INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

NUCLEAR TESTS CASE

(NEW ZEALAND *v.* FRANCE)

JUDGMENT OF 20 DECEMBER 1974

1974

COUR INTERNATIONALE DE JUSTICE

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AVIS CONSULTATIFS ET ORDONNANCES

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(NOUVELLE-ZÉLANDE c. FRANCE)

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NUCLEAR TESTS CASE

(NEW ZEALAND *v.* FRANCE)

Questions of jurisdiction and admissibility—Prior examination required of question of existence of dispute as essentially preliminary matter—Exercise of inherent jurisdiction of the Court.

Analysis of claim on the basis of the Application and determination of object of claim—Significance of submissions and of statements of the Applicant for definition of the claim—Power of Court to interpret submissions—Public statements made on behalf of Respondent before and after oral proceedings.

Unilateral acts creative of legal obligations—Principle of good faith.

Resolution of dispute by unilateral declaration giving rise to legal obligation —Applicant's non-exercise of right of discontinuance of proceedings no bar to independent finding by Court—Disappearance of dispute resulting in claim no longer having any object—Jurisdiction only to be exercised when dispute genuinely exists between the Parties.

JUDGMENT

Present: *President* LACHS; *Judges* FORSTER, GROS, BENGZON, PETRÉN, ONYEAMA, DILLARD, IGNACIO-PINTO, DE CASTRO, MOROZOV, JIMÉNEZ DE ARÉCHAGA, Sir Humphrey WALDOCK, NAGENDRA SINGH, RUDA; *Judge* ad hoc Sir Garfield BARWICK; *Registrar* AQUARONE.

In the Nuclear Tests case,

between

New Zealand,

represented by

Professor R. Q. Quentin-Baxter, of the New Zealand Bar, Professor of International Law, Victoria University of Wellington,

as Agent and Counsel,

assisted by

H.E. Mr. H. V. Roberts, Ambassador of New Zealand,

as Co-Agent,

and by

Hon. Dr. A. M. Finlay, Q.C., Attorney-General of New Zealand,
Mr. R. C. Savage, Q.C., Solicitor-General of New Zealand,
Professor K. J. Keith, of the New Zealand Bar, Professor of International Law, Victoria University of Wellington,
Mr. C. D. Beeby, of the New Zealand Bar, Legal Adviser, New Zealand Ministry of Foreign Affairs,
Mrs. A. B. Quentin-Baxter, of the New Zealand Bar,

as Counsel,

and

the French Republic,

THE COURT,

composed as above,

delivers the following Judgment:

1. By a letter of 9 May 1973, received in the Registry of the Court the same day, the Ambassador of New Zealand to the Netherlands transmitted to the Registrar an Application instituting proceedings against France, in respect of a dispute concerning the legality of atmospheric nuclear tests conducted by the French Government in the South Pacific region. In order to found the jurisdiction of the Court, the Application relied on Article 36, paragraph 1, and Article 37 of the Statute of the Court and Article 17 of the General Act for the Pacific Settlement of International Disputes done at Geneva on 26 September 1928, and, in the alternative, on Article 36, paragraphs 2 and 5, of the Statute of the Court.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was at once communicated to the French Government. In accordance with paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Pursuant to Article 31, paragraph 2, of the Statute of the Court, the Government of New Zealand chose the Right Honourable Sir Garfield Barwick, Chief Justice of Australia, to sit as judge *ad hoc* in the case.

4. By a letter dated 16 May 1973 from the Ambassador of France to the Netherlands, handed by him to the Registrar the same day, the French Government stated that, for reasons set out in the letter and an Annex thereto, it considered that the Court was manifestly not competent in the case; that it could not accept the Court's jurisdiction; and that accordingly the French Government did not intend to appoint an agent, and requested the Court to remove the case from its list. Nor has an agent been appointed by the French Government.

5. On 14 May 1973, the Agent of New Zealand filed in the Registry of the Court a request for the indication of interim measures of protection under

Article 33 of the 1928 General Act for the Pacific Settlement of International Disputes and Articles 41 and 48 of the Statute and Article 66 of the Rules of Court. By an Order dated 22 June 1973 the Court indicated, on the basis of Article 41 of the Statute, certain interim measures of protection in the case.

6. By the same Order of 22 June 1973, the Court, considering that it was necessary to resolve as soon as possible the questions of the Court's jurisdiction and of the admissibility of the Application, decided that the written 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 and fixed 21 September 1973 as the time-limit for the filing of a Memorial by the Government of New Zealand and 21 December 1973 as the time-limit for a Counter-Memorial by the French Government. The Co-Agent of New Zealand having requested an extension to 2 November 1973 of the time-limit fixed for the filing of the Memorial, the time-limits fixed by the Order of 22 June 1973 were extended, by an Order dated 6 September 1973, to 2 November 1973 for the Memorial and 22 March 1974 for the Counter-Memorial. The Memorial of the Government of New Zealand was filed within the extended time-limit fixed therefor, and was communicated to the French Government. No Counter-Memorial was filed by the French Government and, the written proceedings being thus closed, the case was ready for hearing on 23 March 1974, the day following the expiration of the time-limit fixed for the Counter-Memorial of the French Government.

