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Blast from the Past: The French Nuclear Test Cases, and their Relevance to 21st Century Arbitration

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Forty years ago, Australia and New Zealand brought a pair of applications against France in the World Court, complaining about France's ongoing program of above-ground nuclear and thermonuclear weapons tests in French territory in the South Pacific. The cases promised to test the legality, under customary international environmental law, of atmospheric nuclear testing – an issue that had already excited much academic commentary by the early 1970s, but had never been the subject of legal adjudication, partly because the other nuclear superpowers had already agreed to ban the practice. France boycotted the proceedings and ignored a July 1973 judicial direction that it refrain from testing. In early 1974, however, it announced plans to move its nuclear testing program underground, leading the ICJ to dismiss the applications in December 1974 on the grounds they no longer had any "object."[1]

This ruling, issued without prior notice to the applicants of the Court's intention to dismiss the case on grounds of mootness, met stiff criticism at the time, with many commentators feeling that the outcome was a clumsy "fix" to avoid having to adjudicate politically sensitive issues. But the basis for the "fix" – the ruling that a so-called "unilateral declaration" by a State can have binding legal effect – itself has had lasting consequences, including in the realm of international investment arbitration. One commentator went so far as to compare the case to *Marbury v. Madison* – in that it enunciated a law of "extraordinary importance" even in a case in which "technically, the court has refused to decide."[2] This article examines the enigma that is the *Nuclear Tests* decision.

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1. *Nuclear Tests (Austl. v. Fr.)*, Judgment, 1974 ICJ 253, 272, § 62 (Dec. 20) (*"Nuclear Tests (Aust) J/m"*); *Nuclear Tests (N.Z. v. Fr.)*, Judgment, 1974 ICJ 457, 477, § 65 (Dec. 20) (*"Nuclear Tests (NZ) J/m"*).

2. Thomas Franck, *Word Made Law: The Decision of the ICJ in the Nuclear Tests Cases*, 69 Am. J. Int'l. L. 612, 620 (1975).

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I. – The Above-Ground Weapons Tests in the South Pacific

After World War Two, France, the victim of invasions in 1870, 1914 and 1940, decided to develop its own independent nuclear capacity, or *"force de frappe."*[3] Beginning in 1966, it detonated a number of nuclear and thermonuclear weapons at above-ground level in the unpopulated atolls of Mururoa and Fangataufa (some 1,200 kilometers south east of Tahiti).[4]

These tests released some fissile materials into the upper atmosphere, caused local nuclear fallout, and precluded use of the surrounding high seas areas. Some commentators argued that these factors made the tests unlawful.[5] The tests also were at odds with the position taken in 1963 by the three "charter members of the nuclear club" (the United States, Soviet Union and Great Britain), all of whom entered into a "Limited Test Ban Treaty," barring any further atmospheric nuclear tests.[6]

There had already been a significant amount of atmospheric nuclear testing in the late 1940s, 1950s and early 1960s by the U.S. (in Utah, Nevada and the Central Pacific), the Soviet Union (in Central Asia and Siberia), the United Kingdom (in Australia and elsewhere – of which more later) and France itself, which from 1960 until 1963 had conducted nineteen nuclear tests in the Sahara, in what was then French Algeria.[7] Even as early as the 1950s, the legality of above-ground

3. *See* W. Michael Reisman & Manoush H. Arsanjani, *The Question of Unilateral Government Statements as Applicable Law in Investment Disputes, in Völkerrect als Wertordnung – Common Values in International Law* 4019, 413 (Pierre-Marie Dupuy et al. eds., 2006); William K. Ris, Jr., *French Nuclear Testing, a Crisis for International Law*, 4 Denv. J. L. & Policy 111, 112-13 (1974) (describing *"force de frappe"* policy and French nuclear testing in the 1950s and 1960s); Edward McWhinney, *International Law-Making and the Judicial Process: The World Court and the French Nuclear Tests Case*, 3 Syracuse J. Int'l L. & Com. 9, 10-11 (1975); C. Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* § 9.2 (2000). President De Gaulle personally spearheaded the early program; he was present for a 1966 test in Mururoa, *see* Jonathan Femby, *The General* 541, 548 (2012), and later in 1968, with "[p]reparations... going ahead for France's first test of a thermonuclear device in the South Pacific," De Gaulle had reason to believe "everything was in order as [the Fifth Republic] approached its tenth anniversary." *Id.* at 563. That particular test – Operation Canopus, with a yield of 2.6 megatons – occurred during the turbulent summer of 1968.

4. *See* Brigitte Bollecker-Stern, "L'affaire des essais nucléaires français devant la Cour Internationale de Justice", 20e Annuaire francais de droit international 299, 301 (1974); *see also* Don MacKay, *Nuclear Testing: New Zealand and France in the International Court of Justice*, 19 Fordham Int'l L.J. 1857, 1859 (1995); Romano, *supra* note 3, § 9.2; Barbara Kwiatkowska, *New Zealand v. France Nuclear Tests: The Dismissed Case of Lasting Significance*, 37 Va. J. Int'l L. 107, 111-12 (1996).

5. *See* A.G. Mercer, *International Law and the French Nuclear Weapons Tests*, 1968 N.Z. L.J. 405; Anthony A. D'Amato, *Legal Aspects of French Nuclear Tests*, 61 Am. J. Int'l L. 66 (1967); *see also* Stern, *supra* note 4, at 300 (surveying contemporary reactions).

6. Reisman & Arsanjani, *supra* note 3, at 413; *see* Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, *done* Aug. 5, 1963, 14 U.S.T. 1313. The Limited Nuclear Weapons Test Treaty also barred exo-atmospheric (high altitude) testing. One earlier instrument to address the issue was the 1959 Antarctic Treaty, ratified by many of the world's then nuclear powers (including France) which entered into force in 1961 and expressly prohibited "[a]ny nuclear explosions in Antarctica." Antarctic Treaty art. V, Dec. 1, 1959, 12 U.S.T. 794. Later treaties barred the emplacement of nuclear weapons in outer space (*see* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. IV, Jan. 27, 1967, 18 U.S.T. 2410) or the sea bed (Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 1, 1971, 23 U.S.T. 701).

7. *See* McWhinney, *supra* note 3, at 12 (noting that "[b]y the beginning of 1972, there had been a total of 869 nuclear explosions of which nearly two-thirds had been U.S. explosions and nearly

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testing was vigorously debated.[8] Concerns over nuclear proliferation, as well as the belligerent connotation of the tests themselves,[9] also contributed to the 1963 Limited Test Ban Treaty being widely adopted.[10] But France declined to sign the treaty, as did the People's Republic of China.

II. – The Initial Advice to the Australian and New Zealand Governments

Reaction against the tests was particularly acute in Australia and New Zealand, and both countries' governments issued sharp diplomatic protests against the testing. But although each of Australia, New Zealand and France had accepted the compulsory jurisdiction of the World Court under Article 36 of the ICJ Statute, the legal options seemed limited. The conservative Australian federal government of Prime Minister William McMahon (1969-72) had been told by its senior law officers at the Commonwealth Attorney General's Department that "there was no juridical ground on which to bring the case."[11] The advice itself is not publicly available, but a their concerns may have included:

– that France might rely on a reservation in its 1966 acceptance of ICJ compulsory jurisdiction, excluding "disputes concerning activities connected with national defence";[12]

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a third Soviet; the French contribution being 43 tests (or just under 5 per cent) and the Chinese 12 tests"); Ris, *supra* note 3, at 112-13; Kwiatkowska, *supra* note 4, at 114 n.34.

8. *Compare* Emanuel Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 Yale L.J. 629, 647 (1955) (examining the effects of testing in the Pacific at Bikini Atoll and other U.S. territories in the Pacific, discussing their effects on Marshallese communities as well as Japanese fishing vessels, and concluding, by reference to the law of the sea as well as UN trusteeship rules then applicable to the Marshall and Carolinas Islands, that "the laws of humanity suggest and the law of nations requires immediate cessation of the thermonuclear experiments in the Pacific Proving Grounds"), *with* Myres S. McDougall, *The Hydrogen Bomb Tests and the International Law of the Sea*, 1956 Am. J. Int'l L. 356, 360-61 (arguing that the United States had a valid "claim to use territory (Bikini and Eniwetok Atolls), over which it has jurisdiction, for purposes [nuclear tests] which have the effect of temporarily excluding others from large areas of the high seas"; contending that the extent of interference with commercial navigation had been "practically nil," interference with fishing only "slight," and that the tests could be justified by reason of their "reasonableness" in the circumstances, "in preparation for the defense of itself and its allies and of all the values of a free world society"). *See also* Note, *French Nuclear Testing and International Law*, 24 Rutgers L. Rev. 144, 144-56 (1969) (surveying campaigns commenced in 1959 by Morocco and other states, seeking to halt French testing in the Sahara); Stern, *supra* note 4, at 300 n.2.

9. Indeed, during the Cuban Missile Crisis of October 1962, "the two superpowers were engaged in a frenetic round of tit-for-tat nuclear testing, detonating live bombs two or even three times a week while preparing to fight a nuclear war over Cuba," with five atmospheric tests by the U.S. in the South Pacific, and nine Soviet atmospheric tests, mostly at Novaya Zemlyain near the Arctic Ocean. Michael Dobbs, *One Minute to Midnight: Kennedy, Khrushchev, and Castro on the Brink of Nuclear War* 195 (2008).

10. On the growth of concerns about the effects of radiation and the growing momentum against testing that led to the Limited Test Ban Treaty, see generally Howard J. Taubenfeld, *Nuclear Testing and International Law*, 16 Sw. L.J. 365 (1962).

11. *See* I. A. Shearer, *O'Connell, Daniel Patrick (1924-1979)*, Australian Dictionary of Biography, http://adb.anu.edu.au/biography/oconnell-daniel-patrick-11280 (last visited Dec. 14, 2013).

12. McWhinney, *supra* note 3, at 16; *see also* Pierre Lellouche, *The Nuclear Tests Cases: Judicial Silence Versus Atomic Blasts*, 16 Harv. Int'l L.J. 614, 620 (1975).

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– the substantive law governing above-ground nuclear testing was debatable: France was not a party to the Test Ban Treaty, and the scope of its non-treaty obligation towards the environment (under customary international law) was (at least in the early 1970s) unclear;[13]

– elements of Australia's grievances, e.g. its objection to France unilaterally imposing a high seas exclusion zone around the test site,[14] might have been vulnerable to an estoppel argument, given that Australia itself had declared parts of the Indian ocean off-limits during the 1956 British/Australian nuclear tests on Montibello Island[15] and had hosted British nuclear tests on the Australian mainland, at Maralinga in South Australia;[16] and

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13. *See* Ris, *supra* note 3, at 114-15 (discussing debate over customer international law norms concerning nuclear testing in the 1960s and early 1970s); Kathie D. Frankel, *International Law – International Court of Justice Has Preliminary Jurisdiction To Indicate Interim Measures of Protection: The Nuclear Tests Cases*, 7 N.Y.U. J. Int'l L & Pol. 163, 174-75 (1974) (noting debate over whether Limited Test Ban Treaty "could be said to have passed into the realm of customary international law" and noting that there may be pressure for the ICJ not to adjudicate this issue); Stern, *supra* note 4, at 306-07 (noting Australia's and New Zealand's claims presented the Court with issues of first impression); Lellouche, *supra* note 12, at 634 (accepting that the Australian arguments based on international environmental law were potentially admissible as an international claim). The 1972 Stockholm Declaration on the Human Environment contained a statement by numerous states (known as "Principle 21") that "[s]tates have... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." United Nations Conference on the Human Environment, June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, Principal 21, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972), *reprinted in* 11 I.L.M. 1416 (1972); *see also* Ris, *supra* note 3, at 115-16; Pierre-Marie Dupuy, "L'affaire des essais nucléaires français et le contentieux de la responsabilité internationale publique," 20 G.Y.I.L. 375, 386 (1977). This statement, combined with earlier jurisprudence, has since been influential in the development of international environmental law. *See, e.g., Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1905, 1965 (ad hoc Arbitral Tribunal 1941) ("[N]o state has the right to use or permit the use of its territory in such a manner as to cause injury... in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.").

