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 Australia is "to obtain a termination of" the "atmospheric nuclear tests conducted by France in the South Pacific region" (para. 30). It further assumes that, although the judgment which the Applicant seeks would have been rested on a finding that "further tests would not be consistent with international law, such finding would be only a means to an end, and not an end in itself" *(ibid.)*.

3. 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 pursuing 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 Australia's formal submissions as presented in the Application.

4. In the Application Australia:

> "... *Asks the Court to adjudge and declare that*, for the abovementioned reasons or any of them or for any other reason that the Court deems to be relevant, the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law.

and to Order

that the French Republic shall not carry out any further such tests."

5. This submission, as observed by counsel for Australia before the Court (CR 73/3, p. 60):

> ". . . has asked the Court to do two things: the first is to adjudge and declare that the conduct of further atmospheric nuclear tests is contrary to international law and to Australia's rights; the second is to order France to refrain from further atmospheric nuclear tests".

As appears from the initial words of the actual submission, its first part requests from the Court a judicial *declaration* of the illegality of atmospheric tests conducted by France in the South Pacific Ocean.

6. In paragraph 19 of the Application it is stated that:

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

In other words, the request for a declaration is the essential submission. If a declaration of illegality were obtained from the Court which the French Government agreed to treat as a sufficient ground for discontinuing further atmospheric tests, then Australia would not maintain its request for an Order.

Consequently, it can hardly be said, as is done in paragraph 30 of the Judgment, that the declaration of illegality of atmospheric tests asked for in the first part of the Applicant's formal submission is merely a means for obtaining a Court Order for the cessation of further tests. On the contrary, the declaration of illegality is the basic claim submitted by Australia to the Court; and this request is indeed described in the Memorial (para. 430) as the "main prayer in the Application".

7. The Applicant asks for a judicial declaration to the effect that atmospheric nuclear tests are "not consistent . . . with international law". This bare assertion cannot be described as constituting merely a reason advanced in support of the Order. The legal reasons invoked by the Applicant both in support of the declaration and the Order 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 of rights derived from the character of the high seas as *res communis*. These reasons, designed to support the submissions, are clearly distinguished in the pleadings from the decisions which the Court is asked to make. According to the terms of the submission the Court is requested to make the declaration of illegality "for the above-mentioned reasons or any of them or for any other reason that the Court deems to be relevant". Isolated from those reasons or legal propositions, the declaration that atmospheric nuclear tests are "not consistent with applicable rules of 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]", to decide and declare that certain conduct of a State is or is not consistent with international law is of the essence of international adjudication, the heart of the Court's judicial function.

8. The Judgment asserts in paragraph 30 that "the original and ultimate objective of the Applicant was and has remained to obtain a termination of those tests; thus its claim cannot be regarded as being a claim for a declaratory judgment". In our view the premise in no way leads to the conclusion. In international litigation a request for a declaratory judgment is normally sufficient even when the Applicant's ultimate objective is to obtain the termination of certain conduct of the Respondent which it considers to be illegal. As Judge Hudson 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 rôle, 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 task 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 [2]." *[Translation.]*

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

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

9. A dual submission, like the one presented here, comprising both a request for a declaration of illegality and a prayer for an order or injunction to end certain measures is not infrequent in international litigation.

This type of dual submission, when presented in other cases has been considered by this Court and its predecessor as containing two independent formal submissions, the first or declaratory part being treated as a true submission, as an end in itself and not merely as part of the reasoning or as a means to obtain the cessation of the alleged unlawful activity. (*Diversion of Water from the Meuse, P.C.I.J., Series A/B, No. 70*, pp. 5, 6 and 28; *Right of Passage over Indian Territory, I.C.J. Reports 1960*, pp. 10 and 31.)

The fact that consequential requests for an Order or an equivalent injunction are made, as they were made in the above-mentioned cases, 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. Nor is it justified to introduce a conceptual dichotomy between declaratory and other judgments in order to achieve the same effect. The fact that the Applicant's submissions are not limited to a declaration of the legal situation but also ask for some consequential relief cannot be used to set aside the basic submission in which the declaration of the legal situation is asked to be made in the operative part of the Judgment.

10. In the above-mentioned cases the judges who had occasion to analyse in detail in their individual opinions the Applicant's submissions recognized that in these basic submissions the Applicants sought a declaratory judgment from the Court. The individual opinion of Judge Hudson in the *Diversion of Water from the Meuse* case has already been mentioned. In the *Right of Passage over Indian Territory* case, Judges Winiarski and Badawi in their dissenting opinion recognized that: "What the Portuguese Government is asking of the Court, therefore, is that it shall deliver in the first place a declaratory judgment." They added something which is fully applicable to the present case:

> ". . . although this claim is followed by the two others, complementary and contingent, it constitutes the very essence of the case . . . The object of the suit, as it follows from the first Portuguese submission, is to obtain from the Court a recognition and statement of the situation at law between the Parties" (*I.C.J. Reports 1960*, p. 74).

Judge Armand-Ugon in his dissenting opinion also said: "The Court is asked for a declaratory judgment as to the existence of a right of passage." (*Ibid.*, p. 77.) And this approach was not limited to dissenting opinions. The Court's Judgment in that case states that the Applicant

"invoked its right of passage and asked the Court to *declare* the existence of that right" (emphasis added) and also says:

> "To this first claim Portugal adds two others, though these are conditional upon a reply, wholly or partly favourable, to the first claim, and will lose their purpose if the right alleged is not recognized." (*Ibid.*, p. 29.)

11. 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 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. 29) 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.

12. In any event, the cases cited in paragraph 29 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 were 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 as wholly unjustifiable to treat the Applicant's request

for a declaration of illegality merely as reasoning advanced in support of its request for an Order prohibiting further tests.

13. In accordance with these basic principles, the true nature of the Australian 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 revision of the text, which ends in eliminating what the Applicant stated is "the main prayer in the Application", namely the request for a declaration of illegality of nuclear atmospheric tests in the South Pacific Ocean. A radical alteration or mutilation 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.

14. 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. 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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15. 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 the Australian submission, the legality of the French atmospheric tests is brought into question. The term "further atmospheric tests" used in the submission was also employed in the Australian diplomatic Note of 3 January 1973 addressed to the French Government. In that Note the claim as to the illegality of the tests and an express request to refrain from them were raised for the first time. When a State sends a communication asking another State "to refrain from any further acts" which are said to be illegal, it seems obvious that this claim and request refer to all acts which may take place after the date of the diplomatic communication. Similarly, when Australia filed its Application it seems evident that its request to the Court to declare the illegality of "further atmospheric nuclear weapons tests" must be understood as referring to all tests conducted as from 9 May 1973, the date of the Application.

While an injunction or an Order from the Court on the holding of "further atmospheric tests" could have effect only as from the date it is delivered, a judicial declaration of illegality like the one requested would embrace not merely subsequent tests but also those which took place in 1973 and 1974 after the Application was filed. That such was the objective of the Applicant is confirmed by the fact that as soon as the Application was filed Australia requested interim measures in order to protect its position with regard to the possible continuation of atmospheric tests by France after the filing of the Application and before the delivery of the Court's Judgment on the merits. A request for a declaration of illegality covering the atmospheric tests which were conducted in 1973 and 1974, in disregard of the interim Order of the Court, could not be deprived of its object by statements of intention limited to tests to be conducted in 1975 or thereafter.

16. Such a view of the matter takes no account of the possibility of Australia seeking to claim compensation in respect of the 12 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 Australian Government has not waived its right to claim them in the future. It has significantly stated in the Memorial (para. 435) that: "*At the present time*" (emphasis added), it is not the "intention of the Australian Government to seek pecuniary damages". 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 particu-

larly 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.

17. 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" (*Factory at Chorzów, P.C.I.J., Series A, No. 13*, p. 20).

18. 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 in 1973 and 1974. The declaration, if obtained, would characterize those tests as a violation of Australia'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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19. The Judgment implies that there was a dispute between the Parties, but asserts that such a dispute has now disappeared because "the objective of the claim has been achieved by other means" (para. 55).

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 as from the date of the Application. It is true that from a factual point of view the extent of the dispute is reduced if no further atmospheric tests are conducted in 1975 and thereafter, but from a legal point of view the question which remains in dispute is whether the atmospheric nuclear tests which were in fact conducted in 1973 and 1974 were consistent with the rules of international law.

There has been no change in the position of the Parties as to that issue. Australia continues to ask the Court to declare that atmospheric nuclear

tests are inconsistent with international law and is prepared to argue and develop that point. France, on its part, as recognized in the Judgment (para. 51), maintains the view that "its nuclear experiments have not violated any rule 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.

20. 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 stating the general legal position applicable between the Parties—as would the one pronouncing on the first part of 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 Australia. This is shown by the very fact that the Court was able to go only so far as to find 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".

21. 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 would 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, is 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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22. 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.

23. 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 Australia 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 certain 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 the circumstances of 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.

24. 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.

25. 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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26. 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.

27. 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.

28. 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. 51) and "finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific" (para. 52). 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 purposes 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.

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 grounds upon which that jurisdiction rests.

29. 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 on the basis of that same international obligation, to decide that the carrying out of any further such tests would "not be consistent with applicable rules of international law" and to order that "the French Republic shall not carry out 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? The above observation is made solely with reference to the concept of "inherent jurisdiction" developed in the Judgment and is of course not addressed to the merits of the case, which are not before the Court at the present stage.

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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

Introduction

30. At the outset of the present proceedings the French Government categorically denied that the Court has any competence to entertain Australia's Application of 9 May 1973; and it has subsequently continued to deny that there is any legal basis for the Court's Order of 22 June 1973 indicating provisional measures of protection or for the exercise of any jurisdiction by the Court with respect to the matters dealt with in the Application. The Court, in making that Order for provisional measures, stated that the material submitted to it led to the conclusion, at that stage of the proceedings, that the jurisdictional provisions invoked by the Applicant appeared "prima facie, to afford a basis on which the jurisdiction of the Court might be founded". At the same time, it directed that the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application should be the subject of the pleadings in the next stage of the case, that is, in the proceedings with which the Court is now concerned. In our view, these further proceedings confirm that the jurisdictional provisions invoked by the Applicant not merely afforded a wholly sufficient basis for the Order of 22 June 1973 but also provided a valid basis for establishing the competence of the Court in the present case.