7. On 18 May 1973 the Government of Fiji filed in the Registry of the Court a request under Article 62 of the Statute to be permitted to intervene in these proceedings. By an Order of 12 July 1973 the Court, having regard to its Order of 22 June 1973 by which the written proceedings were first to be addressed to the questions of the jurisdiction of the Court and of the admissibility of the Application, decided to defer its consideration of the application of the Government of Fiji for permission to intervene until the Court should have pronounced upon these questions.

8. On 24 July 1973, the Registrar addressed the notification provided for in Article 63 of the Statute to the States, other than the Parties to the case, which were still in existence and were listed in the relevant documents of the League of Nations as parties to the General Act for the Pacific Settlement of International Disputes, done at Geneva on 26 September 1928, which was invoked in the Application as a basis of jurisdiction.

9. The Governments of Argentina, Australia, Fiji and Peru requested that the pleadings and annexed documents should be made available to them in accordance with Article 48, paragraph 2, of the Rules of Court. The Parties were consulted on each occasion, and the French Government having maintained the position stated in the letter of 16 May 1973, and thus declined to express an opinion, the Court or the President decided to accede to these requests.

10. On 10 and 11 July 1974, after due notice to the Parties, public hearings were held, in the course of which the Court heard the oral argument, on the questions of the Court's jurisdiction and of the admissibility of the Application, advanced by Professor R. Q. Quentin-Baxter, Agent of New Zealand, and Dr. A. M. Finlay and Mr. R. C. Savage, counsel, on behalf of the Government of New Zealand. The French Government was not represented at the hearings.

11. In the course of the written proceedings, the following submissions were presented on behalf of the Government of New Zealand:

in the Application:

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

in the Memorial:

"... the Government of New Zealand submits to the Court that it is entitled to a declaration and judgment that—

(a) the Court has jurisdiction to entertain the Application filed by New Zealand and to deal with the merits of the dispute; and

(b) the Application is admissible".

12. At the close of the oral proceedings, the following written submissions were filed in the Registry of the Court on behalf of the Government of New Zealand:

"The Government of New Zealand is entitled to a declaration and judgment that:

(a) the Court has jurisdiction to entertain the Application filed by New Zealand and to deal with the merits of the dispute; and

(b) the Application is admissible."

13. No pleadings were filed by the French Government, and it was not represented at the oral proceedings; no formal submissions were therefore made by that Government. The attitude of the French Government with regard to the question of the Court's jurisdiction was however defined in the above-mentioned letter of 16 May 1973 from the French Ambassador to the Netherlands and the document annexed thereto. The said letter stated in particular that:

"... the Government of the [French] Republic, as it has notified the Government of New Zealand, considers that the Court is manifestly not competent in this case and that it cannot accept its jurisdiction".

*
* *

14. As indicated above (paragraph 4), the letter from the French Ambassador of 16 May 1973 also stated that the French Government "respectfully requests the Court to be so good as to order that the case be removed from the list". At the opening of the public hearing concerning the request for interim measures of protection, held on 24 May 1973, the President announced that "this request ... has been duly noted, and the Court will deal with it in due course, in application of Article 36, paragraph 6, of the Statute of the Court". In its Order of 22 June 1973, the Court stated that the considerations therein set out did not "permit the Court to accede at the present stage of the proceedings" to that

request. Having now had the opportunity of examining the request in the light of the subsequent proceedings, the Court finds that the present case is not one in which the procedure of summary removal from the list would be appropriate.

*
* *

15. It is to be regretted that the French Government has failed to appear in order to put forward its arguments on the issues arising in the present phase of the proceedings, and the Court has thus not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. The Court nevertheless has to proceed and reach a conclusion, and in doing so must have regard not only to the evidence brought before it and the arguments addressed to it by the Applicant, but also to any documentary or other evidence which may be relevant. It must on this basis satisfy itself, first that there exists no bar to the exercise of its judicial function, and secondly, if no such bar exists, that the Application is well founded in fact and in law.

*
* *

16. The present case relates to a dispute between the Government of New Zealand and the French Government concerning the legality of atmospheric nuclear tests conducted by the latter Government in the South Pacific region. Since in the present phase of the proceedings the Court has to deal only with preliminary matters, it is appropriate to recall that its approach to a phase of this kind must be, as it was expressed in the *Fisheries Jurisdiction* cases, as follows:

> "The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudge or appear to prejudge any eventual decision on the merits." (*I.C.J. Reports 1973*, pp. 7 and 54.)