14. Similar exclusion zones also had been declared during the U.S. testing program of the 1950s, and debated extensively at the time. *See* Margolis, *supra* note 8, at 630-31; McDougall, *supra* note 8, at 360; *see also* Ris, *supra* note 3, at 120 (recalling debate and commenting on its relevance to French atmospheric testing).

15. *See* Lellouche, *supra* note 12, at 633 ("In 1952 Australia did precisely what she now alleges is a clear violation of law. By a law entitled Defense (Special Undertakings) Act of 1952, Australia established a 'prohibited area' of about 6,000 square miles around the Montebello Archipelago, enabling the United Kingdom to conduct in the Christmas Islands its first H-bomb test in 1957." (footnote omitted)); McWhinney, *supra* note 3, at 35 (arguing that "[t]he Australian government's enthusiastic endorsement of, or cooperation in, the British and U.S. nuclear tests in the Pacific, over a sustained period of years gave rise... if not to a direct estoppel against the Australian government in its current complaint against the French nuclear tests, at least to the invocation of general equitable principles, going to equality of treatment and to the notion that a state cannot apply a double standard for its favored allies and quite another and lesser treatment for all others"); Guy De Lacharrière, "Commentaires Sur La Position Juridique de la France à L'égard de la Licéité de Ses Expériences Nucléaires," 19 Annuaire français de droit international 235, 247 (1973) (quoting statements by Australian diplomat in 1954, defending U.S. nuclear weapons tests); Romano, *supra* note 3, § 9.3 n.15. The author's great uncle, Sir Alan McNicoll, was on the British/Australian planning committee that oversaw the Montibello Island tests.

16. By contrast, while it is true that New Zealand's earlier conduct in the late 1940s and early to mid-1950s supported the United Kingdom and United States nuclear tests, its involvement in these tests was "slight," and its opposition to nuclear testing in all its forms was more long-standing, dating from 1958 onwards. J. Stephen Kós, *Interim Relief in the International Court: New Zealand and the Nuclear Test cases*, 14 Victoria U. Wellington Rev. 357, 358-59 (1984).

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– proof of physical damage might have been viewed as problematic,[17] especially given the volume of prior nuclear tests by the major superpowers.[18]

The New Zealand government received similarly cautious advice. As related by Stephen Kós:

> In the latter part of 1972, the Ministry of Foreign Affairs, in the course of advising its then minister, the Rt. Hon. Sir Keith Holyoake, had considered the prospects of putting the dispute before the International Court. At that time the ministry's legal division had concluded that there was little chance of being able to maintain contentious proceedings because of the French reservation to its 1966 declaration of acceptance to the court's jurisdiction under the optional clause. The prospects of obtaining an advisory opinion were also canvassed. France would have vetoed any move in the Security Council. The advisers took soundings in the General Assembly. To have obtained the necessary majority in the General Assembly would, at that time, have proved a difficult task. Even if the majority were obtained, the Court might decline to render the opinion on the basis of the *Eastern Carelia* doctrine that advisory proceedings are not to be abused as a back-door means of obtaining a decision in a reservation-barred contentious case. And even if the Court gave a favorable opinion, that would not bind France to any course of action.[19]

III. – The O'Connell Opinion and the Elections of Late 1972

In October 1972, a group of Australian state government Attorneys-General, dissatisfied with the federal government's position, sought alternative advice from Professor D.P. O'Connell, lately of the University of Adelaide (and recently appointed Chichele Professor of International Law at the University of Oxford).[20] Professor Ivan Shearer (a former colleague of O'Connell) recalls:

> During a break in proceedings at the Conference of the State Attorneys-General in Brisbane in July 1972 the Attorney-General for South Australia, the Hon. L. J. King QC... discussed with his Tasmanian and Western Australian

17. *See* Lellouche, *supra* note 12, at 620 (asserting that damage to Australia was "not clearly established, as reflected by the conflicting reports of the various scientific committees which dealt with the consequences of the French tests"); McWhinney, *supra* note 3, at 14 (noting that a 1972 New Zealand study had found no evidence of a health hazard from nuclear testing); Stern, *supra* note 4, at 305-06 (surveying French arguments concerning absence of physical damage as outlined in its *Livre Blanc*); Ris, *supra* note 3, at 115 (even assuming Principle 21 was customary international law as at 1972, there remained a debate over "whether the potential damage" from French testing was "so insignificant as to be *de minimis* or whether it [would] be potentially so dangerous as to constitute a violation of Principle 21").

18. *See supra* note 7.

19. Kós, *supra* note 16, at 363 (footnotes omitted).

20. *See id.* O'Connell was a New Zealand-born academic who had, up to that date, spent much of his professional career in Australia and had served as a Professor of Law at the University of Adelaide. In 1972, he was elected Chichele Professor of Public International Law at All Souls College, Oxford, the post having become vacant when Sir Humphrey Waldock was elected to the ICJ. *See* Shearer, *supra* note 11.

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colleagues the possibility of the States initiating some action against France to stop atmospheric nuclear tests in the Pacific. The Federal Government had previously announced that it had considered the possibility of taking France to the International Court but had been advised that there was no ground of jurisdiction. Mr King promised to seek the opinion of O'Connell when he returned to Adelaide.[21]

O'Connell's 99-page memorandum of advice, while rejecting any notion that the individual states could bring suit in their own name,[22] unveiled an innovative new theory upon which the federal government might bring suit.

As noted above, a perceived obstacle to World Court jurisdiction was France's exclusion of "national defense" matters from its submission to the court's compulsory jurisdiction. O'Connell by-passed this issue by identifying jurisdiction under an entirely separate instrument: the 1928 General Act for the Pacific Settlement of Disputes.[23] The General Act, a multilateral treaty ratified by each of France, Australia and New Zealand, was concluded one month after the Kellogg-Briand Pact of 1928[24] and aimed to integrate some of that Pact's principles into the League of Nations system. The General Act provided (in Article 17) for a broad submission of future disputes to the Permanent Court of International Justice ("PCIJ"):

> 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...

Although Article 39 of the General Act allowed states to make reservations to their submission to PCIJ jurisdiction, France's reservations under this Act did *not* include a "national defence" exclusion; instead it only excluded disputes that had been referred to the "Council of the League of Nations" (the functional predecessor of the United Nations Security Council).[25]

The PCIJ had been abolished and replaced by the ICJ in 1946, but the Statute of the ICJ, in Article 36(5), contains a savings clause providing that

> Declarations made under Article 36 of the Statute of the [PCIJ] and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the [ICJ] for the period which they still have to run and in accordance with their terms.

21. *Obituary: D.P. O'Connell*, 7 Austl. Y.B. Int'l L. xxiii, xxvi (1976-77).

22. *See id.*

23. General Act for the Pacific Settlement of International Disputes, Sept. 26, 1928, 93 L.N.T.S. 343 (General Act). *See generally* J.G. Merrills, *The International Court of Justice and the General Act of 1928*, 39 Cambridge L.J. 137 (1980). O'Connell had "long been conscious" of the "potentialities" this "dormant" instrument, of which he had been aware "as a by-product of his work on state succession." *Obituary: D.P. O'Connell*, *supra* note 21, at xxvi.

24. General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57.

25. *See* 93 L.N.T.S. at 345. Australia and New Zealand made reservations that excluded, among other things, disputes with other member of the British Commonwealth, or matters "which by international law are solely within the domestic jurisdictions of the States." 93 L.N.T.S. at 1541.

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Under the approach suggested by O'Connell, it could thus be argued that France was subject to the compulsory jurisdiction of the ICJ through a combination of Article 17 of the General Act and Article 36(5) of the ICJ Statute.

This jurisdictional theory was potentially controversial. As Stern later noted, the viability of this argument depended upon whether the disappearance of the League brought about the demise of the General Act (the French view), or whether, consistent with its stated aims of achieving dispute resolution, the Act was intended to "survive" its original institutional framework.[26] Some neutral commentators agreed with the O'Connell view.[27] France's supporters later marshaled a series of counterarguments in the academic literature.[28] For example, Pierre Lellouche (writing after the case) contended:

> There is a strong argument that the [General Act] was no longer in force. It was an integral part of the League of Nations "in so far as the pacific settlement of international disputes had necessarily in that system to accompany collective security and disarmament" and as a result the Act was closely linked to the structures of the League. Consequently, with the demise of the League [in 1939], the Act fell into desuetude.[29]

O'Connell's advice apparently made clear that, notwithstanding the prospect of securing jurisdiction, "the battle with regard to admissibility and the merits would be uphill," partly due to the unsettled state of customary international law, and also due to the difficulties in proving damages.[30]

The existence (but not the content) of O'Connell's "alternative" legal analysis was widely publicized in 1972, and was adopted as part of the Australian Labor Party election platform by the then-opposition leader, the charismatic E. Gough Whitlam.[31]

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26. Stern, *supra* note 4, at 308. In 1949, after the United Nations was established, there was a *revised* General Act proposed in 1949, which few countries (and none of France, New Zealand or Australia) signed. The relatively low adherence to the 1949 revision provided further ammunition to those who claimed that the 1928 Act was no longer intended to apply to contemporary disputes. *See* Lellouche, *supra* note 12, at 631. *But see* Merrills, *supra* note 23, at 154 (refuting notion that the existence of the 1949 Revised Act, and its relatively low level of ratifications, affected jurisdiction under the General Act of 1928).

27. *See* Merrills, *supra* note 23, at 137 ("[T]he scope of the Court's jurisdiction [under the General Act] should not be in doubt"); *id.* at 150-52 (addressing and refuting argument that the "demise of the League" had affected the General Act); *id.* at 165 ("[T]he case against the Act is embarrassingly short of legal support.").

28. *See generally* Guy Ladreit de Lacharrière, "Commentaires sur la position juridique de la France à L'égard de la licéité de ses expériences nucléaires, 19 Annuaire français de droit international 235 (1973); Lellouche, *supra* note 12, at 629. Many aspects of France's position (including jurisdictional defenses as well as issues of act and legal substance) were published in a 1973 "White Paper" (*Livre blanc sur les expériences nucléaires,* comité interministeriel pour l'information (1973)), which was drawn upon heavily by France's supporters in the academic literature.