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31. The Application specifies as independent and alternative bases of the Court's jurisdiction:

> "(i) Article 17 of the General Act for the Pacific Settlement of International Disputes, 1928, read together with Articles 36 (1) and 37 of the Statute of the Court. Australia and the French Republic both acceded to the General Act on 21 May 1931. The texts of the conditions to which their accessions were declared to be subject are set forth in Annex 15 and Annex 16 respectively.
> (ii) Alternatively, Article 36 (2) of the Statute of the Court. Australia and the French Republic have both made declarations thereunder."

It follows that, if these are indeed two independent and alternative ways of access to the Court and one of them is shown to be effective to confer jurisdiction in the present case, this will suffice to establish the Court's jurisdiction irrespective of the effectiveness or ineffectiveness of the other. As the Court stated in its Judgment on the *Appeal Relating to the Jurisdiction of the ICAO Council*, if the Court is invested with jurisdiction on the basis of one set of jurisdictional clauses "it becomes irrelevant to consider the objections to other possible bases of jurisdiction" (*I.C.J. Reports 1972*, p. 60).

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The General Act of 1928

32. Article 17 of the General Act of 1928 reads as follows:

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

The disputes "mentioned in Article 36 of the Statute of the Permanent Court" are all or any of the classes of legal disputes concerning:

(a) the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation.

33. The same four classes of legal disputes are reproduced word for word, in Article 36 (2)—the optional clause—of the Statute of the present Court which, together with the declarations of Australia and France, constitutes the second basis of jurisdiction invoked in the Application.

34. Accordingly, the jurisdiction conferred on the Court under Article 17 of the General Act of 1928 and under the optional clause of the present Statute, in principle, covers the same disputes: namely the four classes of legal disputes listed above. In the present instance, however, the bases of jurisdiction resulting from these instruments are clearly not co-extensive because of certain differences between the terms of the Parties' accessions to the General Act and the terms of their declarations accepting the optional clause. In particular, France's declaration under the optional clause excepts from the Court's jurisdiction "disputes concerning activities connected with national defence", whereas no such exception appears in her accession to the General Act of 1928. Consequently, it is necessary to examine the two bases of jurisdiction separately.

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35. The French Government, in its letter of 16 May 1973 addressed to the Registrar, and in the Annex to that letter, put forward the view that the present status of the General Act of 1928 and the attitude of the Parties, more especially of France, in regard to it preclude that Act from being considered today as a clear expression of France's will to accept the Court's jurisdiction. It maintained that, since the demise of the League of Nations, the Act of 1928 is recognized either as no longer being in force or as having lost its efficacy or as having fallen into desuetude. In support of this view, the French Government agreed that the Act of 1928 was, ideologically, an integral part of the League of Nations system "in so far as the pacific settlement of international disputes had necessarily in that system to accompany collective security and disarmament"; that there was correspondingly a close link between the Act and the structures of the League, the Permanent Court of International Justice, the Council, the Secretary-General, the States Members and the Secretariat; that these links were emphasized in the terms of certain of the accessions to the Act, including those of Australia, New Zealand and France; and that this was also shown by the fact that Australia and New Zealand, in acceding to the Act, made reservations regarding disputes with States not members of the League. It further argued that the integration of the Act into the structure of the League of Nations was shown by the fact that, after the latter's demise, the necessity was recognized of a revision of the Act, substituting new terms for those of the defunct system instead merely of relying on the operation of Article 37 of the Statute of the Court. This, according to the French Government, implied that the demise of the

League was recognized as having rendered it impossible for the General Act of 1928 to continue to function normally.

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36. The fact that the text of the General Act of 1928 was drawn up and adopted within the League of Nations does not make it a treaty of that Organization; for even a treaty adopted within an organization remains the treaty of its parties. Furthermore, the records of the League of Nations Assembly show that it was deliberately decided not to make the General Act an integral part of the League of Nations structure (Ninth Ordinary Session, *Minutes of the First Committee*, p. 68); that the General Act was not intended to be regarded as a constitutional document of the League or adjunct of the Covenant (*ibid.*, p. 69); that the General Act was envisaged as operating parallel to, and not as part of the League of Nations system (*ibid.*, p. 71); and that the substantive obligations of the parties under the General Act were deliberately made independent of the functions of the League of Nations. Stressing the last point, Mr. Rolin of Belgium said specifically:

> "The intervention of the Council of the League was not implied as a matter of necessity in the General Act; the latter had been regarded as being of use in connection with the general work of the League, *but it had no administrative or constitutional relationship with it.*" (*Ibid.*, p. 71; emphasis added.)

That the French Government also then understood the pacific settlement system embodied in the General Act to be independent of that of the Covenant of the League of Nations was made clear when the ratification of the Act was laid before the French Chambre des deputés, whose Commission des affaires étrangères explained:

> "... alors que, dans le système conçu par les fondateurs de la Société des Nations, l'action du Conseil, telle quelle est prévue par l'article 15, constitue un mode normal de règlement des différends au même titre que la procédure d'arbitrage, *l'Acte général, au contraire, ignore complètement le Conseil de la Société des Nations*" (*Journal officiel*, documents parlementaires, Chambre, 1929, p. 407; emphasis added).

37. Australia and France, it is true, inserted reservations in their accessions to the General Act designed to ensure the priority of the powers of the Council of the League over the obligations which they were assuming by acceding to the Act. But the fact that they and some other States thought it desirable so to provide in their instruments of accession

seems to testify to the independent and essentially autonomous character of the General Act rather than to its integration in the League of Nations system. Similarly, the fact that, in order to exclude disputes with non-member States from their acceptance of obligations under the Act, Australia and some other States inserted an express reservation of such disputes in their instruments of accession, serves only to underline that the Covenant and the General Act were separate systems of pacific settlement. The reservation was needed for the very reason that the General Act was established as a universal system of pacific settlement independent of the League of Nations and open to States not members of the Organization, as well as to Members (cf. Report of Mr. Politis, as Rapporteur, 18th Plenary Meeting of 25 September 1928, at p. 170).

38. Nor do we find any more convincing the suggested "ideological integration" of the General Act in the League of Nations system: i.e., the thesis of its inseparable connection with the League's trilogy of collective security, disarmament and pacific settlement. Any mention of a connection between those three subjects is conspicuously absent from the General Act, which indeed makes no reference at all to security or disarmament, unlike certain other instruments of the same era. In these circumstances, the suggestion that the General Act was so far intertwined with the League of Nations system of collective security and disarmament as necessarily to have vanished with that system cannot be accepted as having any solid basis.

39. Indeed, if that suggestion had a sound basis, it would signify the extinction of numerous other treaties of pacific settlement belonging to the same period and having precisely the same ideological approach as the General Act of 1928. Yet these treaties, without any steps having been taken to amend or to "confirm" them, are unquestionably considered as having remained in force despite the dissolution of the League of Nations in 1946. As evidence of this two examples will suffice: the Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration of 19 July 1927, Article 17 of which was applied by this Court as the source of its jurisdiction in the *Barcelona Traction, Light and Power Company, Limited* case (*I.C.J. Reports 1964*, at pp. 26-39); and the Franco-Spanish Treaty of Arbitration of 10 July 1929 on the basis of which France herself and Spain constituted the *Lac Lanoux* arbitration in 1956 (*UNRIAA*, Vol. 12, at p. 285). In truth, these treaties and the General Act itself, although largely inspired by the League of Nations aim of promoting the peaceful settlement of disputes together with collective security and disarmament, also took their inspiration from the movement for the development of international arbitration and judicial settlement which had grown up during the nineteenth century and had played a major role at the Hague Peace Conferences of 1899 and 1907. It was, moreover, the French Government itself which in the General Assembly in 1948 emphasized this quite separate source of the "ideology" of the General Act of 1928. Having referred to the General Act as "a valuable

document inherited from the League of Nations", the French delegation added that it constituted:

> "... an integral part of a long tradition of arbitration and conciliation which had proved itself effective long before the existence of the League itself" (*GA, OR, Third Session, Plenary Meeting, 199th Meeting*, p. 193).

That tradition certainly did not cease with the League of Nations.

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40. The General Act of 1928 was, however, a creation of the League of Nations era, and the machinery of pacific settlement which it established almost inevitably exhibited some marks of that origin. Thus, the tribunal to which judicial settlement was to be entrusted was the Permanent Court of International Justice (Art. 17); if difficulties arose in agreeing upon members of a conciliation commission, the parties were empowered, as one possible option, to entrust the appointment to the President of the Council of the League (Art. 6); the Conciliation Commission was to meet at the seat of the League, unless otherwise agreed by the parties or otherwise decided by the Commission's President (Art. 9); a Conciliation Commission was also empowered in all circumstances to request assistance from the Secretary-General of the League (Art. 9); if a deadlock arose in effecting the appointment of members of an arbitral tribunal, the task of making the necessary appointments was entrusted to the President of the Permanent Court of International Justice (Art. 23); in cases submitted to the Permanent Court, it was empowered to lay down "provisional measures" (Art. 33), and to decide upon any third party's request to intervene (Art. 36) and its Registrar was required to notify other parties to a multilateral convention the construction of which was in question (Art. 37); the Permanent Court was also entrusted with a general power to determine disputes relating to the interpretation or application of the Act (Art. 41); the power to extend invitations to non-member States to become parties to the General Act was entrusted to the Council of the League (Art. 43); and, finally, the depositary functions in connection with the Act were entrusted to the Secretary-General of the League (Arts. 43-47). The question has therefore to be considered whether these various links with the Permanent Court and with the Council of the League of Nations and its Secretariat are of such a character that the dissolution of these organs in 1946 had the necessary result of rendering the General Act of 1928 unworkable and virtually a dead letter.

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41. In answering this question, account has first to be taken of Article 37 of the Statute of this Court, on which the Applicant specifically relies for the purpose of founding the Court's jurisdiction on Article 17 of the 1928 Act. Article 37 of the Statute reads:

> "Whenever a treaty or convention in force provides for reference of a matter . . . to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."

The objects and purposes of that provision were examined at length by this Court in the *Barcelona Traction, Light and Power Company, Limited* case (*New Application, Preliminary Objections, I.C.J. Reports 1964*, at pp. 31-36) where, *inter alia*, it said:

> "The intention therefore was to create a special régime which, as between the parties to the Statute, would automatically transform references to the Permanent Court in these jurisdictional clauses, into references to the present Court.
>
> In these circumstances it is difficult to suppose that those who framed Article 37 would willingly have contemplated, *and would not have intended to avoid, a situation in which the nullification of the jurisdictional clauses whose continuation it was desired to preserve, would be brought about by the very event—the disappearance of the Permanent Court—the effects of which Article 37 both foresaw and was intended to parry*; or that they would have viewed with equanimity the possibility that, although the Article would preserve many jurisdictional clauses, there might be many others which it would not; thus creating that very situation of diversification and imbalance which it was desired to avoid." (P. 31, emphasis added.)