It will however be necessary to give a summary of the principal facts underlying the case.

17. Prior to the filing of the Application instituting proceedings in this case, the French Government had carried out atmospheric tests of nuclear devices at its Centre d'expérimentations du Pacifique in the territory of French Polynesia, in the years 1966, 1967, 1968, 1970, 1971 and 1972. The main firing site used has been Mururoa atoll, some 2,500 nautical miles from the nearest point of the North Island of New Zealand and approximately 1,050 nautical miles from the nearest point of the

Cook Islands, a self-governing State linked in free association with New Zealand. The French Government has created "Prohibited Zones" for aircraft and "Dangerous Zones" for aircraft and shipping, in order to exclude aircraft and shipping from the area of the tests centre; these "zones" have been put into effect during the period of testing in each year in which tests have been carried out.

18. As the United Nations Scientific Committee on the Effects of Atomic Radiation has recorded in its successive reports to the General Assembly, the testing of nuclear devices in the atmosphere has entailed the release into the atmosphere and the consequent dissipation, in varying degrees throughout the world, of measurable quantities of radio-active matter. It is asserted by New Zealand that the French atmospheric tests have caused some fall-out of this kind to be deposited, *inter alia*, on New Zealand territory; France has maintained, in particular, that the radio-active matter produced by its tests has been so infinitesimal that it may be regarded as negligible and that any fall-out on New Zealand territory has never involved any danger to the health of the population of New Zealand. These disputed points are clearly matters going to the merits of the case, and the Court must therefore refrain, for the reasons given above, from expressing any view on them.

*
* *

19. By letters of 21 September 1973 and 1 November 1974, the Government of New Zealand informed the Court that subsequent to the Court's Order of 22 June 1973 indicating, as interim measures under Article 41 of the Statute, *(inter alia)* that the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on New Zealand territory, two further series of atmospheric tests, in the months of July and August 1973 and June to September 1974, had been carried out at the Centre d'expérimentations du Pacifique. The letters also stated that fall-out had been recorded on New Zealand territory, analysis of samples of which, according to the New Zealand Government, established conclusively the presence of fall-out from these tests, and that it was "the view of the New Zealand Government that there has been a clear breach by the French Government of the Court's Order of 22 June 1973".

20. Recently a number of authoritative statements have been made on behalf of the French Government concerning its intentions as to future nuclear testing in the South Pacific region. The significance of these statements, and their effect for the purposes of the present proceedings, will be examined in detail later in the present Judgment.

*
* *

21. The Application founds the jurisdiction of the Court on the following basis:

"*(a)* Articles 36 (1) and 37 of the Statute of the Court and Article 17 of the General Act for the Pacific Settlement of International Disputes, done at Geneva on 26 September 1928; and, in the alternative,

(b) Article 36 (2) and (5) of the Statute of the Court."

22. The scope of the present phase of the proceedings was defined by the Court's Order of 22 June 1973, by which the Parties were called upon to argue, in the first instance, questions of the jurisdiction of the Court and the admissibility of the Application. For this reason, as already indicated, not only the Parties but also the Court itself must refrain from entering into the merits of the claim. However, while examining these questions of a preliminary character, the Court is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters.

23. In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

24. With these considerations in mind, the Court has therefore first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings. It will therefore be necessary to make a detailed analysis of the claim submitted to the Court by the Application of New Zealand. The present phase of the proceedings having been devoted solely to preliminary questions, the Applicant has not had the opportunity of fully expounding its contentions on the merits. However the Application, which is required by Article 40 of the Statute of the Court to indicate "the subject of the dispute", must be the point of reference for the consideration by the Court of the nature and existence of the dispute brought before it.

25. The Court would recall that the submission made in the Application (paragraph 11 above) is that the Court should adjudge and declare

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

26. The diplomatic correspondence between New Zealand and France over the past ten years reveals New Zealand's preoccupation with French nuclear tests in the atmosphere in the South Pacific region, and indicates that its objective was to bring about their termination. Thus in a letter from the Prime Minister of New Zealand to the French Ambassador in Wellington dated 19 December 1972, the Prime Minister said:

> "My Government is committed to working through all possible means to bring the tests to an end, and we shall not hesitate to use the channels available to us in concert as appropriate with like-minded countries. It is my hope, however, Mr. Ambassador, that you will convey to your Government while in Paris my earnest desire to see this one element of serious contention removed from what is in other respects an excellent relationship between our countries. For my part, I see no other way than a halt to further testing."

