SEPARATE OPINION OF JUDGE SHAHABUDDEEN

The growing recognition of the need to protect the natural environment is striking. Contemporary international law has been developing responsively. I understand New Zealand's concerns and agree with its case on several points. I agree that it was entitled to come to the Court, entitled to a hearing, entitled to a judge *ad hoc*, and that it was not shut out by the words in paragraph 63 of the 1974 Judgment, "in accordance with the provisions of the Statute". If I do not go the remainder of the way, the reason lies in what appears to me to be substantial legal obstacles, some of which I would like to explain.

I. The Question of the Basis of the Judgment

The central point in New Zealand's case is that the basis of the 1974 Judgment lay in an assumption by the Court that underground tests were safe, that more recent scientific evidence disproves that assumption, and that consequently the basis of the Judgment has been affected within the meaning of paragraph 63 of the Judgment.

A question could arise as to whether the true position was that the Court made an assumption that underground tests were safe, or whether it acted on an understanding that New Zealand was satisfied that such tests were safe, the Court itself being in no position to judge of a complex technical matter not put in issue and not examined. However, whether the distinction between these two possibilities can be made and, if so, with what significance are questions which need not be pursued for the reasons given in Sections II and III below.

II. Whether New Zealand's Request Is within the Limits of the Dispute

Paragraph 64 of New Zealand's present Request states:

> "The 1973 Application makes it clear that the dispute was in its origin about nuclear *contamination* of the environment arising from nuclear testing of whatever nature. The 'atmospheric' feature was merely incidental to the 'contamination' feature, which was of the essence."

New Zealand's position is that the 1974 Judgment incorrectly assumed that its 1973 Application was limited to the question of the legality of atmospheric testing.

I accept that New Zealand was opposed to nuclear contamination arising from nuclear testing of any kind. Evidence of this is to be seen at various places in the pleadings and other material placed before the Court in 1973-1974 (see *I.C.J. Pleadings, Nuclear Tests*, Vol. II, pp. 4, 18, 22 and 301). The question is how far was this general opposition to contamination from nuclear testing of any kind made the subject of the dispute presented in the particular case which New Zealand brought against France in 1973. The bringing of the case was no doubt motivated by New Zealand's general opposition to contamination from nuclear testing of any kind; however, the framework of the case would fall to be determined by more specific considerations governing the designing of any concrete piece of litigation.

In determining what the 1973 case was about, it is necessary to start with the concept of a legal dispute. As the Court remarked in its Judgment of 20 December 1974, "the existence of a dispute is the primary condition for the Court to exercise its judicial function" (*I.C.J. Reports 1974*, p. 476, para. 58).

The case for New Zealand is that its present Request does not introduce a new case, but rather represents a continuation of its 1973 case. It follows that the Request hinges on the dispute presented by the 1973 case and cannot expand it. So the question is, what was the dispute presented in that case?

After references in New Zealand's 1973 Application to discussions between the two sides, paragraph 8 of the Application stated:

> "The French Government . . . made it plain that it did not accept the contention that its programme of atmospheric nuclear testing in the South Pacific involved a violation of international law. There is, accordingly, a dispute between the Government of New Zealand and the French Government as to the legality of atmospheric nuclear tests in the South Pacific region." (*I.C.J. Pleadings, Nuclear Tests*, Vol. II, p. 4.)

That passage fell under the heading "The Subject of the Dispute". Paragraph 10 of the Application, falling under the same heading, added:

> "Having failed to resolve through diplomatic means the dispute that exists between it and the French Government, the New Zealand Government is compelled to refer the dispute to the International Court of Justice." *(Ibid.)*

Thus, the dispute which was referred by New Zealand to the Court in 1973 was one "as to the legality of atmospheric nuclear tests". It is not

that the Court assumed that this was the dispute, and even less that it assumed so erroneously: New Zealand said that that was the dispute; it did so in the operative part of its Application by which it formally defined its complaint and referred it to the Court.

The foregoing view of the dispute, as one which concerned the legality of atmospheric nuclear tests, was maintained in paragraph 188 of New Zealand's 1973 Memorial. Under the heading "Nature of the Claim Which Is the Subject of the Dispute and of the Legal Rights for Which New Zealand Seeks Protection", that paragraph read:

> "The dispute between New Zealand and France is of a legal character. New Zealand claims that the atmospheric testing of nuclear weapons by France in the South Pacific is undertaken in violation of legal obligations owed by France to New Zealand. France has denied and continues to deny this claim." (*I.C.J. Pleadings, Nuclear Tests*, Vol. II, p. 203.)

Against this background it is not surprising that, at the beginning of the oral proceedings relating to jurisdiction and admissibility, President Lachs referred to the Application as having "instituted proceedings against France in respect of a dispute as to the legality of atmospheric nuclear tests in the South Pacific region" (*ibid.*, p. 250). The remark drew no objection from the Bar.