29. Lellouche, *supra* note 12, at 629 (footnote omitted) (citation omitted); *see also* Ladreit de Lacharriere, *supra* note 28, at 238-40; Ris, *supra* note 3, at 127. This argument was described as "frail" by a member of New Zealand's team. Kenneth J. Keith, "The Nuclear Tests After Ten Years," 14 Victoria U. Wellington L. Rev. 345, 348 (1984). One challenge with this argument is that "desuetude is not a recognized mode of treaty termination" under the 1969 Vienna Convention on the Law of Treaties. Merrills, *supra* note 23, at 154.

30. Kós, *supra* note 16, at 365; *see also id.* at 365-67

31. *Obituary: D.P. O'Connell, supra* note 23, at xxvi; *see also* Jenny Hocking, *Lionel Murphy, A Political Biography* 177-78 (1997) ("[In his 1972 policy speech Whitlam had pledged that the Labor government would take the question of French atmospheric nuclear tests to the International

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When his party won power in December 1972, the plan to sue France in the ICJ became government policy.[32]

New Zealand also was experiencing political change. New Prime Minister Norman Kirk, who was elected only days after Gough Whitlam's Australian victory, decided to join Australia in taking the matter to the World Court.[33] Indeed, Kirk's political successors in New Zealand would later take center stage in the overall nuclear tests controversy.

IV. – The Governments Make their Applications to the ICJ

The new governments prepared their claims in strict confidentiality:

> The jurisdictional ground proposed by O'Connell had to be kept secret for fear that France might denounce the General Act before Australia had instituted proceedings. The secret was kept and, on the advent of the Whitlam Government to power, directions were given for the institution of proceedings on the basis of the O'Connell opinion.[34]

As eventually filed on May 9, 1973, Australia and New Zealand's tandem applications, both citing the General Act as a basis for jurisdiction, sought declaratory and injunctive relief to halt French nuclear testing.[35] Both applications were soon followed by a request for interim measures under Article 41 of the ICJ Statute and/or the General Act, in the form of an order restraining any further testing, pending resolution of the claim.[36] The claims thus purported to test the state of international environmental law as it existed in 1973:

Court of Justice. 'We shall act in this matter on the same high level advice which Mr McMahon has received – but failed to act upon.'").

32. Gough Whitlam was an unlikely antagonist; he was given to Francophile outbursts, such as his reaction when December 2, 1972 was selected as the date for the national elections:

> The second day of December is a memorable day. It is the anniversary of Austerlitz. Far be it from me to wish, or to appear to wish, to assume the mantle of Napoleon, but I cannot forget that 2nd December was a date on which a crushing defeat was administered to a coalition – a ramshackle, reactionary coalition.

Jenny Hocking, *Gough Whitlam, A Moment in History* 386 (2008). In political retirement, Whitlam lived for three years in Paris as Australia's Ambassador to UNESCO.

33. *See* Kós, *supra* note 16, at 364-65.

34. *Obituary: D.P. O'Connell*, *supra* note 23, at xxvi. A careful review of Australia's diplomatic correspondence with France in early 1973, however, may have pointed to a new, more aggressive litigation strategy. *See* Stern, *supra* note 4, at 301 (noting that a January 3, 1973 communication from Australia's Foreign Minister marked the first assertion of "illegality" as regards the tests, leading to a later "non-veiled" threat that Australia would have recourse to appropriate international law measures).

35. *See* Australia's Application, *ICJ Pleadings, Nuclear Tests* (Austl. v. Fr.), Vol. I at 28 ("Australian Application"); New Zealand Application, *ICJ Pleadings, Nuclear Tests* (N.Z. v. Fr.), Vol. II at 4-5, 9 ("NZ Application").

36. *See* Australian Request for Interim Measures, *ICJ Pleadings, Nuclear Tests* (Austl. v. Fr.), Vol. I at 43]; New Zealand Request for Interim Measures, *ICJ Pleadings, Nuclear Tests* (N.Z. v. Fr.), Vol. II at 43. Significantly, the General Act's provisions regarding interim measures are "more definite than those of the Statute." Shabtai Rosenne & Yaël Ronen, *The Law and Practice of the International Court, 1920-2005* 649 n.28 (4th ed. 2006). This is because Article 33 of the General Act provides that interim measures, if granted by the PCIJ, are immediately binding, whereas Article 41 of the ICJ

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> The Australian and New Zealand claims are basically five: violation of State sovereignty; violation of freedom of the high seas and airspace; the tort of inflicting mental distress; environmental pollution; and the illegality of atmospheric nuclear testing...
> The sovereignty argument amounts to a difficult balancing of one nation's rights of sovereignty over its own territory against the sovereign rights of another nation. The tort argument alleging violation of the right of people to be free from anxiety and threat of harm involves a great deal of speculation as to the existence and intensity of such anxiety. The high seas and airspace argument likewise engenders serious problems of proof. Statistics seem to indicate no substantial and definitive health hazard or interference with shipping or aircraft. The claims of environmental pollution and illegality of atmospheric nuclear testing may not yet be recognized under international law; nevertheless, they present the basic grievance in a forthright and direct way.[37]

There were some differences between the two cases. Factually, New Zealand was closer to the test sites, particularly given that its territory included the Tokelau Islands and the Cook Islands.[38] In terms of remedies, the Australian case explicitly sought declaratory and injunctive relief against "further atmospheric nuclear weapon tests,"[39] whereas the New Zealand claim was broader (and arguably more artful): it sought to enjoin and declare unlawful *"nuclear tests in the South Pacific region that gave rise to radioactive fallout,"* without explicitly referring to atmospheric testing.[40] This distinction assumed significance some twenty-two years later.[41]

Australia and New Zealand made an identical selection for the *ad hoc* judge. Their appointee, Sir Garfield Barwick, was the sitting Chief Justice of the High Court

Statute of the Court does not explicitly say so. When questioned on this point by Judge Sir Humphrey Waldock, Australia's counsel acknowledged that Australia was "conscious that a difficulty might arise" if it relied upon Article 33 of the General Act prior to a jurisdictional ruling, and thus indicated that, owing to the "dire urgency" of its application, Australia would base its application solely upon Article 41 of the ICJ Statute as the jurisdictional basis for its interim measures application. *See Case Concerning Nuclear Tests (Austl. v. Fr.) – Oral Arguments on the Request for the Indication of Interim Measures of Protection*, Minutes of the Public Sittings held at the Peace Palace, The Hague, on 21, 22, 23 and 25 May 1973, at 230-31. Cot considered that this represented a deliberately "safe" approach which was intended to avoid jurisdictional complications. Jean-Pierre Cot, *Affaire des essais nucléaires (Australie c. France et Nouvelle-Zélande c. France), Demandes en indication de mesures conservatoires. Ordonnance du 22 juin 1973*, 19 Annuaire français de droit international 252, 270 (1973).

37. Frankel, *supra* note 13, at 171-72 (footnotes omitted); *see also* Dinesh Khosla, *Nuclear Tests Cases: Judicial Valour v. Judicial Discretion*, 18 I.J.I.L. 322, 325-27 (1978) (surveying legal basis for applicants' claims). One commentator, however, felt that the applicants, suffering the "embarrassment" of being unable to prove actual or direct loss, might have been expected to take a bolder approach, e.g. by asserting an *erga omnes* right, enforceable by all states, to prevent the explosions. *See* Dupuy, *supra* note 13, at 376-77 (remarking that the applicants' case "constantly hesitates" between bold propositions and "hackneyed principles"); *see also id.* at 403-04 (suggesting that the applicants' pleading may have reflected "uncertainty" in the then-current state of international law concerning state responsibility).

38. *See* Dupuy, *supra* note 13, at 370-75; *see also* MacKay, *supra* note 4, at 1865-66 (describing New Zealand's legal case, including its claim that France was bound by obligations *erga omnes* to refrain from nuclear pollution); Stern, *supra* note 4, at 311-12 (analyzing New Zealand claims).

39. Australian Application, *supra* note 35, at 28.

40. NZ Application, *supra* note 35, at 9 (emphasis added); *see also* MacKay, *supra* note 4, at 1875; Romano, *supra* note 3, § 9.4.

41. *See infra* note 110.

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of Australia (Australia's highest court), a Sydney-born jurist of formidable intellect and persuasive ability. The choice was "bipartisan" in two senses: first, in that the New Zealand camp was willing to forgo the opportunity to select one of their own;[42] second in that Barwick was a former Conservative cabinet minister, whereas the governments appointing him were both from the political left. The choice turned out to be sound;[43] indeed Judge ad hoc Barwick's final dissenting opinion in the case is extremely lucid.[44]

V. – The Hearings of 1973 and the Interim Measures Declaration

The cases represented one of the more significant controversies to reach the Court. This was no mere maritime delimitation or investment dispute; instead, "[t]he Court was invited to develop a totally new area of law with respect to atomic weaponry."[45] ICJ President Manfred Lachs[46] ordered that there immediately be oral hearings on the Australia/New Zealand request for provisional measures.

Australia's legal team, headed by Pat Brazil of the Australia Attorney General's Department, included then-Senator Lionel Murphy (Australian Attorney-General and future High Court Judge), Robert Ellicott (future Attorney-General and, at that time, Solicitor-General), Maurice Byers (future Solicitor-General), Professor

42. According to Barwick, his appointment required "some negotiation with the New Zealanders," who initially favored appointing their own national, Professor Robert Quentin-Baxter of Victoria University, Wellington. Sir Garfield Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* 255 (1995). Though not an international law specialist, Barwick quickly "brushed up my international law and the procedure of the International Court, so that by the time I reached The Hague I was *au fait* with the court's practice and knew the relevant international law tolerably well". *Id.*

43. Barwick's appointment was well-received at the time. *See* Ris, *supra* note 3, at 128 (viewing Barwick's appointment as a sign that the applicant governments "took the petition with the utmost seriousness"). Even an unsympathetic biographer has praised Barwick's performance at The Hague. *See* David Marr, *Barwick* 240 (1980) ("[Barwick] put an immense effort" into preparing for the judges' conference "and afterwards basked in the compliments he received for the presentation and analysis" of the case as he saw it). At the same time, some of the later developments appear to have exacerbated the personal antipathy between Barwick and Prime Minister Whitlam – tensions that eventually culminated in the November 11, 1975 dismissal crisis in which Australia's Governor-General, Sir John Kerr (controversially counseled by Sir Garfield Barwick, acting extra-judicially) unilaterally terminated Whitlam's position as Prime Minister and installed a minority conservative administration in his place. *See generally* Paul Kelly, *November 1975: The Inside Story of Australia's Greatest Political Crisis* 222-30 (1995).

44. For example, Merrills cites those portions of Judge ad hoc Barwick's dissent that address the General Act of 1928 as providing a "complete answer" to those who contested whether the General Act was a valid basis for ICJ jurisdiction, and further observes that his analysis made a "useful" contribution to the parties' argument in the later *Aegean Sea* case. Merrills, *supra* note 23, at 154, 169.