Furthermore in the Application of New Zealand, it is stated, in connection with discussions held in April 1973 between the two Governments that:

> "Unfortunately, however, they [the discussions] did not lead to agreement. In particular, the French Government did not feel able to give the Deputy Prime Minister of New Zealand the assurance which he sought, namely that the French programme of atmospheric nuclear testing in the South Pacific had come to an end."

And in a letter to the President of the French Republic by the Prime Minister of New Zealand dated 4 May 1973, following those discussions, the Prime Minister said:

> "Since France has not agreed to our request that nuclear weapons testing in the atmosphere of the South Pacific be brought to an end, and since the French Government does not accept New Zealand's view that these tests are unlawful, the New Zealand Government sees no alternative to its proceeding with the submission of its dispute with France to the International Court of Justice.
>
> I stress again that we see this as the one question at issue between us, and that our efforts are solely directed at removing it from contention."

27. Further light is thrown on the nature of the New Zealand claim by the reaction of New Zealand, both through its successive Prime Ministers and through its representatives before the Court, to the state-

ments, referred to in paragraph 20 above, made on behalf of France and relating to nuclear tests in the South Pacific region. In the course of the oral proceedings, the Attorney-General of New Zealand outlined the history of the dispute, and included in this review mention of diplomatic correspondence exchanged between 10 June and 1 July 1974 by France and New Zealand, which was communicated to the Court on 3 July by the Applicant, and of a communiqué issued by the Office of the President of the French Republic on 8 June 1974. The Attorney-General's comments on these documents, which are thus part of the record in the case, indicated that they merited analysis as possible evidence of a certain development in the controversy between the Parties, though at the same time he made it clear that this development was not, in his Government's view, of such a nature as to resolve the dispute to its satisfaction. More particularly, when referring to a Note of 10 June 1974 from the French Embassy in Wellington to the New Zealand Ministry of Foreign Affairs (quoted in paragraph 36 below) he stated: "New Zealand has not been given anything in the nature of an unqualified assurance that 1974 will see the end of atmospheric nuclear testing in the South Pacific". The Attorney-General continued:

> "On 11 June the Prime Minister of New Zealand, Mr. Kirk, asked the French Ambassador in Wellington to convey a letter to the President of France. Copies of that letter have been filed with the Registry. It urged among other things that the President should, even at that time, weigh the implications of any further atmospheric testing in the Pacific and resolve to put an end to an activity which has been the source of grave anxiety to the people of the Pacific region for more than a decade." (Hearing of 10 July 1974.)

It is clear from these statements, read in the light of the diplomatic correspondence referred to above, that if the Note of 10 June 1974 could have been construed by New Zealand as conveying "an unqualified assurance that 1974 [would] see the end of atmospheric nuclear testing" by France "in the South Pacific", or if the President of the Republic, following the letter of 11 June 1974, did "resolve to put an end to [that] activity", the applicant Government would have regarded its objective as having been achieved.

28. Subsequently, on 1 November 1974, the Prime Minister of New Zealand, Mr. W. E. Rowling, commented in a public statement on the indications given by France of its intention to put an end to atmospheric tests in the Pacific, and said:

> "It should . . . be clearly understood that nothing said by the French Government, whether to New Zealand or to the international community at large, has amounted to an assurance that there will

> be no further atmospheric nuclear tests in the South Pacific. The option of further atmospheric tests has been left open. *Until we have an assurance that nuclear testing of this kind is finished for good, the dispute between New Zealand and France persists . . .*" (Emphasis added.)

Without commenting for the moment on the Prime Minister's interpretation of the French statements, the Court would observe that the passage italicized above clearly implies that an assurance that atmospheric testing is "finished for good" would, in the view of New Zealand, bring the dispute to an end.

29. The type of tests to which the proceedings relate is described in the Application as "nuclear tests in the South Pacific region that gave rise to radio-active fall-out", the type of testing contemplated not being specified. However, New Zealand's case has been argued mainly in relation to atmospheric tests; and the statements quoted in paragraphs 26, 27 and 28 above, particularly those of successive Prime Ministers of New Zealand, of 11 June and 1 November 1974, show that an assurance "that nuclear testing of this kind", that is to say, testing in the atmosphere, "is finished for good" would meet the object of the New Zealand claim. The Court therefore considers that, for purposes of the Application, the New Zealand claim is to be interpreted as applying only to atmospheric tests, not to any other form of testing, and as applying only to atmospheric tests so conducted as to give rise to radio-active fall-out on New Zealand territory.