That view of the purpose of the proceedings was maintained by the Court after reviewing all of the material before it, including the arguments of New Zealand. Summing up its conclusion in paragraph 29 of the Judgment, the Court said, in a key passage recalled in today's Order:

> "the New Zealand claim is to be interpreted as applying only to atmospheric tests, not to any other form of testing, and as applying only to atmospheric tests so conducted as to give rise to radio-active fall-out on New Zealand territory" (*I.C.J. Reports 1974*, p. 466; and see, *ibid.*, p. 458, para. 1, and p. 461, para. 16).

New Zealand has not sought to contest the submission of France that nothing in any of the dissenting opinions appended to the Judgment questioned that part of the Court's finding (*Aide-mémoire* of France, 6 September 1995, para. 15). The limits of the dispute, as both positively and negatively defined by the Court in that finding, still control the debate. The legality of underground tests lies outside of those limits.

III. Whether New Zealand's Request Is Otherwise Authorized by Paragraph 63 of the Judgment

It is necessary to bear in mind the substantive nature of the reliefs being sought by New Zealand in respect of the underground tests now

being conducted by France. New Zealand is not simply asking the Court to reconsider the matters complained of in its 1973 Application in the light of the new situation; it is asking for substantive reliefs in respect of the new situation in like manner as it would if, instead of its request, it had brought a new case. Its request for an examination of the situation is asking for declarations as to the legality of the underground tests; its request for an indication of provisional measures is seeking measures restraining France from conducting the tests. The acts complained of are new acts. Was a request within the meaning of paragraph 63 of the 1974 Judgment intended to extend to such a case?

The reservation in paragraph 63 of the 1974 Judgment was not intended, in my opinion, to enable the Court to assume and exercise competence over fresh matters not covered by such jurisdictional bond, if any, as existed between the Parties when the Application was brought in 1973. Where the Court has jurisdiction at the time when an Application is brought, the *Nottebohm* principle entitles it to continue to exercise that jurisdiction in relation to the dispute presented in the Application notwithstanding that the jurisdiction was terminated during the course of the proceedings. The last sentence of paragraph 63 of the 1974 Judgment sought to treat a request made pursuant to that paragraph as falling within the operation of that principle, in the same way that the principle would have applied to the original case had it continued; the sentence could not be construed as an attempt by the Court, by force of its own decision, to vest itself with jurisdiction not otherwise available to it. I have not been able to find any principle of law which entitles the Court to exercise a terminated jurisdiction over fresh acts occurring after the termination, in this case some 21 years after the jurisdiction (if it existed) was terminated. A request which leads to that result is not, in my opinion, a request within the meaning of paragraph 63 of the Judgment.

CONCLUSION

As will appear from other opinions appended to the Order, the case raises important questions of principle concerning the role and functions of the Court.

In this respect, it is right to recall that the title of the Court is the "International Court of Justice". However, it is also useful to bear in mind that the "Justice" spoken of is not justice at large; as in the case of courts of justice generally, it is "the primary function of the Court to administer justice based on law" (*Aerial Incident of 27 July 1955 (Israel* v. *Bulgaria), Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 191, joint dissenting opinion). That is made clear by Article 38, paragraph 1, of the Statute, which provides that the Court's "function is to decide in accordance with international law such disputes as are sub-

mitted to it . . .". It is for this reason that the Court is sometimes referred to in its own jurisprudence as "a court of law" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 165, Vice-President Koretsky, dissenting opinion; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 23, para. 29; and *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 192, para. 45); and that, indeed, was how the Court described itself in its 1974 Judgment in this case (*Nuclear Tests (New Zealand* v. *France), I.C.J. Reports 1974*, p. 476, para. 58).

It does not follow from the fact that the Court may also be described as a court of law that it administers the law mechanically. Lacking the full measure of the judicial power available to some national courts, it has nevertheless found opportunity for enterprise and even occasional boldness. Especially where there is doubt, its forward course is helpfully illuminated by broad notions of justice. However, where the law is clear, the law prevails.

The law is clear that the Court cannot act unless there is a dispute before it, and then only within the limits of the dispute. The dispute which New Zealand referred to the Court in 1973 arose out of a claim by New Zealand which the Court found applied "only to atmospheric tests, *not to any other form of testing*" (emphasis added). The Court would have been acting *ultra petita* in 1974 had it sought to adjudicate on the legality of underground tests (supposing it had been asked to do so), these being another form of testing. It is in respect of the legality of underground tests that New Zealand's present Request seeks relief. The matters sought to be so raised do not fall within the limits of the 1973 dispute by which the Court is still bound.

It is for these reasons that, although agreeing with New Zealand on some points, I have not found it possible to accept its main arguments.

(Signed) Mohamed SHAHABUDDEEN.