45. Lellouche, *supra* note 12, at 614 (footnote omitted).

46. Barwick recalls, "When I arrived at the court I went to see the President, Mr Lachs, of Polish origin. He had recently been elected President of the court. There had been quite a bitter struggle and the French national, Manuel Gros, had been narrowly defeated. I sensed some animosity between the two men. I was vastly amused that when Lachs smoked a cigar during a conference, as he regularly did, Gros would pull out the wick of a bottle of Airwick on the table in front of him." Barwick, *supra* note 42, at 255.

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Elihu Lauterpacht QC of the University of Cambridge, and, of course, Professor O'Connell of Oxford.[47] The New Zealand team, led by Robert Quentin-Baxter of Victoria University of Wellington, included its Attorney General Mervyn Finlay, its Solicitor General Richard Savage, and an Auckland-born barrister and international law scholar, Kenneth Keith – later a Supreme Court of New Zealand judge and, currently, a member of the ICJ.

A further player entered the mix on May 16, 1973, when the government of Fiji, citing its own interest in curbing atmospheric fallout, indicated it would seek permission to intervene in the cases pursuant to Article 62 of the ICJ Statute.[48] Intervention, at that time a relatively untested procedure, provided a possible means for Fiji to enter the case and assert its own interests, which it could not have done independently because it was not a party to the General Act of 1928 and had not submitted to compulsory ICJ jurisdiction.[49]

These three legal teams, however, never locked horns with opposing counsel, for France boycotted the hearings. By letter delivered on May 16, 1973, one week before the hearing, the French government informed the ICJ Registrar that it would not appoint an Agent, and that it considered the Court was "manifestly not competent" to hear the case in view of what it considered to be the jurisdictional infirmities in the application.[50] Accompanying the letter was a nine-page "Annex" explaining France's view that (i) the case related to "national defense" and thus fell within the exclusion clause of its 1966 Article 36 declaration; and (ii) the General Act was not operative and, therefore, not a proper basis for jurisdiction (and even if it were, its application was circumscribed by the "national defense" reservation in its 1966 optional declaration).[51]

> Oral argument began on May 22, 1973. Sir Garfield Barwick recalled the scene:
> We sat in a shallow rectangular room in the Peace Palace with stained-glass windows forming a spectacular backdrop to the Bench. The rule of the court was that the advocate appearing should be dressed as would be required by the highest court of his own country.[52]
>
> Sir Garfield also had some interesting observations on the other members of the Court:
> Gros had been longest on the court and sat on the President's right. I think the next senior judge was Bengzon from the Philippines. He had held office in the

47. The Australian team also retained Roberto Ago of Italy (later a judge of the ICJ) as a legal advisor. *See* Kós, *supra* note 16, at 364.

48. *ICJ Pleadings, Nuclear Tests*, Vol. I at 255 (Fiji's application to intervene in Australian action); *ICJ Pleadings, Nuclear Tests*, Vol. II at 459 (Fiji's application to intervene in NZ action).

49. *See* Christin M. Chinkin, *Third-Party Intervention Before the International Court of Justice*, 80 A.J.I.L. 495, 524-25 (1986) (discussing Fiji's jurisdictional position).

50. On the decision of France not to appear, *see* Cot, *supra* note 76, at 252 (observing that orders in the case marked a critical change in French policy – "Un tournant décisif dans l'attitude de la France à l'égard de la juridiction internationale" – and one which departed from France's position of longstanding support for the World Court); *see also id.* at 255-57 (analyzing the legal consequences of non-appearance and furthermore warning of the institutional threat it poses to the ICJ, especially in light of Iceland's then-recent boycott of the *Icelandic Fisheries* case). Cot is today a Judge of the International Tribunal for the Law of the Sea.

51. *See Case Concerning Nuclear Tests (Austl./N.Z. v. Fr.), Correspondence* (May 9, 1973 to Sept. 8, 1977) at 347-57, *available at* http://www.icj-cij.org/docket/files/58/11007.pdf.

52. Barwick, *supra* note 42, at 255.

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Supreme Court of the Philippines before joining the International Court. The other judges presiding included a judge named Ruda who derived from Argentina, a judge from Senegal [Isaac Forster] who spoke no English – all the others did, although Gros insisted that everything be translated into French, though he was a most fluent speaker of English – there was Morozov, a Russian, who was dour but with whom I came to be on good terms; there was Waldock, the most recently elected, an English Professor of Law, a very pleasant companion indeed; there was an Indian named Singh, and de Arechaga from Uruguay. Also sitting were Petren, Onyeama, Dillard and Ignacio-Pinto. De Arechaga was, in my opinion, the best equipped both intellectually and professionally.[53]

Argument began with some emotionally forceful submissions. Opening for Australia, Attorney-General Senator Lionel Murphy, drawing on his scientific training,[54] explained the isotopic profile of radioactive elements released by atmospheric tests. He claimed, for example, that milk produced in Australia in the late 1960s and early 1970s contained heightened levels of fission products such as iodine-131.[55] He further claimed that "inevitably deposit [of fall-out] on our soil invades our people's bones and lungs and critical body organs. Every man, woman and child and foetus in Australia has in his or her body radio-active material from the French as well as other atmospheric tests."[56]

On jurisdiction, counsel for New Zealand observed:

Since 1946 France has more than once acknowledged that the General Act remains in force...

[As] far as the General Act is concerned, there is no manifest lack of jurisdiction to deal with this matter... [T]he Court's jurisdiction on the merits is reasonably probable; there exist weighty arguments in favour of it.[57]

The Australian Solicitor-General, Robert Ellicott, mounted a forceful summing-up of the case in favor of interim relief:

May I conclude by saying that few Orders of the Court would be more closely scrutinized than the one which the Court will make upon this application. Governments and people all over the world will look behind the contents of that Order to detect what they may presume to be the Court's attitude towards the fundamental question of the legality of further testing of nuclear weapons in the atmosphere. Those outside observers are also bound to take note of the somewhat technical character of the French contentions.[58]

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53. *Id.*

54. Murphy was trained as a scientist and had been focusing on the question of fallout from the tests since the 1960s, as a member of the ALP's Science Committee. *See* Hocking, *Murphy*, *supra* note 31, at 178. He was aided by Professor Harry Messel of the University of Sydney, described by one source as "a brash, chain cigar-smoking, scientific research entrepreneur." *Id.*

55. *See Case Concerning Nuclear Tests (Austl. v. Fr.) – Oral Arguments on the Request for the Indication of Interim Measures of Protection,* Minutes of the Public Sittings held at the Peace Palace, The Hague, on 21, 22, 23 and 25 May 1973, at 171-72.

56. *Id.* at 169.

57. *Case Concerning Nuclear Tests (N.Z. v. Fr.) – Oral Arguments on the Request for the Indication of Interim Measures of Protection*, Minutes of the Public Sittings held at the Peace Palace, The Hague, on 21, 22, 23 and 25 May 1973, at 102, 139-40.

58. *Id.* at 223.

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On June 22, 1973, the ICJ, by a vote of eight to six,[59] issued an "indication" of provisional measures in Australia's and New Zealand's favor. After holding, for purposes of Article 41 of the ICJ Statute, that the Court need only be satisfied there was a "prima facie" showing of a possibility of jurisdiction – a finding made here, notwithstanding France's objection,[60] and further holding that the applications disclosed potentially admissible claims under international law – the Court ruled that provisional measures were necessary to prevent aggravation of the dispute, and thus held:

> The Governments of Australia[/New Zealand] and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests

59. *See Nuclear Tests (Austl. v. Fr.), Interim Protection, Order of 22 June 1973*, 1973 ICJ 99, 106 (*"Aust Interim Order"*); *Nuclear Tests (N.Z. v. Fr.), Interim Protection, Order of 22 June 1973*, 1973 ICJ 135, 142 (*"NZ Interim Order"*). The President of the ICJ, Manfred Lachs, was prevented by illness from deliberation, as was Judge Dillard of the United States. *See* McWhinney, *supra* note 3, at 20. A number of judges (Judges Bengson, Onyeama, De Castro, Morozov and Ruda) declined to elaborate on their reasons for decision-making (or even the way they voted), leading one to conclude that "the internal differences of the Court were marked and deeply-felt, and that this accounts for an apparently deliberate decision on the part of a number of judges not to render explicit either their reasons or their actual vote" in the 1973 order. *Id.* at 21.

60. *See Aust Interim Order*, *supra* note 59, at 101-06; *NZ Interim Order*, *supra* note 59, at 137-42. Earlier decisions of the ICJ had shown that provisional measures might be granted even prior to a jurisdictional ruling. *See Fisheries Jurisdiction (U.K. v. Iceland), Interim Protection Order of 17 Aug. 1972*, 1972 ICJ 12, 15, § 15 (holding that the ICJ "need not, before indicating [provisional measures] finally satisfy itself that it has jurisdiction on the merits of the case," unless "the absence of jurisdiction on the merits is manifest"); *Anglo-Iranian Oil Co. Case, Order of 5 July, 1951*, 1951 ICJ 89, 93 (July 5) (granting provisional measures but holding that this "in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction"). Judge Sture Petrén of Sweden urged a stricter test under which provisional measures would not be granted, without an *actual* showing of *prima facie* jurisdiction. *See Nuclear Tests, Aust Interim Order*, Dissenting Opinion of Judge Petrén at 125-26; *See Nuclear Tests, NZ Interim Order*, Dissenting Opinion of Judge Petrén at 160-61. Judge Gros similarly considered that jurisdictional and admissibility objections had "absolute priority" and that the Court should not have proceeded to grant interim measures because such matters remained in doubt. *See Aust Interim Order*, Dissenting Opinion of Judge Gros at 122; *NZ Interim Order*, Dissenting Opinion of Judge Gros at 157. Judge Isaac Forster of Senegal dissented on similar grounds, and also volunteered his view that the General Act was "moribund, if not well and truly dead" as it was associated with the "defunct" PCIJ. *See Aust Interim Order*, Dissenting Opinion of Judge Forster at 112-13; *NZ Interim Order*, Dissenting Opinion of Judge Forster at 148; *see also* Merrills, *supra* note 23, at 147 (noting Judge Forster's characterization of the General Act). Judge Ignacio-Pinto made an even more strident dissent not only doubting the General Act's application, but furthermore claiming that the applicants were both guilty of inconsistent conduct, by reason of the Maralinga nuclear tests conducted on Australian soil between 1956 and 1963], and New Zealand's public statements denying that U.K. nuclear testing was a health hazard. *See Aust Interim Order*, Dissenting Opinion of Judge Ignacio-Pinto at 129, 132-33; *NZ Interim Order*, Dissenting Opinion of Judge Ignacio-Pinto at 163-64. France's supporters joined in these criticisms. *See* De Lacharrière, *supra* note 15, at 242 (describing court's *prima facie* jurisdictional standard as "difficult to comprehend"). Elkind considers that the closeness of the vote reveals that the majority "failed to quiet uneasiness about the doctrine of prima facie jurisdiction particularly when it involved a highly sensitive political issue like nuclear testing." Jerome B. Elkind, *French Nuclear Testing and Article 41 – Another Blow to the Authority of the Court?*, 8 Vand. J. Transnat'l L. 39, 49 (1974-75); *see also* Cot, *supra* note 36, at 263 (considering that the Court's 1973 order had been influenced by the French boycott, in the sense that the court felt need, in the resulting jurisdictional "vacuum," to establish a jurisdictional standard that was demonstrably met in the circumstances).