In a later passage the Court was careful to enter the *caveat* that Article 37 was not intended "to prevent the operation of causes of extinction other than the disappearance of the Permanent Court" (*ibid.*, p. 34). However, it continued:

> "And precisely because it was the sole object of Article 37 to prevent extinction resulting from the particular cause which the disappearance of the Permanent Court would represent, *it cannot be admitted that this extinction should in fact proceed to follow from this very event itself.*" (*Ibid.*, emphasis added.)

42. The Court's observations in that case apply in every particular to the 1928 Act. It follows that the dissolution of the Permanent Court in 1946 was in itself wholly insufficient to bring about the termination of the Act. Unless some other "cause of extinction" is shown to prevent the Act from being considered as "a treaty or convention in force" at the date of the dissolution of the Permament Court, Article 37 of the Statute automatically has the effect of substituting this Court for the Permanent Court as the tribunal designated in Article 17 of the General Act for the

judicial settlement of disputes. And Article 37, in our opinion, also has the effect of automatically substituting this Court for the Permanent Court in Articles 33, 36, 37 and 41 of the General Act.

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43. Account has further to be taken of the arrangements reached in 1946 between the Assembly of the League and the General Assembly of the United Nations for the transfer to the United Nations Secretariat of the depositary functions performed by the League Secretariat with respect to treaties. Australia and France, as Members of both organizations, were parties to these arrangements and are, therefore, clearly bound by them. In September 1945 the League drew up a *List of Conventions with Indication of the Relevant Articles Conferring Powers on the Organs of the League of Nations*, the purpose of which was to facilitate consideration of the transfer of League functions to the United Nations in certain fields. In this list appeared the General Act of 1928, and there can be no doubt that when resolutions of the two Assemblies provided in 1946 for the transfer of the depository functions of the League Secretariat to the United Nations Secretariat, the 1928 Act was understood as, in principle, included in those resolutions. Thus, the first list published by the Secretary-General in 1949 of multilateral treaties in respect of which he acts as depositary contained the General Act of 1928 (*Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary*, UN Publications, 1949, Vol. 9). Moreover, in a letter of 12 June 1974, addressed to Australia's Permanent Representative and presented by Australia to the Court, the Secretary-General expressly confirmed that the 1928 Act was one of the "multilateral treaties placed under the custody of the Secretary-General by virtue of General Assembly resolution 24 (I) of 12 February 1946".

44. Consequently, on the demise of the League of Nations in 1946, the depositary functions entrusted to the Secretary-General and Secretariat of the League of Nations by Articles 43 to 47 of the 1928 Act were automatically transferred to the Secretary-General and Secretariat of the United Nations. It follows that the demise of the League of Nations could not possibly constitute "a cause of extinction" of the General Act by reason of the references to the League Secretariat in those Articles.

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45. The disappearance of the League of Nations system, it is true, did slightly impair the full efficacy of the machinery provided for in the 1928 Act. In conciliation, recourse could no longer be had to the President of

the Council as one of the means provided by Article 6 of the Act for resolving disagreements in the appointment of members of the conciliation commission; nor could the commission any longer assert the right under Article 9 of the Act to meet at the seat of the League and to request assistance from the Secretary-General of the League. As to arbitration, it became doubtful whether Article 37 of the Statute would suffice, in the event of the parties' disagreement, to entrust to the President of this Court the extra-judicial function of appointing members of an arbitral tribunal entrusted by Article 23 of the 1928 Act to the President of the Permanent Court. In both conciliation and arbitration, however, the provisions involving League organs concerned machinery of a merely alternative or ancillary character, the disappearance of which could not be said to render the 1928 Act as a whole unworkable or impossible of performance. Nor could their disappearance be considered such a fundamental change of circumstances as might afford a ground for terminating or withdrawing from the treaty (cf. Art. 62 of the Vienna Convention on the Law of Treaties). Moreover, none of these provisions touched, still less impaired, the procedure for judicial settlement laid down in Article 17 of the 1928 Act.

46. Another provision the efficacy of which was impaired by the dissolution of the League was Article 43, under which the power to open accession to the General Act to additional States was given to the Council of the League. The disappearance of the Council put an end to this method of widening the operation of the 1928 Act and prejudiced, in consequence, the achievement of a universal system of pacific settlement founded on the Act. It did not, however, impair in any way the operation of the Act as between its parties. Indeed, in principle, it did not preclude the parties to the Act from agreeing among themselves to open it to accession by additional States.

47. Analysis of the relevant provisions of the General Act of 1928 thus suffices, by itself, to show that neither the dissolution of 1946 of the Permanent Court of International Justice nor that of the several organs of the League of Nations can be considered as "a cause of extinction" of the Act. This conclusion is strongly reinforced by the fact, already mentioned, that a large number of treaties for the pacific settlement of disputes, clauses of which make reference to organs of the League, are undoubtedly accepted as still in force; and that some of them have been applied in practice since the demise of the League. For present purposes, it is enough to mention the application by France herself and by Spain of their bilateral Treaty of Arbitration of 10 July 1929 as the basis for the constitution of the *Lac Lanoux* Arbitral Tribunal in 1956 (*UNRIAA*, Vol. 12, at p. 285). That convention was conspicuously a treaty of the League of Nations era, containing references to the Covenant and to the Council of the League as well as to the Permanent Court. Moreover, some of those references did not deal with the mere machinery of peaceful settlement

procedures, but with matters of substance. Article 20, for example, expressly reserved to the parties, in certain events, a right of unilateral application to the Council of the League; and Article 21, which required provisional measures to be laid down by any tribunal dealing with a dispute under the treaty, provided that "it shall be the duty of the Council of the League of Nations, if the question is brought before it, to ensure that suitable provisional measures be taken". Those Articles provided for much more substantial links with organs of the League than anything contained in the 1928 Act; yet both France and Spain appear to have assumed that the treaty was in force in 1956 notwithstanding the demise of the League.

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The So-Called Revision of the General Act

48. In the case of the 1928 Act, the French Government maintains that the so-called revision of the General Act undertaken by the General Assembly in 1948 implies that the demise of the League was recognized as having rendered it impossible for the 1928 Act to continue to function normally. This interpretation of the proceedings of the General Assembly and the Interim Committee regarding the "revision" of the Act does not seem to us sustainable. Belgium introduced her proposal for the revision of the 1928 Act in the Interim Committee at a time when the General Assembly was engaged in revising a number of treaties of the League of Nations era in order to bring their institutional machinery and their terminology into line with the then new United Nations system. It is therefore understandable that, notwithstanding the automatic transfers of functions already effected by Article 37 of the Statute and General Assembly resolution 24 (I), the Interim Committee and the General Assembly should have concerned themselves with the replacement of the references in the General Act to the Permanent Court, the Council of the League and the League Secretariat by references to their appropriate counterparts in the United Nations system.

49. In any event, what began as a proposal for the revision of the 1928 General Act was converted in the Interim Committee into the preparation of a text of a new Revised General Act which was to be opened for accession as an entirely independent treaty. This was to avoid the difficulty that certain of the parties to the 1928 Act, whose agreement was necessary for its revision, were not members of the United Nations and not taking part in the revision (cf. Arts. 39 and 40 of the Vienna Convention on the Law of Treaties). As the Belgian delegation explained to the Interim Committee, the consent of the parties to the 1928 Act would now be unnecessary "since in its final form their proposal did not suppress or

modify the General Act, as established in 1928, *but left it intact as also, therefore, whatever rights the parties to that Act might still derive from it*" (emphasis added). This explanation was included in the Committee's report to the General Assembly and, in our opinion, clearly implies that the 1928 Act was recognized to be a treaty still in force in 1948. Moreover, the records of the debates contain a number of statements by individual delegations indicating that the 1928 Act was then understood by them to be in force; and those statements did not meet with contradiction from any quarter.

50. Equally, the mere fact that the General Assembly drew up and opened for accession a new Revised General Act could not have the effect of putting an end to, or undermining the validity of, the 1928 Act. In the case of the amendment of multilateral treaties, the principle is well settled that the amending treaty exists side by side with the original treaty, the latter remaining in force unamended as between those of its parties which have not established their consent to be bound by the amending treaty (cf. Art. 40 of the Vienna Convention on the Law of Treaties). Numerous examples of the application of this principle are to be found precisely in the practice of the United Nations regarding the amendment of League of Nations Treaties; and it was this principle to which the General Assembly gave expression in the preamble to its resolution 268A (III), by which it instructed the Secretary-General to prepare and open to accession the text of the Revised Act. The preamble to the resolution, *inter alia*, declared:

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

It is therefore evident that the General Assembly neither intended that the Revised General Act should put an end to its predecessor, the 1928 Act, nor understood that this would be the result of its adoption of the Revised Act. Such an intention in the General Assembly would indeed have been surprising when it is recalled that the "revision" of the General Act was undertaken in the context of a programme for encouraging the development of methods for the pacific settlement of disputes.

51. In the above-quoted clause of the preamble, it is true, resolution 268A (III) qualifies the statement that the amendments would not affect rights of parties to the 1928 Act by the words "in so far as it might still be operative". Moreover, in another clause of the preamble the resolution also speaks of its being "expedient to restore to the General Act its original efficacy, impaired by the fact that the organs of the League of Nations and the Permanent Court of International Justice to which it refers have now disappeared". We cannot, however, accept the suggestion that by these phrases the General Assembly implied that the 1928 Act

was no longer capable of functioning normally. These phrases find a sufficient explanation in the fact, which we have already mentioned, that the disappearance of the League organs and the Permanent Court would affect certain provisions regarding alternative methods for setting up conciliation commissions or arbitral tribunals, which might in the event of disagreements impair the efficacy of the procedures provided by the Act.

52. But there was also another reason for including those words in the preamble to which the Interim Committee drew attention in its report (UN doc. A/605, para. 46):

> "Thanks to a few alterations, the new General Act would, for the benefit of those States acceding thereto, restore the original effectiveness of the machinery provided in the Act of 1928, an Act which, though still theoretically in existence, has largely become inapplicable.
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> It was noted, for example, that *the provisions of the Act relating to the Permanent Court of International Justice had lost much of their effectiveness in respect of parties which are not members of the United Nations or parties to the Statute of the International Court of Justice.*" (Emphasis added.)