30. In the light of the above statements, it is essential to consider whether the Government of New Zealand requests a judgment by the Court which would only state the legal relationship between the Applicant and the Respondent with regard to the matters in issue, or a judgment of a type which in terms requires one or both of the Parties to take, or refrain from taking, some action. Thus it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions. It is true that, when the claim is not properly formulated because the submissions of the parties are inadequate, the Court has no power to "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), but that is not the case here, nor is it a case of the reformulation of submissions by the Court. The Court has on the other hand repeatedly exercised the power to exclude, when necessary, certain contentions or arguments which were advanced by a party as part of the submissions, but which were regarded by the Court, not as indications of what the party was asking the Court to decide, but as reasons advanced why the

Court should decide in the sense contended for by that party. Thus in the *Fisheries* case, the Court said of nine of the thirteen points in the Applicant's submissions: "These are elements which might furnish reasons in support of the Judgment, but cannot constitute the decision" (*I.C.J. Reports 1951*, p. 126). Similarly in the *Minquiers and Ecrehos* case, the Court observed that:

> "The Submissions reproduced above and presented by the United Kingdom Government consist of three paragraphs, the last two being reasons underlying the first which must be regarded as the final Submission of that Government. The Submissions of the French Government consist of ten paragraphs, the first nine being reasons leading up to the last, which must be regarded as the final Submission of that Government." (*I.C.J. Reports 1953*, p. 52; see also *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 16.)

31. In the circumstances of the present case, as already mentioned, the Court must ascertain the true subject of the dispute, the object and purpose of the claim (cf. *Interhandel, Judgment, I.C.J. Reports 1959*, p. 19; *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, pp. 33-34). In doing so it must take into account not only the submission, but the Application as a whole, the arguments of the Applicant before the Court, and other documents referred to above. If these clearly define the object of the claim, the interpretation of the submission must necessarily be affected. The Court is asked to adjudge and declare that French atmospheric nuclear tests are illegal, but at the same time it is requested to adjudge and declare that the rights of New Zealand "will be violated by any further such tests". The Application thus contains a submission requesting a definition of the rights and obligations of the Parties. However, it is clear that the *fons et origo* of the dispute was the atmospheric nuclear tests conducted by France in the South Pacific region, and that the original and ultimate objective of the Applicant was and has remained to obtain a termination of those tests. This is indeed confirmed by the various statements made by the New Zealand Government, and in particular by the statement made before the Court in the oral proceedings, on 10 July 1974, when, after referring to New Zealand's submission, the Attorney-General stated that "My Government seeks a halt to a hazardous and unlawful activity". Thus the dispute brought before the Court cannot be separated from the situation in which it has arisen, and from further developments which may have affected it.

32. As already mentioned, the Applicant itself impliedly recognized the possible relevance of events subsequent to the Application, by drawing the Court's attention to the communiqué of 8 June 1974 and subsequent

diplomatic correspondence, and making observations thereon. In these circumstances, the Court is bound to take note of further developments, both prior to and subsequent to the close of the oral proceedings. In view of the non-appearance of the Respondent, it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts.

33. At the hearing of 10 July 1974 the Court was presented by counsel for New Zealand with an interpretation of certain expressions of intention communicated to the New Zealand Government by the French Government and the French President. In particular he referred to a communiqué of 8 June 1974 (paragraph 35 below) and a diplomatic Note of 10 June 1974 (paragraph 36 below), and after quoting from that Note, he said:

> "I emphasize two points: first, the most France is offering is that in her own time she will cease to disregard an existing Order of the Court; and second, even that offer is qualified by the phrase 'in the normal course of events'. New Zealand has not been given anything in the nature of an unqualified assurance that 1974 will see the end of atmospheric nuclear testing in the South Pacific."

Since that time, certain French authorities have made a number of consistent public statements concerning future tests which provide material facilitating the Court's task of assessing the Applicant's interpretation of the earlier documents, and which indeed require to be examined in order to discern whether they embody any modification of intention as to France's future conduct. It is true that these statements have not been made before the Court, but they are in the public domain, are known to the New Zealand Government, and were commented on by its Prime Minister in his statement of 1 November 1974. It will clearly be necessary to consider all these statements, both those drawn to the Court's attention in July 1974 and those subsequently made.

34. It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings. Such a course however would have been fully justified only if the matter dealt with in those statements had been completely new, had not been raised during the proceedings, or was unknown to the Parties. This is manifestly not the case. The essential material which the Court must examine was introduced into the proceedings by the Applicant itself, by no means incidentally, during the course of the hearings, when it drew the Court's attention to statements by the French authorities made prior to that date, submitted the documents containing them and presented an interpretation of their character, touching particularly upon the

question whether they contained a firm assurance. Thus both the statements and the New Zealand interpretation of them are before the Court pursuant to action by the Applicant. Moreover, the Applicant subsequently publicly expressed its comments (see paragraph 28 above) on statements made by the French authorities since the closure of the oral proceedings. The Court is therefore in possession not only of the statements made by French authorities concerning the cessation of atmospheric nuclear testing, but also of the views of the Applicant on them. Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim *audi alteram partem*, it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings, and which merely supplement and reinforce matters already discussed in the course of the proceedings, statements with which the Applicant must be familiar. Thus the Applicant, having commented on the statements of the French authorities, both that made prior to the oral proceedings and those made subsequently, could reasonably expect that the Court would deal with the matter and come to its own conclusion on the meaning and effect of those statements. The Court, having taken note of the Applicant's comments, and feeling no obligation to consult the Parties on the basis for its decision, finds that the reopening of the oral proceedings would serve no useful purpose.