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causing the deposit of radio-active fall-out on the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands...[61]

The court added, however, that this ruling "in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case, or any questions relating to the admissibility of the Application, or relating to the merits themselves..."[62]

VI. – Whitlam's Leak

What should have been a high point for the Applicants soon faded. An initial sour note arose immediately, when it emerged that Prime Minister Whitlam, speaking at a lawyers' gathering in Melbourne only hours before the order's release, was heard (via a live microphone) to predict that the Australian/New Zealand application for interim measures would be granted by eight votes to six, leading the press to report his remarks the next day under the heading, *"The Prime Minister: We've won N-test case."*[63] This apparent breach of ICJ rules (which requires deliberations to be private and confidential) prompted inquiries by the ICJ Registrar and the submission of a June 27, 1973 letter of apology from Whitlam expressing regret "at any embarrassment which the Court may have suffered as a result of my remarks," which, he claimed, were purely speculative in nature, not intended for publication, and based upon his own counsel's assessment of prospects – not any leak.[64] On March 21, 1974, the members of the court voted (by 11 votes to 3, with Judge Gros dissenting) to close its investigation on the "scope and origins" of Whitlam's remarks.[65] Suspicions lingered, however, and Judge Gros returned to the issue later in the case, all but declaring Whitlam's denials to be untrue, and accusing Lachs of staging a cover-up.[66] The "indiscretions" of the Australian side were inevitably seized upon by the French media and supporters of France.[67]

Sir Garfield Barwick remained "indignant" at the embarrassment caused to him by this episode.[68] He resented the accusation that he himself had leaked the vote, and, while he believed he had "fully convinced at least the greater majority of

61. *Aust Interim Order, supra* note 59, at 106, § 35; *NZ Interim Order, supra* note 59, at 142, § 36.

62. *Aust. Interim Order, supra* note 59, at 105, § 33, *NZ Interim Order, supra* note 59, at 142, § 34.

63. *See Nuclear Tests (Aust) J/m*, 1974 ICJ at 293, § 29 & n.2 (separate opinion of Judge Gros).

64. *Id.* at 294, § 30 (separate opinion of Judge Gros) (quoting Whitlam letter).

65. *Id.* at 293, § 30 (separate opinion of Judge Gros); *see also id.*, at 273 (declaration of President Lachs).

66. *See id.* at 294, § 31 (separate opinion of Judge Gros) (expressing skepticism at the "crystal-gazing explanation relied on by [Whitlam]" and doubting the "attribution of an oracular role to the Australian advisers"); *see also id.* at 295-96, §§ 32-35 (separate opinion of Judge Gros) (lamenting the termination of the investigation).

67. *See* Cot, *supra* note 36, at 253 (quoting *Le Monde*'s edition of January 20-21, 1974 concerning Whitlam's "indiscretions"); De Lacharrière, *supra* note 15, at 250 (contending that the leaking of the vote for the "benefit" of a party was "unprecedented" and complaining that the Court had failed to take adequate steps to investigate). One commentator seized upon this "bizarre" incident as "confirm[ing]" his doubts about the "political wisdom and good judgment" of the Whitlam government in bringing the case in the first place. McWhinney, *supra* note 3, at 36.

68. *See* Barwick, *supra* note 42, at 256-57 ("I straight away expressed my indignation to Whitlam and said that the least he could do was to apologise forthwith to the President of the court, which I understand he did.").

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the judges that I had not made any disclosure," he felt that Judge Gros remained unpersuaded: decades later, Barwick wrote, "I suppose in his heart to this day [1995] Gros believes I disclosed to Whitlam the result of our unpublished determination."[69] In all, according to Barwick, "the incident left a bad taste in my mouth. I was the victim of a piece of egotistical exhibitionism of a very poor kind."[70] Whether this contributed to the later Whitlam-Barwick feud is best left to students of the 1975 Australian "Constitutional Crisis."

VII. – French Testing Continues During the Jurisdictional/ Admissibility Phase

A more serious dissonant note was struck by the French government, which soon made it known that it did not view the Court's interim measures order as valid, and that, accordingly, it would resume atmospheric testing.[71] In mid-July 1973, there took place the first of a series of five atmospheric tests of French nuclear weapons at Mururoa Atoll.[72] Future tests took place in August and September 1973. The implications were clear: the ICJ's interim order, though theoretically carrying force of international law, would not be obeyed, there was no guarantee that a final order (if granted) would be complied with.[73] Indeed, the principal enforcement mechanism for ICJ judgments – action by the UN Security Council pursuant to Article 94 of the UN Charter – was potentially ineffectual, since France held a Security Council veto.[74]

69. *Id.* at 256. Judge Gros later expressed skepticism at the "oracular" abilities Whitlam ascribed to his advisors, and stated that he disagreed with ICJ President Lachs's earlier decision to close the inquiry. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 294 (separate opinion of Judge Gros).

70. Barwick, *supra* note 42, at 256. According to Barwick, "[Whitlam] had nominated almost accurately the majority by which he said it had won. He well knew of course that the judgment had not been published. A moment's consideration would have indicated the peril in which he placed me in making such a premature and unwarranted public statement." *Id.* He elaborated:

When the President [Lachs] asked me what would happen if a like disclosure were made of an unpublished decision of the High Court, I made it plain that if the Prime Minister had done to that court what he had done to this he would be severely dealt with, probably for contempt, notwithstanding the high office he held.

Id.

71. This was also met with strong internal opposition within France. Jean Pierre Cot, then a member of France's National Assembly, felt that "the contempt shown by the French government for international justice throughout this process, culminating in the abrogation of the declaration accepting the compulsory jurisdiction, leaves a feeling of bitterness. Is this the image of France? Cot, *supra* note 36, at 271.

72. *In Mururoa, Paradise Now Has Atomic Aura; Romance and Destruction Fallout Through Coconuts*, N.Y. Times (July 22, 1973); *France Sets off 2d Atomic Blast*, N.Y. Times (July 29, 1973); *see also* Elkind, *supra* note 60, at 39.

73. *See* Ris, *supra* note 3, at 111 (arguing that the continuation of the test program, "and the present inability of the world community to stop or even postpone it, raises serious questions about the value of available international mechanisms for solving conflict between nations and preventing global environmental damage").

74. *See* Lellouche, *supra* note 12, at 617. In the prior *Anglo-Iranian* and *Icelandic Fisheries* cases, the respondent states (Iceland and Iran) had refused to obey interim measures issued by the ICJ. *See generally* Frankel, *supra* note 13, at 168 (speculating that Judge Petrén's [per Frankel] desire for a "more stringent" jurisdictional test "was influenced by the refusal of Iran and Iceland to abide by recent indications of interim measures").

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During oral argument, several judges had questioned counsel on the issue of whether the General Act properly conferred jurisdiction.[75] The issue was highlighted further still during June 1973, when the Court heard argument in a claim by Pakistan seeking repatriation of prisoners of war captured during the India-Pakistan War of 1971 – in that case, the General Act was invoked as one basis for ICJ jurisdiction.[76] In its June 1973 Provisional Measures decision, the Court directed that "the written proceedings shall first be addressed to the questions of the jurisdiction of the Court . . . and of the admissibility of the Application," and set a briefing schedule to address these points, with a French response due in the first half of 1974.[77]

France, however, distanced itself further from the case. In January 1974, in what was seen by one French commentator as "retaliat[ion]" for the 1973 order,[78] France simultaneously denounced the General Act ("without prejudice" to its position that the instrument was no longer in force)[79] and withdrew its 1966 declaration of the compulsory acceptance of ICJ jurisdiction.[80] France forwent the chance to submit memorials, and failed to appear or appoint an Agent at the oral hearings on jurisdiction and admissibility that took place at The Hague on July 4-11, 1974.[81]

VIII. – France Announces a Halt to Atmospheric Testing – and the ICJ Judges Take Note

But the French government was not silent on the issue of nuclear testing. Far from it: on June 8, 1974, the office of President Giscard d'Estaing stated:

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75. *See Case Concerning Nuclear Tests (Austl. v. Fr.) – Oral Arguments on the Request for the Indication of Interim Measures of Protection,* Minutes of the Public Sittings held at the Peace Palace, The Hague, on 21, 22, 23 and 25 May 1973, at 141.

76. *See Trial of Pakistani Prisoners of War (Pakistan v. India) – Oral Arguments,* Minutes of the Public Sittings held at the Peace Palace, The Hague, from 4 to 26 June 1973, at 53 (Pakistan counsel contending that General Act of 1928 was "binding between India and Pakistan"); *see also* Merrills, *supra* note 23, at 142-43 (summarizing India's counter arguments). The *Pakistani Prisoners of War* case was later discontinued.

77. *Aust Interim Order, supra* note 59, at 106, § 35; NZ Interim Order at 142, § 36. The ICJ also indicated that it would defer making a decision on Fiji's applications to intervene until after it had pronounced on the admissibility of the two cases. *See Nuclear Tests (Austl. v. Fr.),* Order, 1973 ICJ 320, 321 (July 12); *Nuclear Tests (N.Z. v. Fr.),* Order, 1973 ICJ 324, 325 (July 12).

78. Lellouche, *supra* note 12, at 636.

79. An extract of France's January 10, 1974 General Act denunciation appears at *ICJ Pleadings, Nuclear Tests (Austl. v. Fr.), supra* note 35, at 55.

80. Guy Ladreit de Lacharriere, of the French Foreign Office, justified the withdrawal of France from ICJ compulsory jurisdiction by reference to the supposed irregularities in the 1973 interim measures, which persuaded France that it could no longer "trust" the Court to reject jurisdiction based on the wording of its reservation. Ladreit de Lacharriere, *supra* note 28, at 251. By contrast, Professor Jean-Pierre Cot of the University of Paris I, while not necessarily agreeing with the Court's 1973 decision, lamented that "[t]he withdrawal of France, at a time when the International Court of Justice is in crisis, seriously undermines the very principle of international justice. The act has serious consequences." Cot, *supra* note 36, at 253. Both these individuals went on to high international judicial office: Ladreit de Lacharrière as an ICJ judge from 1982 until his death in 1987.

81. Indeed, it detonated one bomb on July 7, 1974, *during* oral arguments. Stern, *supra* note 4, at 302.

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> [I]n 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.[82]

This announcement was briefly discussed during the July 1974 oral argument; counsel downplayed its importance, arguing they it did not constitute an "'explicit and binding undertaking to refrain from further atmospheric tests.'"[83]

Other, subsequent statements came to the attention of the Court. At a July 25, 1974 press conference at which President Giscard stated:

> [O]n 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 . . . .[84]

The Court also became aware of a September 25, 1974 General Assembly speech by French Minister for Foreign Affairs, where he stated that France had "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,"[85] as well as other statements made by officials in television interviews and press conferences from August to October 1974.[86]

Sir Garfield Barwick describes what happened next:

> After we had retired to consider what we heard and were in the course of preparing judgments, the President assembled the court claiming, with the support of other judges, that the case had become "moot." It seems that there had been a press statement that the French President d'Estaing had said in a press conference, in the course of rebuffing a journalist's suggestion, that of course there will be no more aerial atomic testing, or words which carried the same import.[87]

82. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 265, § 34; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 469, § 35. The text of this statement was formally conveyed to the New Zealand Government by the French Ambassadors in Wellington and Canberra. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 265, § 34; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 469, § 36. It gave rise to further correspondence between the New Zealand and French governments, leading to a June 11, 1974 letter from President Giscard to Prime Minister Kirk which repeated the June communique's statement that France was "going over to underground testing." *Nuclear Tests (NZ) J/m*, 1974 ICJ at 470-71, § 38.

83. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 261, § 27 (quoting Australian Attorney-General's statement July 4, 1974 hearing on admissibility); *Nuclear Tests (NZ) J/m*, 1974 ICJ at 465, § 27 (quoting similar comments by NZ Attorney-General made in diplomatic correspondence dated July 3, 1974).

84. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 266, § 37; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 471, § 40.

85. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 266, § 39; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 471, § 42

86. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 266, §§ 38, 40; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 471, §§ 41, 43.

87. Barwick, *supra* note 42, at 257.

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IX. – The Dismissal

On December 20, 1974, by 9-6 majority, the Court issued tandem judgments dismissing the two cases on the ground that that "the claim[s] of Australia [and New Zealand] no longer ha[ve] any object and that the Court is therefore not called upon to give a decision thereon."[88] The majority explained that it was necessary to decide, as an "essentially preliminary" matter, whether a "dispute" existed, in view of the stated objectives of the parties in bringing the claims and the subsequent "authoritative statements" of the French government concerning atmospheric testing.[89]

Examining the "diplomatic correspondence of recent years between Australia and France," the Court held that Australia's "objective" had been to "bring about the[] termination" of "atmospheric tests in the South Pacific region."[90] The Court made precisely the same factual determination concerning New Zealand's objective,[91] and, as to each applicant, concluded that if it had received an "unqualified" or "firm" undertaking from France to cease atmospheric testing in the South Pacific, it "would have regarded its objective as having been achieved."[92]

The Court then indicated that it would take account of the "further developments, both prior to and subsequent to the close of the oral proceedings" bearing on the issue of whether a dispute existed, namely the series of "consistent public statements" by France, all of which were in the "public domain."[93]

The Court then stated what it considered to be the relevant law:

> 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,

88. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 272, § 62; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 477, § 65.

89. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 259-60, §§ 20, 24; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 462-63, §§ 20, 24.

90. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 260, § 26.

91. *Nuclear Tests (NZ) J/m*, 1974 ICJ at 464, § 26.

92. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 261, § 27 (analyzing reaction of Australian Prime Minister Whitlam and his Attorney-General); *Nuclear Tests (NZ) J/m*, 1974 ICJ at 464-65, §§ 27-28 (analyzing reactions of New Zealand Prime Minister Kirk and his Attorney General). It furthermore held that the "fons et origo" of both cases 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," with the result that the precise formulation of the requested remedies (which, in Australia's case, involved a request for declaratory relief) were not decisive in characterizing the parties' objective. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 263, § 30; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 467, § 31.

93. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 263-64, §§ 31-32; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 468, §§ 32-33. The court added that although it was mindful of the principle of "audi alteram partem," the post-hearing statements "merely supplement[ed] and reinforce[ed] matters already discussed in the course of the proceedings, statements with which the Applicant must be familiar." *Nuclear Tests (Aust) J/m*, 1974 ICJ at 265, § 33; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 469, § 34.

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> 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.
> 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 bond – 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.
> 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.[94]

The Court continued:

> 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.[95]

The Court, applying this test, noted first that the President of the Republic himself, as "Head of State," had committed to the cessation of tests; a fact that indicated "an engagement of the State, having regard to their intention and to the circumstances in which they were made."[96] It construed these statements as "convey[ing] to the world at large" a commitment to "terminate these tests," in terms that indicated a unilateral "undertaking possessing legal effect."[97] It continued:

> It is true that the French Government has consistently maintained, for example in a Note dated 7 February 1973 from the French Ambassador in Canberra to the Prime Minister and Minister for Foreign affairs of Australia, that it "has the conviction that its nuclear experiments have not violated any rule 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

94. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 267-68, §§ 43-45; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 472-73, §§ 46-48.
95. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 268, § 46; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 473, § 49.
96. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 269, § 49; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 474, § 51.
97. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 269, § 51; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 474, § 53.

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> 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.[98]

The applicants' "objective" having been achieved by the issuance of this binding commitment, and there being no claim for damages for past testing, the Court held that, the object of the litigation was fully satisfied, there was no longer a "dispute" in existence and "any further finding would lack a raison d'être."[99] It added:

> 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.[100]

Two concurring judges went even further than the majority. Judge Petrén indicated that he would have been prepared to dismiss the case on the basis that it presented a non-justiciable political dispute, adding that there existed no norm barring nuclear testing (a fact which, he considered, removed any basis for a dispute).[101] Judges Forster, Ignacio-Pinto and Gros likewise found that the dispute was nonjusticiable,[102] with Judge Gros also reserving scorn for Prime Minister Whitlam's earlier "leak" of the case (and President Lachs's "hesitation to get to the bottom of the incident").[103]

The six dissenting judges strongly disagreed with the majority's conclusions. Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock delivered a joint dissenting opinion which emphasized that the applicants had not only sought an order prohibiting future tests, but had also sought a declaration declaring the prior tests to be unlawful – which the French Government's statements did not render moot.[104] The dissenting judges furthermore were prepared to uphold jurisdiction under Article 17 of the General Act, as well as find that the claims were legally admissible (while reserving for the merits stage the issue of whether

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98. *Nuclear Tests (Aust) J/m,* 1974 ICJ. at 270, § 51; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 474-75, § 53.

99. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 270, §§ 52-53, 272, § 56; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 475-76, §§ 55-56, 59.

100. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 271 § 58; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 477, § 61. As a consequence of dismissing the cases, the Court also dismissed Fiji's requests to intervene. *Nuclear Tests (Austl. v. Fr.), Application to Intervene, Order of 20 December 1974*, 1974 ICJ 530, 531 (Dec. 20); *Nuclear Tests (Austl. v. Fr.), Application to Intervene, Order of 20 December 1974*, 1974 ICJ 535, 536 (Dec. 20). Judges Gros, Petren, and Ignacio-Pinto made declarations indicating that they doubted Fiji's ability to intervene. 1974 ICJ. at 322, 326.

101. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 302-03 (separate opinion of Judge Petren); *Nuclear Tests (NZ) J/m*, 1974 ICJ at 487 (separate opinion of Judge Petren) (Petren holding that the case "belong to a highly political domain where the norms of legality or illegality are still at the gestation stage").

102. *See Nuclear Tests (Aust) J/m*, 1974 ICJ at 288, § 21 (separate opinion of Judge Gros); *Nuclear Tests (NZ) J/m*, 1974 ICJ at 480 (separate opinion of Judge Gros); *Nuclear Tests (Aust) J/m*, 1974 ICJ at 308-09 (separate opinion of Judge Ignacio-Pinto); *Nuclear Tests (NZ) J/m*, 1974 ICJ at 493 (separate opinion of Judge Ignacio-Pinto); *Nuclear Tests (Aust) J/m*, 1974 ICJ at 275 (separate opinion of Judge Forster); *Nuclear Tests (NZ) J/m*, 1974 ICJ at 479 (separate opinion of Judge Forster).

103. *Nuclear Tests (Aust) J/m*, 1974 I.C.J at 296, § 34 (separate opinion of Judge Gros); *see supra* notes 63-70 and accompanying text.

104. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 312-13, § 2-6 (joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock); *Nuclear Tests (NZ) J/m*, 1974 ICJ at 494-95, §§ 2-6 (joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock).

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there existed a customary norm barring nuclear tests).[105] Judge De Castro and Judge ad hoc Sir Garfield Barwick delivered separate dissents that reached the same conclusions, and added some trenchant comments on the mootness finding.[106] Sir Garfield (who acknowledged later that he was "[p]erhaps... the most vociferous in condemning as unjudicial what was being done"[107]) wrote:

> Nothing is found as to the duration of the obligation although nothing said in the Judgment would suggest that it is of a temporary nature. There are apparently no qualifications of it related to changes in circumstances or to the varying needs of French security...
>
> The Judgment finds an intention to enter into a binding legal obligation after giving the warning that statements limiting a State's freedom of action should receive a restrictive interpretation... I regret to say that I am unable to do so. There seems to be nothing, either in the language used or in the circumstances of its employment, which in my opinion would warrant, and certainly nothing to compel, the conclusion that those making the statements were intending to enter into a solemn and far-reaching international obligation... I would have thought myself that the more natural conclusion to draw from the various statements was that they were statements of policy...[108]

Sir Garfield also chided the majority for its decision to decide the case without first informing the applicants of the possibility it might declare the dispute moot, remarking that this seemed to be based on an "unconvincing" claim of "judicial omniscience."[109]

The ICJ did leave one small sliver of hope for the applicants. In paragraph 63, the majority stated:

> 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 [ICJ] Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for Pacific Settlement

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105. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 358, § 94, 365-66, § 109 (joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock); *Nuclear Tests (NZ) J/m*, 1974 ICJ at 509-10, §§ 29-30 (joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock). The joint dissenting opinion also expressly rejected the notion that this dispute was "political," holding that the applicants had "invoke[d] legal rights" and did not "merely pursue [their] political interest"; they "expressly ask[ed] the Court to determine and apply what [they] contend[ed were] existing rules of international law." *Nuclear Tests (Aust) J/m*, 1974 ICJ at 366, § 110 (joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock); *Nuclear Tests (NZ) J/m*, 1974 ICJ at 518, § 45 (joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock).

106. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 373-74 (dissenting opinion of Judge de Castro); *Nuclear Tests (NZ) J/m*, 1974 ICJ at 524 (dissenting opinion of Judge de Castro); *Nuclear Tests (Aust) J/m*, 1974 ICJ at 391-93 (dissenting opinion of Judge ad hoc Barwick); *Nuclear Tests (NZ) J/m*, 1974 ICJ at 524 (dissenting opinion of Judge ad hoc Barwick).

107. Barwick, *supra* note 42, at 275.

108. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 448-49 (dissenting opinion of Judge ad hoc Barwick) at 372; *see also Nuclear Tests (NZ) J/m*, 1974 ICJ at 525 (dissenting opinion of Judge ad hoc Barwick.

109. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 442 (dissenting opinion of Judge ad hoc Barwick); *see also Nuclear Tests (NZ) J/m*, 1974 ICJ at 525 (dissenting opinion of Judge ad hoc Barwick).

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of International Disputes, which is relied upon as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of such a request.[110]

The import of this paragraph would be tested twenty years later.