In 1948 several parties to the 1928 Act were neither members of the United Nations nor parties to the Statute of this Court so that, even with the aid of Article 37 of the Statute, the provisions in the 1928 Act on judicial settlement were not "operative" as between them and other parties to the Act. Therefore, in this respect also it could properly be said that the original efficacy of the 1928 Act had been impaired. On the other hand, the clear implication, *a contrario*, of the Interim Committee's report was that the provisions of the 1928 Act concerning judicial settlement—Article 17—had not lost their efficacy as between those of its parties who were parties to the Statute of this Court.

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The Question of the Continued Force of the 1928 Act

53. Equally, we do not find convincing the thesis put forward by the French Government that the 1928 Act cannot serve as a basis for the competence of the Court because of "the desuetude into which it has fallen since the demise of the League of Nations system". Desuetude is not mentioned in the Vienna Convention on the Law of Treaties as one of the grounds for termination of treaties, and this omission was deli-

berate. As the International Law Commission explained in its report on the Law of Treaties:

> ". . . while 'obsolescence' or 'desuetude' may be a factual cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty" (*Yearbook of the International Law Commission*, 1966, Vol. II, p. 237).

In the present instance, however, we find it impossible to imply from the conduct of the parties in relation to the 1928 Act, and more especially from that of France prior to the filing of the Application in this case, their consent to abandon the Act.

54. Admittedly, until recently the Secretary-General was not called upon to register any new accession or other notification in relation to the 1928 Act. But this cannot be considered as evidence of a tacit agreement to abandon the treaty, since multilateral treaties not infrequently remain in force for long periods without any changes in regard to their parties.

55. Nor is such evidence to be found in the fact, referred to in the Annex to the French Government's letter of 16 May 1973, that "Australia and Canada did not feel, in regard to the Act, any need to regularize their reservations of 1939 as they did those expressed with regard to their optional declarations". The reservations in question, made by both countries four days after the outbreak of the Second World War, notified the depositary that they would not regard their accessions to the 1928 Act as "covering or relating to any dispute arising out of events occurring during the present crisis". These reservations were not in accord with Article 45 of the 1928 Act, which permitted modification of the terms of an accession only at the end of each successive five-year period for which the Act runs unless denounced. But both countries justified the reservations on the basis of the breakdown of collective security under the League and the resulting fundamental changes in the circumstances existing when they acceded to the Act; and if that justification was well founded there was no pressing need to "regularize" their reservations in 1944 when the current five-year period was due to expire. Nor would it be surprising if in that year of raging war all over the globe they should not have had their attention turned to this question. Moreover, the parallelism suggested between the position of these two countries under the 1928 Act and under the optional clause is in any case inexact. Their declarations under the optional clause expired in 1940, so that they were called upon to re-examine their declarations; under Article 45 of the 1928 Act, on the other hand, their accessions remained in force indefinitely unless denounced.

56. A more general argument in the Annex to the letter of 16 May 1973, regarding a lack of parallelism in States' acceptance respectively of the 1928 Act and the optional clause, also appears to us unconvincing.

The desuetude of the 1928 Act, it is said, ought to be inferred from the following facts: up to 1940 reservations made to the 1928 Act and to the optional clause were always similar but after that date the parallelism ceased; reservations to the optional clause then became more restrictive and yet the same States appeared unconcerned with the very broad jurisdiction to which they are said to have consented under the Act.

57. Even before 1940, however, the suggested parallelism was by no means complete. Thus, France's declaration of 19 September 1929, accepting the optional clause, did not contain the reservation of matters of domestic jurisdiction which appeared in her accession to the 1928 Act; and the declarations made in that period by Australia, Canada, New Zealand and the United Kingdom did not exclude disputes with non-member States, as did their accessions to the 1928 Act. The provisions of Articles 39 and 45 of the Act in any case meant that there were material differences in the conditions under which compulsory jurisdiction was accepted under the two instruments. Moreover, even granting that greater divergencies appear in the two systems after 1940, this is open to other explanations than the supposed desuetude of the 1928 Act. The more striking of these divergencies arise from reservations to the optional clause directed to specific disputes either already existing or imminently expected. Whereas under the optional clause many States have placed themselves in a position to change the terms of their declarations in any manner they may wish, without notice and with immediate effect, their position under the 1928 General Act is very different by reason of the provisions of Articles 39 and 45 regulating the making and taking effect of reservations. Because of these provisions a new reservation to the 1928 Act directed to a specific matter of dispute may serve only to alert the attention of the other party to the State's obligations under the Act and hasten a decision to institute proceedings before the reservation becomes effective under Article 45. In short, any parallelism between the optional clause and the 1928 Act is in this respect an illusion.

58. As to the further suggestion in the above-mentioned letter that if the 1928 Act were still in force the refusal of Australia, New Zealand and France to become parties to the Revised General Act would be difficult to explain, this does not appear to us to bear a moment's examination. Since 1946, the 1928 Act has had a limited number of existing parties and has been open to accession only by a small and finite group of other States, while the Revised General Act is open to accession by a much wider and still expanding group of States. Accordingly, it is no matter for surprise that parties to the 1928 General Act should have been ready simply to continue as such, while not prepared to take the new step of assuming more wide-ranging commitments under the Revised Act. Even more decisive is the fact that, of the six parties to the 1928 Act which have

become parties to the Revised Act, at least four are on record as formally recognizing that the 1928 Act is also still in force for them.

59. It follows that, in our opinion, the various considerations advanced in the French Government's letter and Annex of 16 May 1973 fall far short of establishing its thesis that the 1928 Act must now be considered as having fallen into desuetude. Even if this were not the case, the State practice in relation to the Act in the post-war period, more especially that of France herself, appears to us to render that thesis manifestly untenable.

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Evidence of the 1928 Act's Continuance in Force

60. Between the dissolution of the League of Nations in April 1946 and Australia's invocation of the 1928 Act in her Application of 9 May 1973 there occurred a number of examples of State practice which confirm that, so far from abandoning the Act, its parties continued to recognize it as a treaty in force. The first was the conclusion of the Franco-Siamese Settlement Agreement on 17 November 1946 for the purpose of re-establishing the pre-war territorial situation on Siam's borders and renewing friendly relations between the two countries. Siam was not a party to the General Act of 1928, but in the Franco-Siamese Treaty of Friendship of 1937 she had agreed to apply the provisions of the Act for the settlement of any disputes with France. Under the Settlement Agreement of 1946 France and Siam agreed to constitute immediately "a Conciliation Commission, composed of the representatives of the Parties and three neutrals, in accordance with the General Act of Geneva of 26 September 1928 for the Pacific Settlement of International Disputes, which governs the constitution and working of the Commission". The 1928 Act, it is true, applied between France and Siam, not as such, but only through being incorporated by reference into the 1937 Treaty of Friendship. But it is difficult to imagine that in November 1946, a few months after she had participated in the dissolution of the League, France should have revived the operation of the provisions of the 1928 Act in her relations with Siam if she had believed the dissolution of the League to have rendered that Act virtually defunct.

61. In 1948-1949, as we have already pointed out, a number of member States in the debates and the General Assembly in resolution 268A (III) referred to the 1928 Act, as still in force, and met with no contradiction. In 1948 also the 1928 Act was included in New Zealand's official treaty list published in that year. Again, in 1949, the Norwegian Foreign Minister, in reporting to parliament on the Revised Act, stated that the 1928 Act was still in force, and in 1950 the Swedish Government did likewise in referring the Revised Act to the Swedish parliament. Similarly,

in announcing Denmark's accession to the Revised Act in 1952, the Danish Government referred to the 1928 Act as still in force.

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62. Accordingly, France was doing no more than conform to the general opinion when in 1956 and 1957 she made the 1928 Act one of the bases of her claim against Norway before this Court in the *Certain Norwegian Loans* case (*I.C.J. Reports 1957*, p. 9). In three separate passages of her written pleadings France invoked the 1928 Act as a living, applicable, treaty imposing an obligation upon Norway to submit the dispute to arbitration; for in each of these passages she characterized Norway's refusal to accept arbitration as a violation, *inter alia*, of the General Act of 1928 (*I.C.J. Pleadings*, *Certain Norwegian Loans* case, Vol. I, at pp. 172, 173 and 180). She did so again in a diplomatic Note of 17 September 1956, addressed to the Norwegian Government during the course of the proceedings and brought to the attention of the Court (*ibid.*, p. 211), and also at the oral hearings (*ibid.*, Vol. II, p. 60). The reason was that Norway's refusal to arbitrate was a specific element in the French claim that Norway was not entitled unilaterally to modify the conditions of the loans in question "without negotiation with the holders, with the French State which has adopted the cause of its nationals, *or without arbitration* . . ." (*I.C.J. Reports 1957*, at. p 18, emphasis added). Consequently, the explanation given in the Annex to the French Government's letter of 16 May 1973 that it had confined itself in the *Certain Norwegian Loans* case "to a very brief reference to the General Act, without relying on it expressly as a basis of its claim", is not one which it is possible to accept.

63. Nor do we find the further explanation given by the French Government in that Annex any more convincing. In effect this is that, if the 1928 Act had been considered by France to be valid at the time of the *Certain Norwegian Loans* case, she would have used it to found the jurisdiction of the Court in that case so as to "parry the objection which Norway was to base upon the reciprocity clause operating with reference to the French Declaration"; and that her failure to found the Court's jurisdiction on the 1928 Act "is only explicable by the conviction that in 1955 it had fallen into desuetude". This explanation does not hold water for two reasons. First, it does not account for the French Government's repeated references to the 1928 Act as imposing an obligation on Norway in 1955 to arbitrate, one of which included a specific mention of Chapter II of the Act relating to judicial settlement. Secondly, it is not correct that France, by founding the Court's jurisdiction on the Act, would have been able to escape the objection to jurisdiction under the optional clause raised by Norway on

the basis of a reservation in France's declaration; and it is unnecessary to look further than to Article 31, paragraph 1, of the 1928 Act for the reason why France did not invoke the Act as a basis for the Court's jurisdiction. This paragraph reads:

> "In the case of a dispute the occasion of which, according to the municipal law of one of the parties, falls within the competence of its judicial or administrative authorities, *the party in question may object to the matter in dispute being submitted for settlement by the different methods laid down in the present General Act until a decision with final effect has been pronounced* . . ." (Emphasis added.)

Since the French bond holders had deliberately abstained from taking any action in the Norwegian tribunals, the above clear and specific provision of Article 31 constituted a formidable obstacle to establishing the Court's jurisdiction on the basis of the 1928 Act.

64. Thus, the position taken by France in the *Certain Norwegian Loans* case, so far from being explicable only on the basis of a conviction of the desuetude of the Act, provides evidence of the most positive kind of her belief in its continued validity and efficacy at that date. As to Norway, it is enough to recall her Government's statement in Parliament in 1949 that the 1928 Act remained in force, and to add that at no point in the *Certain Norwegian Loans* case did Norway question either the validity or the efficacy of the Act as an instrument applicable between herself and France at that date.