35. It will be convenient to take the statements referred to above in chronological order. The first statement is contained in the communiqué issued by the Office of the President of the French Republic on 8 June 1974, shortly before the commencement of the 1974 series of French nuclear tests:

> "The Decree reintroducing the security measures in the South Pacific nuclear test zone has been published in the Official Journal of 8 June 1974.
>
> The Office of the President of the Republic takes this opportunity of stating that in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed."

36. The second is contained in a Note of 10 June 1974 from the French Embassy in Wellington to the New Zealand Ministry of Foreign Affairs:

> "It should . . . be pointed out that the decision taken by the Office of the President of the French Republic to have the opening of the nuclear test series preceded by a press communiqué represents a departure from the practice of previous years. This procedure has been chosen in view of the fact that a new element has intervened in the development of the programme for perfecting the French deterrent force. This new element is as follows: France, at the point which has been reached in the execution of its programme of defence

by nuclear means, will be in a position to move to the stage of underground firings as soon as the test series planned for this summer is completed.

Thus the atmospheric tests which will be carried out shortly will, in the normal course of events, be the last of this type.

The French authorities express the hope that the New Zealand Government will find this information of some interest and will wish to take it into consideration."

37. As indicated by counsel for the Applicant at the hearing of 10 July 1974, the reaction of the New Zealand Prime Minister to this second statement was expressed in a letter to the President of the French Republic dated 11 June 1974, from which the following are two extracts:

". . . I have noted that the terms of the announcement do not represent an unqualified renunciation of atmospheric testing for the future."

"I would hope that even at this stage you would be prepared to weigh the implications of any further atmospheric testing in the Pacific and resolve to put an end to this activity which has been the source of grave anxiety to the people in the Pacific region for more than a decade."

Thus the phrase "in the normal course of events" was regarded by New Zealand as qualifying the statement made, so that it did not meet the expectations of the Applicant, which evidently regarded those words as a form of escape clause. This is clear from the observations of counsel for New Zealand at the hearing of 10 July 1974. In a Note of 17 June 1974, the New Zealand Embassy in Paris stated that it had good reason to believe that France had carried out an atmospheric nuclear test on 16 June and made this further comment:

"The announcement that France will proceed to underground tests in 1975, while presenting a new development, does not affect New Zealand's fundamental opposition to all nuclear testing, nor does it in any way reduce New Zealand's opposition to the atmospheric tests set down for this year: the more so since the French Government is unable to give firm assurances that no atmospheric testing will be undertaken after 1974."

38. The third French statement is contained in a reply made on 1 July 1974 by the President of the Republic to the New Zealand Prime Minister's letter of 11 June:

"In present circumstances, it is at least gratifying for me to note the positive reaction in your letter to the announcement in the communiqué of 8 June 1974 that we are going over to underground

tests. There is in this a new element whose importance will not, I trust, escape the New Zealand Government."

39. These three statements were all drawn to the notice of the Court by the Applicant at the time of the oral proceedings. As already indicated, the Court will also have to consider the relevant statements subsequently made by the French authorities: on 25 July 1974 by the President of the Republic; on 16 August 1974 by the Minister of Defence; on 25 September 1974 by the Minister for Foreign Affairs in the United Nations General Assembly; and on 11 October 1974 by the Minister of Defence.

40. The next statement to be considered, therefore, will be that made on 25 July at a press conference given by the President of the Republic, when he said:

". . . on this question of nuclear tests, you know that the Prime Minister had publicly expressed himself in the National Assembly in his speech introducing the Government's programme. He had indicated that French nuclear testing would continue. I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect . . ."

41. On 16 August 1974, in the course of an interview on French television, the Minister of Defence said that the French Government had done its best to ensure that the 1974 nuclear tests would be the last atmospheric tests.

42. On 25 September 1974, the French Minister for Foreign Affairs, addressing the United Nations General Assembly, said:

"We have now reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing, and we have taken steps to do so as early as next year."