X. – The Fallout

Reaction to the ICJ's decision was mixed. Many found fault with the dismissal, both procedurally – the ICJ had not afforded parties the opportunity to be heard and argue the significance of the French declaration[111] – as well as substantively.[112] Even those who were sympathetic with the Court's perceived political embarrassment found the "solomonic" judgment "far from being totally satisfying; particularly for the jurist concerned with legal purity and with the development and strengthening of the international judicial process."[113] Many agreed with Judge ad hoc Barwick's (and the other dissenters') assessment that, even assuming that a unilateral declaration was theoretically capable of binding a state, these particular statements were non-committal in nature and not a valid basis for terminating a legal dispute.[114] Two argued that at least one of the claims had not actually been

110. *Nuclear Tests (Aust) J/m*, 1974 ICJ at 272, § 60; *Nuclear Tests (NZ) J/m*, 1974 ICJ at 477 § 63.

111. *See* John Dugard, *The Nuclear Tests Cases and the South West Africa Cases: Some Realism About the International Judicial Decision*, 16 Va. J. Int'l L. 463, 476 (1976); R. St. J. MacDonald & Barbara Hough, "The Nuclear Tests Case Revisited," 20 Ger. Y.B. Int'l L. 337, 356-57 (1977). Dugard observed that the Court's methodology was at odds with a 1956 Advisory Opinion where it held that "[t]he judicial character of the Court requires that both sides directly affected by these proceedings should be in a position to submit their views and their arguments to the Court." *Judgments of the Administrative Tribunal of the International Labor Organization Upon Complaints Made by UNESCO, Advisory Opinion*, 1956 ICJ 77, 86. In Dugard's view, "[b]y neglecting to inform Australia and New Zealand of its intention to base a decision on the French statements and its consequent failure to allow the applicants to 'submit their views and their arguments' on this subject, the Court surely undermined its judicial character." Dugard, 16 Va. J. Int'l L. at 476.

112. *See* Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 Am. J. Int'l L. 1, 27-28 (1977) (analyzing the French declarations one by one and doubting whether they evinced any binding "commitment"); MacDonald & Hough, *supra* note 111, at 353-54. Rubin also considered that the law of unilateral declarations itself was only vaguely understood until the Court issued its December 1974 opinion, meaning that it was hard to understand how France could have understood itself to have been bound by its own words. *See* Rubin, 71 Am J. Int'l L. at 26.

113. Jose Juste Ruiz, Mootness in International Adjudication: The Nuclear Tests Cases, 20 Ger. Y.B. Int'l L. 359, 373 (1977). For a more recent critique, see Camille Goodman, *Acta Sunt Servanda: A Legal Regime for the Unilateral Acts of States at International Law*," 25 Austl. Y.B. Int'l L. 43, 72 (2006) (arguing that the majority erected a "'legal fiction'" from which it "deduced" an "intention" that France intended to be legally bound by its statements, even though this might not subjectively have been true).

114. Even commentators who were sympathetic to the French position were skeptical of the Court's interpretation of the 1974 French government statements. Lellouche, *supra* note 12, at 622 (arguing that the 1974 decision "offers a rather dubious interpretation of the Parties' intentions. Although the Court has the discretionary power to moot a case, the Court exceeded it by a decision to moot when both sides still maintained their basic contentions. France never said that there was no dispute... Similarly Australia and New Zealand could have withdrawn their case if they had been satisfied by the 1974 French statements... By not doing so, the claimants maintained their request for a declaratory judgment on the legality of the tests. The decision to moot the case thus amounted to the Court's distorting the real intentions of the parties.").

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"mooted" because the applicants had called into question the legality of tests predating the declaration, and there was no reason not to adjudicate that issue.[115]

Other commentators expressed frustration at the apparent U-turn between the June 1973 order purporting to bar the tests (which implied a robust judicial desire to engage in the dispute) and the December 1974 dismissal (which indicated the exact opposite). John Dugard, recalling the controversies associated with the 1966 *South West Africa* decision – in which the Court "s[ought] refuge in technical niceties to escape a politically explosive issue" (in that case the validity of South Africa's occupation of Namibia), felt that the 1974 dismissal represented precisely the same kind of questionable decision-making in order to "abstain from committing itself" on the "highly debatable and controversial" issue of whether there was a "rule prohibiting nuclear tests."[116] He felt that the Court had, in both instances, acted in a reactive, political manner: its 1973 decision borne of a desire not to be seen as endorsing atmospheric tests, and its 1974 decision borne of a fear that if it took jurisdiction and banned the tests "France would curtly reject any adverse decision by the Court and... the French representative would veto any attempt aimed at the enforcement of an adverse decision by the Security Council."[117] Franck noted that if jurisdiction had been denied (or, indeed, if Australia/New Zealand's claims on the merits had been rejected), the Court might have been seen as undermining the 1963 Limited Test Ban Treaty.[118] Pierre Lellouche went so far as to say that the Court's hesitation to rule on substantive issues, and the contradictions between the 1973 and 1974 orders, meant that "the 'fall-out' of this case may be much more dangerous than the radioactive pollution which resulted from the French tests themselves."[119]

In retrospect, some critics were particularly skeptical of the 1973 order, particularly the holding that Article 41 gave it the power to grant injunctive relief

115. *See* Ruiz, *supra* note 114, at 366 (observing that the Court showed "very little concern for the consideration that its judgment – even if merely declaratory – could have constituted the basis for an eventual determination of the international responsibility of the respondent state, or, in any event, an important contribution to the reinforcement of the legal position of the Applicant"); Jean-Paul Ritter, *L'Affaire des essais nucléaires et la notion de jugement déclaratoire*, 21 Annuaire français de droit international 278, 291 (1975) (noting that New Zealand's declaration was worded in a way that arguably sought a declaration that *past* tests were unlawful).

116. Dugard, *supra* note 111, at 464-65, 483; MacDonald & Hough, *supra* note 111, at 345-46. Dugard further considered that the "strong disagreements manifested in the separate opinions" reflected concern over the "difficulties" that would be confronted at the "merits stage." Dugard, *supra* note 111, at 483.

117. Dugard, *supra* note 111, at 486.

118. *See* Franck, *supra* note 2, at 612 (characterizing the result as "a judicial avoidance of confrontation with political authority," and noting that "[h]ad the Court taken on the issue of legal responsibility they might also have produced a majority vote that the [Limited Test Ban Treaty] created no legal rights *erga omnes* and no binding customary law applicable to nonsignatories" even had the Court found there to be a *Trail Smelter*-type obligation on France to avoid causing injuries to its neighbors, "the majority might still have found a lack of convincing evidence of determinable injury to the applicants attributable solely to the respondent's conduct"); P. de Visscher, "Remarques sur l'évolution de la jurisprudence de la Cour internationale de justice relative au fondement obligatoire de certains actes unilatéraux," in *Essays in International Law in Honor of Judge Manfred Lachs* 459, 459-60 (J. Makaraczyk ed., 1984) (making similar observations about the "cruel dilemma" posed by the case; observing that this accounts for the "discomfort" one might feel in reading the 1974 judgment).

119. Lellouche, *supra* note 12, at 616; *see also id.* at 635 (arguing that "the result of the court's attitude" was "to leave the vast area of nuclear matters outside the law"); *see also* Dugard, *supra* note 111, 463-64 (stating that the *Nuclear Tests Cases* and the earlier *South West Africa* decision of 1966 "suggest that all is not well with the Court").

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even before adjudicating jurisdiction. Had it adopted a more stringent jurisdictional test at this threshold point (and first demanded a full hearing on the question of "General Act" jurisdiction), it might have avoided either the embarrassment of issuing an order that was later disobeyed, or the awkward maneuvering that led to the 1974 judgment dismissing the case.[120] Of course, this assumes that the Court should have fashioned its procedures to avoid controversy or embarrassment at the hands of an absent party – a view that itself is debatable.[121]

Whether or not they agreed with the decision, virtually all commentators acknowledged that the Court was under considerable political pressure.[122] Writing years later, Barwick speculated that the pressure may also have derived from non-nuclear causes:

> I have no doubt many of the nations were pleased to see the result because there were many instances in Europe of fumes and gases passing out of the territory of their origin to adjoining territory.[123]

The individual composition of the majority (and the minority) also lent itself to criticism. It was noted, for example, that "judges with past careers in government

120. *See* Lellouche, *supra* note 12, at 617 (arguing that the Court "paid heavily for its own imprudence" in issuing the 1973 orders when in 1974 it "retreated from its own positions for the sake of salvaging what could still be salvaged of 'international harmony'"); *id.* at 635 (arguing that the 1973 Order went too far and that "the Court should have at least answered the question of its own competence"); *see also* Romano, *supra* note 3, § 9.4.1 ("With much hindsight, the simplest and certainly the most direct solution for the Court probably would have been to rule on the jurisdictional issue forthwith and then, if it found in favor of jurisdiction, to proceed to at least a preliminary examination of the substantive legal issues, with the right to grant interim relief measures at any time.").

121. "It may not be always correct to state that the Court's legitimacy would be eroded if its orders are violated. Maybe it would be given greater legitimacy for what may be called as a bold and unconventional judgment..." Khosla, *supra* note 37, at 334 n.68. For his part, Dugard warned that the Court's seeming desire to avoid the embarrassment of non-compliance revealed a weakness in the Court's structure and meant that "States should assess the capabilities of the Court in the realist perspective before resorting to it for the settlement of disputes with highly charged political implications." Dugard, *supra* note 111 at 501.

122. Stern, *supra* note 4, at 303-04 (while praising the "clever" means by which the Court defused the dispute, acknowledging that had it dismissed on jurisdictional/admissibility grounds, it would have disappointed those who expect it to rule on important cases, whereas if it had reached the merits, France would have accused it of "'abuse of power'" and treated the decision as a nullity); Lellouche, *supra* note 12, at 616-17 (commenting on the ICJ's "obvious hesitation... to deal with the acute political controversy raised by the litigation in the absence of any consensus in the international community on the question of nuclear disarmament" and the "unappealing alternatives" it faced in 1974 of "either declaring itself incompetent... which would have been tantamount to inviting France to renew atmospheric tests, or continuing the trial on the merits" in which case "compliance could hardly be expected from France... or China"; while upholding the legality of atmospheric tests would "reverse a decade of efforts to limit nuclear testing and weaken the commitments of 102 countries to the 1963 Test Ban Treaty"); Ruiz, *supra* note 114, at 368, 371 (noting the "unappealing options" facing the Court in 1973, the embarrassment of France's "blatant disregard" of the interim measures, and the "fragile position" in which it found itself in 1974); Khosla, *supra* note 37, at 334-35 (noting the Court's "complicated" situation: if it "tried to convert the global ideal into reality by legal pronouncement" by declaring the tests contrary to customary international law it risked "confrontation with the political authority," whereas if it decided that the applicants had not shown any injury, it "ran the risk of erosion of its legitimacy because such a decision would be seen [by some] as permitting some sort of atmospheric nuclear testing – a situation contrary to the global ideal"); *see also* Romano, *supra* note 3, § 9.4.2. Franck also noted that, in dismissing the case early, the Court "also avoided the possibility of doing another *Barcelona Traction*, *i.e.*, of having a prolonged and expensive litigation on the merits resulting in an eventual dismissal of the application on an essentially procedural ground." Franck, *supra* note 2, at 613.