65. Furthermore, the interpretation placed in the Annex on the treatment of the 1928 Act by the Court and Judge Basdevant in the *Certain Norwegian Loans* case does not seem to us to be sustained by the record of the case. The Court did not, as the French Government maintains, have to decide the question of the 1928 Act. Stressing that France had based her Application "clearly and precisely on the Norwegian and French declarations under Article 36, paragraph 2, of the Statute", the Court held it "would not be justified in seeking a basis for its jurisdiction different from that which the French Government itself set out in its Application . . .". Having so held, it examined the question of its jurisdiction exclusively by reference to the parties' declarations under the optional clause and made no mention of the 1928 Act. As to Judge Basdevant, at the outset of his dissenting opinion (p. 71) he emphasized that on the question of jurisdiction he did not dispute the point of departure on which the Court had placed itself. In holding that the matters in dispute did not fall within the reservation of matters of domestic jurisdiction, on the other hand, he expressly relied on the 1928 Act as one of his grounds for so holding. The fact that the Court did not follow him in this approach to the interpretation of the reservation cannot, in our view, be understood as meaning that it rejected his view as to the 1928 Act's being in force between France

and Norway. Indeed, if that had been the case, it is almost inconceivable that Judge Basdevant could have said, as he did, of the 1928 Act: "At no time has any doubt been raised as to the fact that this Act is binding as between France and Norway" (*I.C.J. Reports 1957*, p. 74).

66. The proceedings in the *Certain Norwegian Loans* case, therefore, in themselves constitute unequivocal evidence that the 1928 Act did survive the demise of the League and was recognized by its parties, in particular by France, as in force in the period 1955-1957. We may add that in this period statements by parties to the 1928 Act are also to be found in the records of the proceedings of the Council of Europe leading to the adopting of the European Convention for the Pacific Settlement of International Disputes in 1957, which show that they considered the Act to be still in force. A Danish delegate, for example, stated in the Consultative Assembly in 1955, without apparent contradiction from anyone, that the 1928 Act "binds twenty States".

67. No suggestion is made in the letter of 16 May 1973 or its Annex that, if the 1928 Act was in force in 1957, there was nevertheless some development which deprived it of validity before Australia filed her Application; nor does the information before the Court indicate that any such development occurred. On the contrary, the evidence consistently and pointedly confirms the belief of the parties to the 1928 Act as to its continuance in force. In 1966 Canada's official publication *The Canada Treaty Series: 1928-1964* listed the 1928 Act as in force; as likewise did Finland's list in the following year. In Sweden the treaty list published by the Ministry of Foreign Affairs in 1969 included the 1928 Act, with a footnote "still in force as regards some countries". In 1971 the Netherlands Minister for Foreign Affairs, in submitting the Revised Act for parliamentary approval, referred to the 1928 Act as an agreement to which the Netherlands is a party and, again, as an Act "which is still in force for 22 States"; and Australia's own official treaty list published in that year included the 1928 Act. In addition, the 1928 Act appears in a number of unofficial treaty lists compiled in different countries.

68. As to France herself, there is nothing in the evidence to show any change of position on her part regarding the 1928 Act prior to the filing of Australia's Application on 9 May 1973. Indeed, a written reply to a deputy in the National Assembly, explaining why France was not contemplating ratification of the European Convention for the Pacific Settlement of Disputes, gives the opposite impression. That reply stated that, like the majority of European States, France was already bound by numerous obligations of pacific settlement amongst which was mentioned "l'Acte général d'arbitrage du 26 septembre 1928 revisé en 1949". The

French Government, in a footnote in the *Livre blanc sur les expériences nucléaires*, has drawn attention to the confused character of the reference to the 1928 Act revised in 1949. Even so, and however defective the formulation of the written reply, it is difficult to understand it in any other way than as confirming the position taken up by the French Government in the *Certain Norwegian Loans* case, that the 1928 Act was to be considered as a treaty in force with respect to France; for France had not ratified the Revised General Act and could be referred to as bound by the General Act only in its original form, the 1928 Act.

69. Accordingly, we are bound to conclude that the 1928 Act was a treaty in force between Australia and France on 9 May 1973 when Australia's Application in the present case was filed. Some months after the filing of the Application, on 10 January 1974, the French Government transmitted to the Secretary-General a notification of its denunciation of the Act, without prejudice to the position which it had taken regarding the lack of validity of the Act. Under the settled jurisprudence of the Court, however, such a notification could not have any retroactive effect on jurisdiction conferred upon the Court earlier by the filing of the Application; the *Nottebohm* case (*Preliminary Objection, I.C.J. Reports 1953*, at pp. 120-124).

70. Nor, in our view, can the conclusion that the 1928 Act was a treaty in force between Australia and France on 9 May 1973 be in any way affected by certain action taken with respect to the Act since that date by two other States, India and the United Kingdom. In the case concerning *Trial of Pakistani Prisoners of War*[1], by a letter of 24 June 1973 India informed the Court of its view that the 1928 Act had ceased to be a treaty in force upon the disappearance of the organs of the League of Nations. Pakistan, however, expressed a contrary view and has since addressed to the Secretary-General a letter from the Prime Minister of Pakistan affirming that she considers the Act as continuing in force. Again, although the United Kingdom, in a letter of 6 February 1974, referred to doubts having been raised as to the continued legal force of the Act and notified the Secretary-General of its denunciation of the Act in conformity with the provisions of paragraph 2 of Article 45, it did so in terms which do not prejudge the question of the continuance in force of the Act. In any event, against these inconclusive elements of State practice in relation to the 1928 Act which have occurred since the filing of Australia's Application, we have to set the many indications of the Act's continuance in force, some very recent, to which we have already drawn attention. Moreover, it is axiomatic that the termination of a multilateral treaty requires the express or tacit consent of all the parties, a requirement which is manifestly not fulfilled in the present instance.

[1] *I.C.J. Reports 1973*, p. 348.

We are therefore clearly of the opinion that Article 17 of the 1928 Act, in combination with Article 37 of the Statute of the Court, provided Australia with a valid basis for submitting the *Nuclear Tests* case to the Court on 9 May 1973, subject only to any particular difficulty that might arise in the application of the Act between Australia and France by reason of reservations made by either of them. This question we now proceed to examine.

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Applicability of the 1928 Act as Between Australia and France

71. The French Government has urged in the Annex to its letter of 16 May 1973 that, even if the 1928 Act should be considered as not having lost its validity, it would still not be applicable as between Australia and France by reason of two reservations made by Australia to the Act itself and, in addition, a reservation made by France to its Declaration under the optional clause of 20 May 1966.

72. The Australian reservations to the 1928 Act here in question are (1) a clause allowing the temporary suspension of proceedings under the Act in the case of a dispute that was under consideration by the Council of the League of Nations and (2) another clause excluding from the scope of the Act disputes with any State party to the Act but not a member of the League of Nations. The disappearance of the League of Nations, it is said, means that there is now uncertainty as to the scope of these reservations; and this uncertainty, it is further said, is entirely to the advantage of Australia and unacceptable.

73. The clause concerning suspension of proceedings was designed merely to ensure the primacy of the powers of the Council of the League in the handling of the disputes; and the disappearance of the Council, in our opinion, left intact the general obligations of pacific settlement undertaken in the Act itself. Indeed, a similar reservation was contained in a number of the declarations made under the optional clause of the Statute of the Permanent Court of International Justice, and there has never been any doubt that those declarations remained effective notwithstanding the demise of the Council of the League. Thus, in the *Anglo-Iranian Oil Co.* case the declarations of both Parties contained such a reservation and yet it was never suggested that the demise of the Council of the League had rendered either of them ineffective. On the contrary, Iran invoked the reservation, and the United Kingdom contested Iran's right to do so only on the ground that the merits of the dispute were not

under consideration by the Security Council (*I.C.J. Pleadings, Anglo-Iranian Oil Co.* case, pp. 282 and 367-368). Furthermore, France's own accession to the 1928 Act contained a reservation in much the same terms and yet in the *Certain Norwegian Loans* case she does not seem to have regarded this fact as any obstacle to the application of the Act between herself and Norway.

74. Equally, the disappearance of the League of Nations cannot be considered as having rendered the general obligations of pacific settlement embodied in the 1928 Act inapplicable by reason of Australia's reservation excluding disputes with States not members of the League. This Court has not hesitated to apply the term Member of the League of Nations in connection with the Mandate of South West Africa (*I.C.J. Reports 1950*, pp. 138, 158-159 and 169; *South West Africa* cases, *I.C.J. Reports 1962*, pp. 335-338); nor has the Secretary-General in discharging his functions as depositary of the League of Nations multilateral treaties open to participation by States "Members of the League of Nations".

75. Should any question arise in a case today concerning the application of either of the two reservations found in Australia's accession to the 1928 Act, it would be for the Court to determine the status of the reservation and to appreciate its meaning and effect. Even if the Court were to hold that one or other reservation was no longer capable of application, that would not detract from the essential validity of Australia's accession to the 1928 Act. Moreover, owing to the well-settled principle of reciprocity in the application of reservations, any uncertainty that might exist as to the scope of reservations could not possibly work entirely to the advantage of Australia. It may be added that France has not suggested that the present case itself falls within the operation of either reservation.

76. In the light of the foregoing considerations, we are unable to see in Australia's reservations any obstacle to the applicability of the 1928 Act as between her and France.

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77. Another and quite different ground is, however, advanced by the French Government for considering the 1928 Act inapplicable between France and Australia with respect to the present dispute. The terms of the declarations of the two countries under the optional clause, it is said, must be regarded as prevailing over the terms of their accessions to the 1928 Act. In consequence, even on the hypothesis of the validity of the 1928 Act, the reservations in France's declaration of 1966 under the optional clause are, she maintains, to be treated as applicable. Those reservations include the one which excepts from France's acceptance

of jurisdiction under the optional clause "disputes concerning activities connected with national defence"; and according to the French Government that reservation necessarily covers the present dispute regarding atmospheric nuclear weapon tests conducted by France.

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78. One argument advanced in support of that contention is that, the Statute of the Court being an integral part of the Charter of the United Nations, the obligations of Members undertaken on the basis of the optional clause of the Statute must in virtue of Article 103 of the Charter be regarded as prevailing over their obligations under the 1928 Act. This argument appears to us to be based on a misconception. The Charter itself places no obligation on member States to submit their disputes to judicial settlement, and any such obligation assumed by a Member under the optional clause of the Statute is therefore undertaken as a voluntary and additional obligation which does not fall within the purview of Article 103. The argument is, in any case, self-defeating because it could just as plausibly be argued that the obligations undertaken by parties to the 1928 Act are obligations under Article 36 (1) of the Statute and thus also obligations under the Charter.