43. On 11 October 1974, the Minister of Defence held a press conference during which he stated twice, in almost identical terms, that there would not be any atmospheric tests in 1975 and that France was ready to proceed to underground tests. When the comment was made that he had not added "in the normal course of events", he agreed that he had not. This latter point is relevant in view of the Note of 10 June 1974 from the French Embassy in Wellington to the Ministry of Foreign Affairs of New Zealand (paragraph 36 above), to the effect that the atmospheric tests contemplated "will, in the normal course of events, be the last of this type". The Minister also mentioned that, whether or not other governments had been officially advised of the decision, they could become aware of it through the press and by reading the communiqués issued by the Office of the President of the Republic.

44. In view of the foregoing, the Court finds that the communiqué issued on 8 June 1974 (paragraph 35 above), the French Embassy's Note of 10 June 1974 (paragraph 36 above) and the President's letter of 1 July 1974 (paragraph 38) conveyed to New Zealand the announcement that France, following the conclusion of the 1974 series of tests, would cease the conduct of atmospheric nuclear tests. Special attention is drawn to the hope expressed in the Note of 10 June 1974 "that the New Zealand Government will find this information of some interest and will wish to take it into consideration", and the reference in that Note and in the letter of 1 July 1974 to "a new element" whose importance is urged upon the New Zealand Government. The Court must consider in particular the President's statement of 25 July 1974 (paragraph 40 above) followed by the Defence Minister's statement of 11 October 1974 (paragraph 43). These reveal that the official statements made on behalf of France concerning future nuclear testing are not subject to whatever proviso, if any, was implied by the expression "in the normal course of events *[normalement]*".

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45. Before considering whether the declarations made by the French authorities meet the object of the claim by the Applicant that no further atmospheric nuclear tests should be carried out in the South Pacific, it is first necessary to determine the status and scope on the international plane of these declarations.

46. It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo*, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

47. Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by

interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.

48. With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive. As the Court said in its Judgment on the preliminary objections in the case concerning the *Temple of Preah Vihear*:

> "Where . . . as is generally the case in international law, which places the principal emphasis on the intention of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it." (*I.C.J. Reports 1961*, p. 31.)

The Court further stated in the same case: ". . . the sole relevant question is whether the language employed in any given declaration does reveal a clear intention . . ." (*ibid.*, p. 32).

49. One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

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50. Having examined the legal principles involved, the Court will now turn to the particular statements made by the French Government. The Government of New Zealand has made known to the Court its own interpretation of some of these statements at the oral proceedings (paragraph 27 above). As to subsequent statements, reference may be made to what was said by the Prime Minister of New Zealand on 1 November 1974 (paragraph 28 above). It will be observed that New Zealand has recognized the possibility of the dispute being resolved by a unilateral declaration, of the kind specified above, on the part of France. In the public statement of 1 November 1974, it is stated that "Until we have an assurance that nuclear testing of this kind is finished for good, the dispute between New Zealand and France persists". This is based on the view

that "the option of further atmospheric tests has been left open". The Court must however form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation, and cannot in this respect be bound by the view expressed by another State which is in no way a party to the text.

51. Of the statements by the French Government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State. His statements, and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute a whole. Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.

52. The unilateral statements of the French authorities were made outside the Court, publicly and *erga omnes*, even if some of them were communicated to the Government of New Zealand. As was observed above, to have legal effect, there was no need for these statements to be addressed to a particular State, nor was acceptance by any other State required. The general nature and characteristics of these statements are decisive for the evaluation of the legal implications, and it is to the interpretation of the statements that the Court must now proceed. The Court is entitled to presume, at the outset, that these statements were not made *in vacuo*, but in relation to the tests which constitute the very object of the present proceedings, although France has not appeared in the case.

53. In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect. The Court considers that the President of the Republic, in deciding upon the effective cessation of atmospheric tests, gave an undertaking to the international community to which his words were addressed. It is true that the French Government has consistently maintained that its nuclear experi-

ments do not contravene any subsisting provision of international law, nor did France recognize that it was bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements examined above. The Court finds that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration. The Court finds further that the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed.

54. The Court will now confront the commitment entered into by France with the claim advanced by the Applicant. Though the latter has formally requested from the Court a finding on the rights and obligations of the Parties, it has throughout the dispute maintained as its final objective the termination of the tests. It has sought from France an assurance that the French programme of atmospheric nuclear testing would come to an end. While expressing its opposition to the 1974 tests, the Government of New Zealand made specific reference to an assurance that "1974 will see the end of atmospheric nuclear testing in the South Pacific" (paragraph 33 above). On more than one occasion it has indicated that it would be ready to accept such an assurance. Since the Court now finds that a commitment in this respect has been entered into by France, there is no occasion for a pronouncement in respect of rights and obligations of the Parties concerning the past—which in other circumstances the Court would be entitled and even obliged to make—whatever the date by reference to which such pronouncement might be made.

