution and declaration adopted at the Stockholm Conference on the Human Environment. In addition, it has referred to the psychological injury said to be caused to the peoples of New Zealand, the Cook Islands, Niue and the Tokelau Islands through their anxiety as to the possible effects of radio-active fall-out on the well-being of themselves and their descendants. On the other side, there are before the Court the repeated assurances of the French Government, in diplomatic Notes and public statements, concerning the precautions taken by her to ensure that the nuclear tests would be carried out "in complete security". There are also reports of various scientific bodies, including those of the Australian National Radiation Advisory Committee in 1967, 1969, 1971 and 1972 and of the New Zealand National Radiation Laboratory in 1972, which all concluded that the radio-active fall-out from the French tests was below the damage level for public health purposes. In addition, the Court has before it the report of a meeting of Australian and French scientists in May 1973 in which they arrived at common conclusions as to the data of the amount of fall-out but differed as to the interpretation of the data in terms of the biological risks involved. Whatever impressions may be gained from a prima facie reading of the evidence so far presented to the Court, the questions of the materiality of the damage resulting from, and of the risk of future damage from, atmospheric nuclear tests, appear to us manifestly questions which cannot be resolved in preliminary proceedings without the Parties having had the opportunity to submit their full case to the Court.

51. The dispute as to the facts regarding damage and potential damage

from radio-active nuclear fall-out itself appears to us to be a matter which falls squarely within the third of the categories of legal disputes listed in Article 36 (2) of the Statute: namely a dispute concerning "the existence of any fact which, if established, would constitute a breach of an international obligation". Such a dispute, in our view, is inextricably linked to the merits of the case. Moreover, New Zealand contends that rights which she invokes are violated by France's conduct of atmospheric tests independently of proof of damage. Thus, the whole issue of material damage appears to be inextricably linked to the merits. Just as the question whether there exists any general rule of international law prohibiting atmospheric tests is "a question of international law" and part of the legal merits of the case, so also is the point whether material damage is an essential element in that alleged rule. Similarly, just as the questions whether there exist any general rules of international law applicable to invasion of territorial sovereignty by deposit of nuclear fall-out and regarding violation of so-called "decisional sovereignty" by such a deposit are "questions of international law" and part of the legal merits, so also is the point whether material damage is an essential element in any such alleged rules. *Mutatis mutandis*, the same may be said of the question whether a State claiming in respect of an alleged violation of the freedom of the seas has to adduce material damage to its own interests.

52. Finally, we turn to the question of New Zealand's legal interest in respect of the claims which she advances. With regard to the right said to be inherent in New Zealand's territorial sovereignty, we think that she is justified in considering that her legal interest in the defence of that right is direct. Whether or not she can succeed in persuading the Court that the particular right which she claims falls within the scope of the principle of territorial sovereignty, she clearly has a legal interest to litigate that issue in defence of her territorial sovereignty. With regard to the rights to be free from atmospheric tests, said to be possessed by New Zealand in common with other States, the question of "legal interest" again appears to us to be part of the general legal merits of the case. If the materials adduced by New Zealand were to convince the Court of the existence of a general rule of international law, prohibiting atmospheric nuclear tests, the Court would at the same time have to determine what is the precise character and content of that rule and, in particular, whether it confers a right on every State individually to prosecute a claim to secure respect for the rule. In short, the question of "legal interest" cannot be separated from the substantive legal issue of the existence and scope of the alleged rule of customary international law. Although we recognize that the existence of a so-called *actio popularis* in international law is a matter of controversy, the observations of this Court in the *Barcelona Traction, Light and Power Company, Limited* case, *Second Phase, I.C.J. Reports 1970*, at page 32, suffice to show that the question is one that may be considered as capable of rational legal argument and a proper subject of litigation before this Court.

53. As to the rights said to be derived from the principle of the freedom of the high seas, the question of "legal interest" once more appears clearly to belong to the general legal merits of the case. Here, the existence of the fundamental rule, the freedom of the high seas, is not in doubt, finding authoritative expression in Article 2 of the Geneva Convention of 1958 on the High Seas. The issues disputed between the parties under this head are (i) whether the establishment of a nuclear weapon-testing zone covering areas of the high seas and the superjacent air space are permissible under that rule or are violations of the freedoms of navigation and fishing, and (ii) whether atmospheric nuclear tests also themselves constitute violations of the freedom of the seas by reason of the pollution of the waters alleged to result from the deposit of radio-active fall-out. In regard to these issues, the Applicant contends that it not only has a general and common interest as a user of the high seas but also that its geographical position gives it a special interest in freedom of navigation, over-flight and fishing in the South Pacific region. That States have individual as well as common rights with respect to the freedoms of the high seas is implicit in the very concept of such freedoms which involve rights of user possessed by every State, as is implicit in numerous provisions of the Geneva Convention of 1958 on the High Seas. It is, indeed, evidenced by the long history of international disputes arising from conflicting assertions of their rights on the high seas by individual States. Consequently, it seems to us that it would be difficult to admit that the Applicant in the present case is not entitled even to litigate the question whether it has a legal interest individually to institute proceedings in respect of what she alleges to be violations of the freedoms of navigation, over-flight and fishing. This question, as we have indicated, is an integral part of the substantive legal issues raised under the head of the freedom of the seas and, in our view, could only be decided by the Court at the stage of the merits.

54. Having regard to the foregoing observations, we think it clear that none of the questions discussed in this part of our opinion would constitute a bar to the exercise of the Court's jurisdiction with respect to the merits of the case on the basis of Article 17 of the 1928 Act. Whether regarded as matters of jurisdiction or of admissibility, they are all either without substance or do "not possess, in the circumstances of the case, an exclusively preliminary character". Dissenting, as we do, from the Court's decision that the claim of New Zealand no longer has any object, we consider that the Court should have now decided to proceed to pleadings on the merits.

PART IV. CONCLUSION

55. Since we are of the opinion that the Court has jurisdiction and that the case submitted to the Court discloses no ground on which New Zealand's claims should be considered inadmissible, we consider that the Applicant had a right under the Statute and the Rules to have the case adjudicated. This right the Judgment takes away from the Applicant by a procedure and by reasoning which, to our regret, we can only consider as lacking any justification in the Statute and Rules or in the practice and jurisprudence of the Court.

(Signed) Charles D. ONYEAMA.

(Signed) Hardy C. DILLARD.

(Signed) E. JIMÉNEZ DE ARÉCHAGA.

(Signed) H. WALDOCK.