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79. The French Government, however, also rests the contention on the ground that the situation here is analogous to one where there is "a later treaty relating to the same subject-matter as a treaty concluded earlier in the relations between the same countries". In short, according to the French Government, the declarations of the Parties under the optional clause are to be considered as equivalent to a later treaty concerning acceptance of compulsory jurisdiction which, being a later expression of the wills of the Parties, should prevail over the earlier Act of 1928, relating to the same subject-matter. In developing this argument, we should add, the French Government stresses that it does not wish to be understood as saying that, whenever any treaty contains a clause conferring jurisdiction on the Court, a party may release itself from its obligations under that clause by an appropriate reservation inserted in a subsequent declaration under the optional clause. The argument applies only to the case of a treaty, like the General Act, "the exclusive object of which is the peaceful settlement of disputes, and in particular judicial settlement".

80. This argument appears to us to meet with a number of objections,

not the least of which is the fact that "treaties and conventions in force" and declarations under the optional clause have always been regarded as two different sources of the Court's compulsory jurisdiction. Jurisdiction provided for in treaties is covered in paragraph 1 of Article 36 and jurisdiction under declarations accepting the optional clause in paragraph 2; and the two paragraphs deal with them as quite separate categories. The paragraphs reproduce corresponding provisions in Article 36 of the Statute of the Permanent Court, which were adopted to give effect to the compromise reached between the Council and other Members of the League on the question of compulsory jurisdiction. The compromise consisted in the addition, in paragraph 2, of an optional clause allowing the establishment of the Court's compulsory jurisdiction over legal disputes between any States ready to accept such an obligation by making a unilateral declaration to that effect. Thus, the optional clause was from the first conceived of as an independent source of the Court's jurisdiction.

81. The separate and independent character of the two sources of the Court's jurisdiction—treaties and unilateral declarations under the optional clause—is reflected in the special provisions inserted in the present Statute for the purpose of preserving the compulsory jurisdiction attaching to the Permanent Court at the time of its dissolution. Two different provisions were considered necessary to achieve this purpose: Article 36 (5) dealing with jurisdiction under the optional clause, and Article 37 with jurisdiction under "treaties and conventions in force". The separate and independent character of the two sources is also reflected in the jurisprudence of both Courts. The Permanent Court in its Order refusing provisional measures in the *Legal Status of the South-Eastern Territory of Greenland* case and with reference specifically to a clause in the 1928 Act regarding provisional measures, underlined that a legal remedy would be available "even independently of the acceptance by the Parties of the optional clause" (*P.C.I.J., Series A/B, No. 48*, at p. 289). Again, in the *Electricity Company of Sofia and Bulgaria* case the Permanent Court held expressly that a bilateral treaty of conciliation, arbitration and judicial settlement and the Parties' declarations under the optional clause opened up separate and cumulative ways of access to the Court; and that if examination of one of these sources of jurisdiction produced a negative result, this did not dispense the Court from considering "the other source of jurisdiction invoked separately and independently from the first" (*P.C.I.J., Series A/B, No. 77*, at pp. 76 and 80). As to this Court, in the *Barcelona Traction, Light and Power Company, Limited* case it laid particular emphasis on the fact that the provisions of Article 37 of the Statute concerning "treaties and conventions in force" deal with "a different category of instrument" from the unilateral declarations to which Article 36 (5) relates (*I.C.J. Reports 1964*, at p. 29). More recently, in the *Appeal Relating to the Jurisdiction of the ICAO Council* case the Court based one of its conclusions specifi-

cally on the independent and autonomous character of these two sources of its jurisdiction (*I.C.J. Reports 1972*, at pp. 53 and 60).

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82. In the present instance, this objection is reinforced by the fact that the 1928 Act contains a strict code of rules regulating the making of reservations, whereas no such rules govern the making of reservations to acceptances of the Court's jurisdiction under the optional clause. These rules, which are to be found in Articles 39, 40, 41, 43 and 45 of the Act, impose restrictions, *inter alia*, on the kinds of reservations that are admissible and the times at which they may be made and at which they will take effect. In addition, a State accepting jurisdiction under the optional clause may fix for itself the period for which its declaration is to run and may even make it terminable at any time by giving notice, whereas Article 45 (1) of the Act prescribes that the Act is to remain in force for successive fixed periods of five years unless denounced at least six months before the expiry of the current period. That the framers of the 1928 Act deliberately differentiated its régime in regard to reservations from that of the optional clause is clear; for the Assembly of the League, when adopting the Act, simultaneously in another resolution drew the attention of States to the wide possibilities of limiting the extent of commitments under the optional clause "both as regards duration and as regards scope". Consequently, to admit that reservations made by a State under the uncontrolled and extremely flexible system of the optional clause may automatically modify the conditions under which it accepted jurisdiction under the 1928 Act would run directly counter to the strict system of reservations deliberately provided for in the Act.

83. The French Government evidently feels the force of that objection; for it suggests that its contention may be reconciled with Article 45 (2) of the Act, which requires any changes in reservations to be notified at least six months before the end of the current five-year period of the Act's duration, by treating France's reservations made in her 1966 declaration as having taken effect only at the end of the then current period, namely in September 1969. This suggestion appears, however, to disregard the essential nature of a reservation. A reservation, as Article 2, paragraph 1 *(d)*, of the Vienna Convention on the Law of Treaties records, is:

> "... a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect

of certain provisions of the treaty in their application to that State".

Thus, in principle, a reservation relates exclusively to a State's expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations. The mere fact that it never seems to have occurred to the Secretary-General of the League or of the United Nations that reservations made in declarations under the optional clause are of any concern whatever to parties to the General Act shows how novel is this suggestion.

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84. The novelty is further underlined by the fact that, whenever States have desired to establish a link between reservations to jurisdiction under the optional clause and jurisdiction under a treaty, this has been done by an express provision to that effect. Thus, the parties to the Brussels Treaty of 17 March 1948 agreed in Article VIII to refer to the Court all disputes falling within the scope of the optional clause subject only, in the case of each of them, to any reservation already made by that party when accepting that clause. Even in that treaty, we observe, the parties envisaged the application to jurisdiction under the treaty only of optional clause reservations "already made". Article 35, paragraph 4, of the European Convention for the Peaceful Settlement of Disputes goes further in that it empowers a party at any time, by simple declaration, to make the same reservations to the Convention as it may make to the optional clause. But under this Article a specific declaration, made with particular reference to the European Convention, is needed in order to incorporate reservations contained in a party's declaration under the optional clause into its acceptance of jurisdiction under the Convention. Moreover, the power thus given by Article 35, paragraph 4, of the Convention is expressly subjected to the general restrictions on the making of reservations laid down in paragraph 1 of that Article, which confine them to reservations excluding "disputes concerning particular cases or clearly specified special matters, such as territorial disputes, or disputes falling within clearly defined categories" (language taken directly from Art. 39, para. 2 *(c)*, of the 1928 Act). It therefore seems to us abundantly clear that the European States which framed these two European treaties assumed that declarations under the optional clause, whether prior or subsequent to the treaty, would not have any effect on the jurisdictional obligations of the parties under the treaty, unless they inserted an express

provision to that effect; and that this they were only prepared to agree to under conditions specially stipulated in the treaty in question.

85. The question of the relation between reservations made under the optional clause and jurisdiction accepted under treaties has received particular attention in the United States in connection with the so-called "Connally Amendment", the adoption of which by the Senate resulted in the United States inserting in its declaration under the optional clause its well-known "self-judging" form of reservation with regard to matters of domestic jurisdiction. Two years later, the United States signed the Pact of Bogotá, a general inter-American treaty of pacific settlement which conferred jurisdiction on the Court for the settlement of legal disputes "in conformity with Article 36 (2) of the Statute". The United States, however, made its signature subject to the reservation that its acceptance of compulsory jurisdiction under the Pact is to be limited by "any jurisdictional or other limitations contained in any declaration deposited by the United States under the optional clause and in force at the time of the submission of any case". It thus appears to have recognized that its reservations to the optional clause would not be applicable unless it made provision for this specially by an appropriate reservation to the Pact of Bogotá itself. This is confirmed by the facts that, whenever it has desired the Connally reservation to apply to jurisdiction conferred by treaty, the United States has insisted on the inclusion of a specific provision to that effect, and that the Department of State has consistently advised that, without such a provision, the Connally reservation will not apply (cf. *American Journal of International Law*, 1960, pp. 941-942, and, *ibid.*, 1961, pp. 135-141). Moreover, the Department of State has taken this position not merely with reference to jurisdictional clauses attached to treaties dealing with a particular subject-matter, but also with reference to optional protocols, the sole purpose of which was to provide for the judicial settlement of certain categories of legal disputes (cf. *Whiteman's Digest of International Law*, Vol. 12, p. 1333). On this point, the United States appears clearly to recognize that any jurisdiction conferred by treaty on the Court under Article 36 (1) of the Statute is both separate from and independent of jurisdiction conferred on it under Article 36 (2) by accepting the optional clause. Thus, in a report on ratification of the Supplementary Slavery Convention, the Foreign Relations Committee of the Senate said: "Inasmuch as the Connally amendment applies to cases referred to the Court under Article 36 (2), it does not apply to cases referred under Article 36 (1) which would include cases arising out of this Convention." (*US Senate, 90 Congress, 1st Session, Executive Report No. 17*, p. 5.)

86. In our opinion, therefore, the suggestion that the reservation made by France in her optional clause declaration of 1966 ought to be considered as applicable to the Court's jurisdiction under the 1928 Act does not accord with either principle or practice.

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87. It remains to consider the French Government's main thesis that the terms of its 1966 declaration must be held to prevail over those of the 1928 Act on the ground that the optional clause declarations of France and Australia are equivalent to a later treaty relating to the same subject-matter as the 1928 Act. This proposition seems probably to take its inspiration from the dissenting opinions of four judges in the *Electricity Company of Sofia and Bulgaria* case *(P.C.I.J., Series A/B, No. 77)*, although the case itself is not mentioned in the French Government's letter of 16 May 1973. These judges, although their individual reasoning differed in some respects, were at one in considering that a bilateral treaty of conciliation, arbitration and judicial settlement concluded between Belgium and Bulgaria in 1931 should prevail over the declarations of the two Governments under the optional clause, as being the later agreement between them. Quite apart, however, from any criticisms that may be made of the actual reasoning of the opinions, they provide very doubtful support for the proposition advanced by the French Government. This is because the situation in that case was the reverse of the situation in the present case; for there the bilateral treaty was the more recent "agreement". It is one thing to say that a subsequent treaty, mutually negotiated and agreed, should prevail over an earlier agreement resulting from separate unilateral acts; it is quite another to say that a State, by its own unilateral declaration alone, may alter its obligations under an existing treaty.