55. Thus the Court faces a situation in which the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific.

56. This conclusion is not affected by a reference made by the New Zealand Government, in successive diplomatic Notes to the French Government from 1966 to 1974, to a formal reservation of "the right to hold the French Government responsible for any damage or losses received by New Zealand . . . as a result of any nuclear weapons tests conducted by France"; for no mention of any request for damages is made in the Application, and at the public hearing of 10 July 1974 the Attorney-General of New Zealand specifically stated: "My Government seeks a halt to a hazardous and unlawful activity, and not compensation for its continuance." The Court therefore finds that no question of damages in respect of tests already conducted arises in the present case.

57. It must be assumed that had New Zealand received an assurance, on one of the occasions when this was requested, which, in its interpretation, would have been satisfactory, it would have considered the dispute as concluded and would have discontinued the proceedings in

accordance with the Rules of Court. If it has not done so, this does not prevent the Court from making its own independent finding on the subject. It is true that "the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement" (*Factory at Chorzów (Merits)*, *P.C.I.J.*, *Series A*, *No. 17*, p. 51). However, in the present case, that is not the situation before the Court. The Applicant has clearly indicated what would satisfy its claim, and the Respondent has independently taken action; the question for the Court is thus one of interpretation of the conduct of each of the Parties. The conclusion at which the Court has arrived as a result of such interpretation does not mean that it is itself effecting a compromise of the claim; the Court is merely ascertaining the object of the claim and the effect of the Respondent's action, and this it is obliged to do. Any suggestion that the dispute would not be capable of being terminated by statements made on behalf of France would run counter to the unequivocally expressed views of the Applicant both before the Court and elsewhere.

58. The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since "whether there exists an international dispute is a matter for objective determination" by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, *Advisory Opinion*, *I.C.J. Reports 1950*, p. 74). The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the final objective which the Applicant has maintained throughout has been achieved by other means. If the declarations of France concerning the effective cessation of the nuclear tests have the significance described by the Court, that is to say if they have caused the dispute to disappear, all the necessary consequences must be drawn from this finding.

59. It may be argued that although France may have undertaken such an obligation, by a unilateral declaration, not to carry out atmospheric nuclear tests in the South Pacific region, a judgment of the Court on this subject might still be of value because, if the Judgment upheld the Applicant's contentions, it would reinforce the position of the Applicant by affirming the obligation of the Respondent. However, the Court having found that the Respondent has assumed an obligation as to conduct, concerning the effective cessation of nuclear tests, no further judicial action is required. The Applicant has repeatedly sought from the Respondent an assurance that the tests would cease, and the Respondent has, on its own initiative, made a series of statements to the effect that they will cease. Thus the Court concludes that, the dispute having disappeared, the claim advanced by New Zealand no longer has any object. It follows that any further finding would have no *raison d'être*.

60. This is not to say that the Court may select from the cases submitted to it those it feels suitable for judgment while refusing to give judgment in others. Article 38 of the Court's Statute provides that its function is "to decide in accordance with international law such disputes as are submitted to it"; but not only Article 38 itself but other provisions of the Statute and Rules also make it clear that the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties. In refraining from further action in this case the Court is therefore merely acting in accordance with the proper interpretation of its judicial function.

61. The Court has in the past indicated considerations which would lead it to decline to give judgment. The present case is one in which "circumstances that have . . . arisen render any adjudication devoid of purpose" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 38). The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.

62. Thus the Court finds that no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment.

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63. Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of such a request.

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64. In its above-mentioned Order of 22 June 1973, the Court stated that the provisional measures therein set out were indicated "pending its final decision in the proceedings instituted on 9 May 1973 by New

Zealand against France". It follows that such Order ceases to be operative upon the delivery of the present Judgment, and that the provisional measures lapse at the same time.

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65. For these reasons,

THE COURT,

by nine votes to six,

finds that the claim of New Zealand no longer has any object and that the Court is therefore not called upon to give a decision thereon.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twentieth day of December, one thousand nine hundred and seventy-four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of New Zealand and the Government of the French Republic, respectively.

(Signed) Manfred LACHS,
President.

(Signed) S. AQUARONE,
Registrar.

Judges FORSTER, GROS, PETRÉN and IGNACIO-PINTO append separate opinions to the Judgment of the Court.

Judges ONYEAMA, DILLARD, JIMÉNEZ DE ARÉCHAGA and Sir Humphrey WALDOCK append a joint dissenting opinion, and Judge DE CASTRO and Judge *ad hoc* Sir Garfield BARWICK append dissenting opinions to the Judgment of the Court.

(Initialled) M.L.

(Initialled) S.A.