88. In any event, the thesis conflicts with the Judgment of the Permanent Court in that case; and is diametrically opposed to the position taken by France and by Judge Basdevant on this question in the *Certain Norwegian Loans* case as well as with that taken by this Court in the *Appeal Relating to the Jurisdiction of the ICAO Council* case. In the *Electricity Company of Sofia and Bulgaria* case, while regarding the two optional clause declarations as amounting to an agreement, the Permanent Court held that they and the 1931 treaty constituted independent and alternative ways of access to the Court both of which, and each under its own conditions, could be used cumulatively by the Applicant in trying to establish the Court's jurisdiction. It based its decision on what it

found was the intention of the Parties in entering into the multiplicity of agreements:

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

Moreover, as indications of this intention, it underlined that both Parties had argued their cases "in light of the conditions independently laid down by each of these two agreements"; and that:

> "Neither the Bulgarian nor the Belgian Government at any time considered the possibility that *either of these agreements might have imposed some restriction on the normal operation of the other during the period for which they were both in force.*" (*Ibid.*, p. 75; emphasis added.)

89. In the *Certain Norwegian Loans* case, as we have already indicated in paragraphs 62-65 of this opinion, France sought to found the jurisdiction of the Court upon the optional clause declarations alone; and she invoked the 1928 Act, together with an Arbitration Convention of 1904 and Hague Convention No. II of 1907, for the purpose of establishing that Norway was subject to an obligation to submit the matters in dispute to arbitration. In that case, therefore, the issue of the relation between the respective jurisdictional obligations of the Parties under the optional clause and under treaties did not arise with reference to the Court's own jurisdiction. It was raised, however, by France herself in the context of the relation between the obligations of the Parties to accept compulsory jurisdiction under the optional clause and their obligations compulsorily to accept arbitration under the three treaties. Moreover, in this context the temporal relation between the acceptances of jurisdiction under the optional clause and under the treaties was the same as in the present case, the three treaties all antedating the Parties' declarations under the optional clause. In its observations on Norway's preliminary objections, after referring to the General Act of 1928 and the other two treaties, the French Government invoked with every apparent approval the pronouncement of the Permanent Court in the *Electricity Company of Sofia and Bulgaria* case that:

> "... the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the result that no jurisdiction would remain".

Again at the oral hearing of 14 May 1957, after referring specifically to Article 17 of the 1928 Act, the French Government said:

> "Pour que, de cette multiplicité d'engagements d'arbitrage et de juridiction, découle l'incompétence de la Cour, *malgré la règle contraire de l'arrêt Compagnie d'Electricité de Sofia*, il faudrait que la Cour estime qu'il n'y a aucun différend d'ordre juridique ..." (*I.C.J. Pleadings, Certain Norwegian Loans*, Vol. II, at pp. 60-61; emphasis added.)

And in its oral reply—this time in connection with Hague Convention No. II of 1907—the French Government yet again reminded the Court of that passage in the Judgment in the *Electricity Company of Sofia and Bulgaria* case (*ibid.*, at p. 197).

90. The Court, in the *Certain Norwegian Loans* case, for the reasons which have already been recalled, found it unnecessary to deal with this question. Judge Basdevant, on the other hand, did refer to it and his observations touch very directly the issue raised by the French Government in the present case. Having pointed out that the French declaration under the optional clause limited "the sphere of compulsory jurisdiction more than did the General Act in relations between France and Norway", Judge Basdevant observed:

> "Now, it is clear that this unilateral Declaration by the French Government could not modify, in this limitative sense, the law that was then in force between France and Norway.
>
> In a case in which it had been contended that not a unilateral declaration but a treaty between two States had limited the scope as between them of their previous declarations accepting compulsory jurisdiction, the Permanent Court rejected this contention . . ." (*I.C.J. Reports 1957*, p. 75.)

He then quoted the passage from the *Electricity Company of Sofia and Bulgaria* case about "multiplicity of agreements" and proceeded to apply it to the *Certain Norwegian Loans* case as follows:

> "A way of access to the Court was opened up by the accession of the two Parties to the General Act of 1928. It could not be closed or cancelled out by the restrictive clause which the French Government, and not the Norwegian Government, added to its fresh acceptance of compulsory jurisdiction stated in its Declaration of 1949. *This restrictive clause, emanating from only one of them, does not constitute the law as between France and Norway. The clause is not sufficient to set aside the juridical system existing between them on this point.* It cannot close the way of access to the Court that was

> formerly open, or cancel it out with the result that no jurisdiction would remain." (*I.C.J. Reports 1957*, pp. 75 and 76; emphasis added.)

It is difficult to imagine a more forcible rejection of the thesis that a unilateral declaration may modify the terms on which compulsory jurisdiction has been accepted under an earlier treaty than that of Judge Basdevant on the *Certain Norwegian Loans* case.

91. The issue did arise directly with reference to the Court's jurisdiction in the *Appeal Relating to the Jurisdiction of the ICAO Council* case (*I.C.J. Reports 1972*, p. 46), where India in her Application had founded the jurisdiction of the Court on certain provisions of the Convention on International Civil Aviation and of the International Air Services Transit Agreement, together with Articles 36 and 37 of the Statute of the Court. Pakistan, in addition to raising certain preliminary objections to jurisdiction on the basis of provisions in the treaties themselves, had argued that the Court must in any event hold itself to lack jurisdiction by reason of the effect of one of India's reservations to her acceptance of compulsory jurisdiction under the optional clause (*ibid.*, p. 53, and *I.C.J. Pleadings, Appeal Relating to the Jurisdiction of the ICAO Council*, p. 379). In short, Pakistan had specifically advanced in that case the very argument now put forward by the French Government in the Annex to its letter of 16 May 1973. Furthermore, India's declaration containing the reservation in question had been made subsequently to the conclusion of the two treaties, so that the case was on all fours with the present case. The Court, the Judgment shows, dealt with the treaties and the optional clause declarations as two separate and wholly independent sources of jurisdiction. Speaking, *inter alia*, of Pakistan's reliance on the reservation in India's declaration, the Court observed:

> "In any event, such matters would become material only if it should appear that the Treaties and their jurisdictional clauses did not suffice, and that the Court's jurisdiction must be sought outside them, which, for reasons now to be stated, the Court does not find to be the case." (*I.C.J. Reports 1972*, p. 53.)

Having then stated these reasons, which were that the Court rejected Pakistan's preliminary objections relating to the jurisdictional clauses of the Treaties and upheld its jurisdiction under those clauses, the Court summarily disposed of the objection based on the reservation in India's declaration:

> "Since therefore the Court is invested with jurisdiction under those clauses and, in consequence . . . under Article 36, paragraph 1, and under Article 37, of its Statute, *it becomes irrelevant to consider the objections to other possible bases of jurisdiction.*" (*Ibid.*, p. 60; emphasis added.)

Thus the Court expressly held the reservation in India's subsequent declaration under the optional clause to be of no relevance whatever in determining the Court's jurisdiction under the earlier treaties.

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Australia's Alleged Breach of the 1928 Act in 1939

92. Finally, one further argument put forward in the Annex to the letter of 16 May 1973 for considering the 1928 Act inapplicable between France and Australia needs to be mentioned. In connection with another contention of the French Government, we have already referred to the notification addressed by Australia to the Secretary-General of the League of Nations four days after the outbreak of the Second World War to the effect that she would not regard her accession to the Act as "covering or relating to any dispute arising out of events occurring during present crisis" (para. 27). The further argument now requiring our attention is that this notification was not in accord with the provision in Article 45 concerning modification of reservations; that Australia refrained from regularizing her position with regard to this provision when it could have done so in 1944; and that, although France never protested against the supposed breach of the Act, the French Government is not bound to respect a treaty which Australia herself has "ceased to respect since a date now long past". We have already pointed out that Australia, as also Canada, justified her notification of the new reservation on the basis of the breakdown of collective security under the League and the resulting fundamental change in the situation obtaining when she acceded to the Act, and that if that justification was well founded, there was no pressing need to "regularize" her position under the Act in 1944. Reference to the historical context in which the Australian notification was made shows also that this further argument lacks all plausibility.

93. In February 1939 France, the United Kingdom, India and New Zealand each notified the Secretary-General of their reservation from the 1928 Act of "disputes arising out of any war in which they might be engaged". These notifications were all made expressly under Article 45 of the Act, and were accompanied by explanations referring to the withdrawal of some Members of the League and the reinterpretation by others of their collective security obligations. Having regard to the similarity of the terms of the four notifications and the fact that they were deposited almost simultaneously (on 14 and 15 February 1939), it seems evident that the four States acted together. Similar action was not, however, taken by either Australia or Canada with reference to the 1928 Act at that date.

On 7 September 1939, four days after the outbreak of hostilities, the United Kingdom, Australia, New Zealand and Canada by letter notified the Secretary-General of the League that they would "not regard their acceptance of the optional clause as covering disputes arising out of events occurring during the present hostilities". The United Kingdom's letter contained lengthy explanations referring to the breakdown of collective security under the League and the resulting fundamental change in the conditions which had existed when it accepted the optional clause; and these explanations have generally been understood as invoking, whether rightly or wrongly, the doctrine of fundamental change of circumstances. The Australian Government specifically associated itself with the explanations given by the United Kingdom Government, as also did the French Government when it deposited its notification of a similar reservation only three days later. South Africa and India followed suit a short time afterwards. Again, it is evident that the notifications of France and the Commonwealth States were made in consultation and with an eye to disputes which might arise between the Allies and neutral States. It was in accord with this policy that Australia, on the same day as she made her notification regarding the optional clause, also notified her similar reservation in respect of the General Act. In doing so, she expressly based herself on the explanations given by the United Kingdom in its notification regarding the optional clause with which, as has been stated, France also associated herself. Furthermore, if Australia's notification regarding the General Act did not conform to the terms of Article 45 of that Act, France's notification regarding the optional clause equally did not conform to the terms of her acceptance of the optional clause, which was due to continue in force without modification until 25 August 1941. Accordingly, if France was justified in invoking fundamental change of circumstances with respect to her acceptance of the optional clause, Australia was also justified in doing so with respect to her acceptance of the 1928 Act.

The mere recalling of the historical context thus suffices to discount this argument regarding Australia's alleged breach of the Act. Even if this were not so, the suggestion that France is now entitled to invoke the alleged breach as a ground for considering the Act inapplicable with respect to Australia, for the first time nearly 35 years after the event, does not commend itself as compatible with the law of treaties (cf. Arts. 45 and 60 of the Vienna Convention on the Law of Treaties).

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Conclusions on the Question of Jurisdiction

94. In our view, therefore, close examination of the various objections to the Court's assuming jurisdiction on the basis of the General Act of 1928, which are developed in the French Government's letter and Annex of 16 May 1973, show them all to be without any sound foundation. Nor has our own examination of the matter, *proprio motu*, revealed any other objection calling for consideration. We accordingly 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 in the present case.

95. 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". We do not, therefore, find it necessary to examine the alternative basis of jurisdiction invoked by the Applicant, i.e., the two declarations of the Parties under the optional clause, or any problems which the reservations to those declarations may raise.

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

96. 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.

97. 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.

98. In the present proceedings, Australia has described the subject of the dispute in paragraphs 2-20 of her Application. *Inter alia*, she there 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; and she identifies the legal dispute as having taken shape in diplomatic Notes of 3 January, 7 February and 13 February 1973 which she annexed to her Application. In the first of these three Notes, the Australian Government made clear its opinion that the conducting of such tests would:

> ". . . be unlawful—particularly in so far as it involves modification of the physical conditions of and over Australian territory; pollution of the atmosphere and of the resources of the seas; interference with freedom of navigation both on the high seas and in the airspace above; and infraction of legal norms concerning atmospheric testing of nuclear weapons".

This opinion was challenged by the French Government in its reply of 7 February 1973, in which it expressed its conviction that "its nuclear experiments have not violated any rule of international law" and controverted Australia's legal contentions point by point. In a further Note of 13 February, however, the Australian Government expressed its disagreement with the French Government's views, repeated its opinion that the conducting of the tests violates rules of international law, and said it was clear that "in this regard there exists between our two Governments a substantial legal dispute". Then, after extensive observations on the consequences of nuclear explosions, the growth of the awareness of the danger of nuclear testing and of the particular aspects and specific consequences of the French tests, Australia set out seriatim, in paragraph 49 of her Application, three separate categories of Australia's rights which she contends have been, are, and will be violated by the French atmospheric tests.

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[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.

99. Prima 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 Application. The French Government itself does not seem in the diplomatic exchanges to have challenged the Australian Government's characterization of the dispute as a "substantial legal dispute", even although in the above-mentioned Note of 7 February 1973 it expressed a certain scepticism regarding the legal considerations invoked by Australia. 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.

100. 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.

101. Complying with the Court's Order of 22 June 1973, Australia submitted her observations on the questions of the jurisdiction of the Court and the admissibility of the Application. Under the rubric of "jurisdiction" she expressed her views, *inter alia*, on the question of the political or legal nature of the dispute; and under the rubric of "admissibility" she furnished further explanations of the three categories of rights which she claims to be violated by France's conduct of nuclear atmospheric tests in the South Pacific region. These rights, as set out in paragraph 49 of the Application and developed in her pleadings, may be broadly described as follows:

(1) A right said to be possessed by every State, including Australia, to be free from atmospheric nuclear weapon tests, conducted by any State, in virtue of what Australia maintains is now a generally accepted rule of customary international law prohibiting all such tests. As support for the alleged right, the Australian Government invoked a variety of

considerations, including the development from 1955 onwards of a public opinion strongly opposed to atmospheric tests, the conclusion of the Moscow Test Ban Treaty in 1963, the fact that some 106 States have since become parties to that Treaty, diplomatic and other expressions of protests by numerous States in regard to atmospheric tests, rejected resolutions of the General Assembly condemning such tests as well as pronouncements of the Stockholm Conference on the Human Environment, Articles 55 and 56 of the Charter, provisions of the Universal Declaration of Human Rights and of the International Covenant on Economic, Social and Cultural Rights and other pronouncements on human rights in relation to the environment.

(2) A right, said to be inherent in Australia's own territorial sovereignty, to be free from the deposit on her territory and dispersion in her air space, without her consent, of radio-active fall-out from the French nuclear tests. The mere fact of the trespass of the fall-out, the harmful effects which flow from such fall-out and the impairment of her independent right to determine what acts shall take place within her territory (which she terms her "decisional sovereignty") all constitute, she maintains, violations of this right. As support for this alleged right, the Australian Government invoked a variety of legal material, including pronouncements of this Court in the *Corfu Channel* case (*I.C.J. Reports 1949*, at pp. 22 and 35), of Mr. Huber in the *Island of Palmas Arbitration* (*UNRIAA*, Vol. II, p. 839) and of the Permanent Court of International Justice in the *Customs Union* case (*P.C.I.J., Series A/B, No. 41*, at p. 39), the General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation, the Charter of the Organization of African Unity, and Declarations of the General Assembly and of Unesco regarding satellite broadcasting, and opinions of writers.

(3) A right, said to be derived from the character of the high seas as *res communis* and to be possessed by Australia in common with all other maritime States, to have the freedoms of the high seas respected by France; and, in particular, to require her to refrain from *(a)* interference with the ships and aircraft of other States on the high seas and in the superjacent air space, and *(b)* the pollution of the high seas by radio-active fall-out. As support for this alleged right, the Australian Government referred to Articles 2 and 25 of the Geneva Convention of 1958 on the High Seas, the commentaries of the International Law Commission on the corresponding provisions of its draft Articles on the Law of the Sea and to other legal material, including the records of the debates in the International Law Commis-

sion, passages in this Court's Judgment in the Anglo-Norwegian *Fisheries* case, various declarations and treaty provisions relating to marine pollution, and opinions of writers.

In response to a question put by a Member of the Court, the Australian Government also furnished certain explanations regarding (i) the distinction which it draws between the transmission of chemical or other matter from one State's territory to that of another as a result of a normal and natural use of the former's territory and one which does not result from a normal and natural use; and (ii) the relevance or otherwise of harm or potential harm as an element in the legal cause of action in such cases.

102. In regard to each of the above-mentioned categories of legal rights, Australia maintained that there is a correlative legal obligation resting upon France, the breach of which would involve the latter in international responsibility towards Australia. In addition, she developed a general argument by which she sought to engage the international responsibility of France on the basis of the doctrine of "abuse of rights" in the event that France should be considered as, in principle, invested with a right to carry out atmospheric nuclear tests. In this connection, she referred to a dictum of Judge Alvarez in the *Anglo-Iranian Oil Co.* case, the Report of the Asian-African Legal Consultative Committee in 1964 on the Legality of Nuclear Tests, Article 74 of the Charter, the opinions of certain jurists and other legal materials.

103. Under the rubric of "admissibility", Australia also presented her views on the question, mentioned in paragraph 23 of the Order of 22 June 1973, of her "legal interest" in respect of the claims put forward in her Application. She commented, in particular, on the question whether, in the case of a right possessed by the international community as a whole, an individual State, independently of material damage to itself, is entitled to seek the respect of that right by another State. She maintained in regard to certain categories of obligations owed *erga omnes* that every State may have a legal interest in their performance, citing certain pronouncements of the Permanent Court and of this Court and more especially the pronouncement of this Court on the matter in the *Barcelona Traction Light and Power Company* case (*Second Phase, I.C.J. Reports 1970*, at p. 32). With regard to the right said to be inherent in Australia's own territorial sovereignty, she considered it obvious that a State possesses a legal interest "in the protection of its territory from any form of external harmful action as well as in the defence of the well-being of its population and in the protection of national integrity and independence". With regard to the right said to be derived from the character of the high seas as *res communis*, Australia maintained that "every State has a legal interest in safeguarding the respect by other States of the freedom of the seas", that the practice of States demonstrates the irrelevance of the possession of a specific material interest on the part of the individual State, and that this general legal interest of all States in safeguarding the freedom of the

seas has received express recognition in connection with nuclear tests. As support for the above proposition she cited a variety of legal material.

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104. In giving this very summary account of the legal contentions of the Australian 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 Australia's Application determined. Before we draw any conclusions, however, from that account of Australia's legal contentions, we must also indicate our understanding of the principles which should govern our determination of these matters at the present stage of the proceedings.

* *

105. 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 pleadings 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 issues of jurisdiction

and admissibility now before the Court have not been raised in the form of objections *stricto sensu*.

106. 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. 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.

107. 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 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 of 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.

108. 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 prejudging 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.

109. The summary account which we have given above of the grounds invoked by Australia in support of her claims appears to us amply sufficient, in the language of the Court in 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.

110. 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*, 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.

111. 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.

112. Nor is our conclusion in any way affected by the suggestion that in the present case the Court, in order to give effect to Australia'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*.

113. Quite 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.

114. 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 actively assisted in, 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 prelimi-

nary proceedings. The very basis of the Applicant's legal position, as presented to the Court, is that in connection with and 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.

115. We are also 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 Australian Government has given its account of "nuclear explosions and their consequences" in paragraphs 22-39 of the Application and, in dealing with the growth of international concern on this matter, has cited a series of General Assembly resolutions, the establishment of UNSCEAR in 1955 and its subsequent reports on atomic radiation, the Test Ban Treaty itself, the Treaty for the Prohibition of Nuclear Weapons in Latin America, and declarations and resolutions of South Pacific States, Latin American States, African and Asian States, and a resolution of the Twenty-sixth Assembly of the World Health Organization. It has also referred to the psychological injury said to be caused to the Australian people 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.

116. 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, Australia in any event contends, in respect of each one of the rights which she invokes, that the right is violated by France's conduct of atmospheric tests independently of proof of damage suffered by Australia. 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.

117. Finally, we turn to the question of Australia's legal interest in respect of the claims which she advances. With regard to the right said to be inherent in Australia's territorial sovereignty, we think that she is justified in considering that her legal interest in the defence of that right is self-evident. 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 right to be free from atmospheric tests, said to be possessed by Australia 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 ma-

terials adduced by Australia 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 [1] 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.

118. As to the right 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

[1] *Second Phase, I.C.J. Reports 1970*, at p. 32.

of the seas and, in our view, could only be decided by the Court at the stage of the merits.

119. 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 Australia no longer has any object, we consider that the Court should have now decided to proceed to pleadings on the merits.

PART IV. CONCLUSION

120. Since we are of the opinion that the Court has jurisdiction and that the case submitted to the Court discloses no ground on which Australia'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.