123. Barwick *supra* note 42, at 275.

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constituted the majority and those with predominantly academic-judicial backgrounds were in the minority."[124] Nationality also may have been a factor: "the two Francophone African judges, Forster (Senegal) and Ignacio-Pinto ([Benin]), and the French national judge, Gros, were in the majority, while the Commonwealth judges, Onyeama (Nigeria), Waldock (United Kingdom) and Barwick (Australia), were in the minority."[125] Moreover, the one Commonwealth judge to vote for France, Justice Singh, was an Indian national – leading some to speculate that he was influenced by the fact that "[o]n May 18, 1974, India [had] detonated its first nuclear weapon, thus joining the nuclear club."[126]

Not all reaction was negative. Some, such as Ted McWhinney of Canada, regarded the 1973 decision as having been so improvident an exercise in "judicial policy-making" that the 1974 decision represented a necessary "corrective."[127] Some other commentators, particularly from the civil law tradition, warmly endorsed the Court's holdings concerning legally binding unilateral declarations.[128] An even more enthusiastic view was expressed by Thomas Franck, who remarked that, although the ICJ's decision represented "only a mouse of a decision as to the specific issue," nevertheless confirmed an important rule of law concerning unilateral declarations.[129] The rule, he opined, had precedential basis,[130] and the

124. Dugard, *supra* note 111, at 494 (footnotes omitted).

125. Dugard, *supra* note 111, at 499. As Stern notes, however, even the dissenting judges carefully confined themselves to expressing views on jurisdiction and admissibility; avoided expressing any view on the actual merits issue, i.e., the legality of nuclear tests. Stern, *supra* note 4, at 303.

126. Dugard, *supra* note 111, at 498. Judge Singh had earlier voted in favor of the 1973 interim measures order and, indeed, had written an article in 1959 "denou[ncing] as illegal the testing of nuclear weapons in peace." *Id.* (citing N. Singh, *Nuclear Weapons and International Law* 227-35 (1959)).

127. McWhinney, *supra* note 3, at 45-46.

128. *See, e.g.*, Sergio Carbone, *Promise in International Law: A Confirmation of its Binding Force*, 1 Italian Y.B. Int'l L. 166, 166 (1975) (arguing that the ruling on unilateral declarations was "decisive" in "contribut[ing]... to the clarification of certain aspects which have been made the object of lengthy and thorough debate especially by Italian doctrine: namely, the legal value of a 'promise'"); Kwiatkowska, *supra* note 4, at 182 (discussing important impact of rule). For a more nuanced analysis, recognizing the potential benefits of the announced rules on universal declarations but also acknowledging there was room for debate over its antecedents, *see* J.D. Sicault, "Du caractère obligatoire des engagement unilatéraux," [1979] Revue générale de droit international public 640; *see also* de Visscher, *supra*, note 118.

129. Franck, *supra* note 2, at 613. For a more recent analysis of the legal principles potentially arising from unilateral declarations, *see, generally*, Goodman, *supra* note 113.

130. *See* Franck, *supra* note 2, at 615-16 (surveying past instances, including the *Eastern Greenland* dispute, where unilateral declarations were said to have potentially binding legal effect); Khosla, *supra* note 37, at 339-40; Stern, *supra* note 4, at 329-30. Two previous decisions arguably are on point: (1) the *Eastern Greenland* case, where a verbal undertaking conveyed by the Foreign Minister of Norway to the Danish government, indicating that Norway would not object to Danish sovereignty over Greenland, had been held to constitute an "unconditional" undertaking that was "binding" on Norway. *Legal Status of Eastern Greenland (Den. v. Nor.)*, Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, at 71 (Apr. 5); and (2) the *Temple* case, where Thailand was precluded from denying a boundary line, by reason of its long silence in failing to object to it. *Case Concerning the Temple at Preah Vihear*, 1962 ICJ 6, 26-27. Professor Rubin considered these two cases distinguishable because: (a) the *Eastern Greenland* case dealt with statements made in the context of negotiations, *see* Rubin, *supra* note 112, at 4-5; *see also* Goodman, *supra* note 113, at 72; and (b) in *Temple* "the critical issue was not the legal effect of any discrete unilateral act but of long continued practices the repudiation of which would disrupt what the ICJ regarded as an established stability." *See* Rubin, *supra* note 112, at 24. Thus, he contended that "at the time the ICJ produced its Judgment in the *Nuclear Tests* cases there was no real support in theory for the proposition that a unilateral declaration, not made in a negotiating context and provoking no reaction from second states, created an obligation or, to the extent that it created legal effects, put them beyond reach of cancellation

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Court's opinion represented an important elaboration of that rule – as well as presenting the possibility that, unlike the rules of "estoppel" in common law, a declaration might become binding even in the absence of "reliance" by the states affected by the unilateral undertaking.[131]

In a further prescient note, Franck noted that the Court's reservation of power (in paragraph 63) to "examine" the situation in the event of future non-compliance raised the possibility that the applicants could return to the court and effect a "revival, *nunc pro tunc*, of the terminated proceedings" – a possibility that assumed greater importance here in light of what he considered France's "petulant renunciation" of the General Act.[132]

XI. – Later Reflections

Any disappointment in the Australian/New Zealand camps abated in time. In 2008, Australian team member Sir Eli Lauterpacht reflected that:

> the case came to a successful conclusion in the sense that the French were led to undertake unilaterally that they would discontinue the tests after 1973 or 1974. That is to say, they would discontinue atmospheric nuclear testing, not that they would discontinue underground nuclear testing.[133]

Of course, the opposite may also be true in that the 1974 decision "substantially satisfied the basic objective of France that wanted to forestall a judicial condemnation of its freedom to perform this last series of atmospheric tests, considered a necessary step in its program of national defense."[134]

For his part, New Zealand's counsel Sir Kenneth Keith wrote:

> My whole instinct as a common lawyer says that the dissenters were right: a hearing should have been given. And yet, looking back, I hesitate. I wonder just what the parties would have done. Would their action have interfered with the subtle role which the Court, or some of its members, appear, in retrospect, to have been playing in nurturing the settlement, the fragile agreement, that was starting to appear?... Can we say then that the Court showed considerable

by the declarant state."); *cf.* Reisman & Arsanjani, *supra* note 3, at 412 (commenting that the ICJ's *Nuclear Tests* cases "went further than it had in previous holdings in relying upon a unilateral statement that had been made *erga omnes* and holding it to be binding *erga omnes*"); Sicault, *supra* note 128 at 687 (noting the irony of France benefiting from the announced rule of unilateral declarations that cannot be revoked, when previously France's diplomats in 1957 had expressed concern that a unilateral declaration might be revoked arbitrarily by the declarant).

131. Franck, *supra* note 2, at 617-18.

132. *Id.* at 618.

133. Interview by Lesley Dingle with Professor Sir Eli Lauterpacht, Cambridge University (Squire Law Library Eminent Scholars Archive), Third Interview (Mar. 13, 2008), *available at* http://www.sms.cam.ac.uk/media/1176823; *see also* Frankel, *supra* note 13, at 176 ("It seems apparent... that the *Nuclear Tests Cases* were instituted not so much to secure compliance with the Court's decision as to gain publicity and sympathy for a cause. France's announcement subsequent to the ICJ's orders of plans to convert its atmospheric testing in the Pacific to underground operations by 1976 may have been in part a belated gesture of conciliation to world opinion mounted against its disregard of the Court's indication of interim measures." (footnote omitted)).

134. Ruiz, *supra* note 114, at 374.

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skill in contributing to (or it would say recognizing) the settlement of the disputes (or at least the main line of the disputes) and thereby, as a principal organ of the United Nations, adhering to and promoting a basic principle of the organization: the settlement of international disputes by peaceful means. The particular situation strongly supports a positive answer.[135]

France meanwhile remained unwilling to sign the 1963 Limited Test Ban Treaty. Its underground tests continued: it exploded 134 nuclear devices at Mururoa and Fangataufa Atolls between 1975 and 1992[136] – leading to two important sequel disputes in the decades ahead.

XII. – Tragedy in Auckland – the Rainbow Warrior

Despite the claims of harmful radioactive fallout, at no point in the 1960s or 1970s had an individual human death been alleged to have resulted directly from French governmental action in the South Pacific. In 1985, however, things changed.

French nuclear testing in the South Pacific had long been a *cause célèbre* of the international environmental movement. Playing a leading role in these international protests was Greenpeace, a private NGO which, during the 1980s, had managed to field a fleet of vessels which purported to take direct action against French underground testing by sailing near the test site and entering the so-called exclusion zone. These actions drew the ire of the French military establishment, which decided to take direct action of its own.

On July 10, 1985, an explosion occurred below the waterline of the Greenpeace ship "Rainbow Warrior" while at anchor in Auckland harbour in New Zealand. The ship soon capsized and sank, and although eleven of the crewmembers escaped harm, one, Fernando Pereira, died, drowning while attempting to recover his photographic equipment.[137] In the ensuing investigation, it became evident the vessel had been sunk by means of plastic explosives.[138] Sensationally, it emerged that those responsible for the blast – five French nationals, including two who had been arrested in New Zealand – were members of the French secret intelligence services, or DGSE, acting on government orders.[139] New Zealand's Prime Minister, David Lange, took strong exception to what his country perceived as an attack by a foreign power on its own soil, and insisted that the saboteurs be prosecuted to the full extent of the law.[140] The saboteurs pled guilty to manslaughter and were sentenced to 10-year prison terms, while France applied trade and diplomatic pressure in an attempt to secure their release.[141] Eventually, the sides agreed to a solution brokered by UN Secretary-General Javier Pérez de Cuéller, including

135. Keith, *supra* note 29, at 355-56. [not found]
136. MacKay, *supra* note 4, at 1866; Romano, *supra*, note 3, § 9.5.
137. *See* MacKay, *supra* note 4, at 1866; Romano, *supra* note 3, § 9.5.
138. *See* MacKay, *supra* note 4, at 1866; Romano, *supra* note 3, § 9.5.
139. *See* MacKay, *supra* note 4, at 1866; Romano, *supra* note 3, § 9.5.
140. *See* MacKay, *supra* note 4, at 1867; Romano, *supra* note 3, § 9.5.
141. *See* MacKay, *supra* note 4, at 1867; Romano, *supra* note 3, § 9.5.

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a non-binding adjudicative process in which both parties, having made legal submissions, agreed to follow a "recommendation" made by the Secretary-General. The recommendation provided for the release and repatriation of the alleged saboteurs to serve their sentences in French custody, a payment of $US 7 million compensation to New Zealand, a restoration of normal trade and diplomatic relations and arbitration of any further disputes.[142]

By the end of the Cold War, France's nuclear testing policy had shifted. In 1992, French Prime Minister Beregovoy announced a moratorium on all nuclear tests.[143] The root cause of the antipathy between Australia/New Zealand and France had temporarily receded.

XIII. – The 1995 Tests and the New Zealand Request for Examination

On June 13, 1995, the new French President, Jacques Chirac announced that France would resume nuclear tests at Mururoa with a new and final series of tests commencing in September 1995.[144] This news was perceived in many quarters as provocative, especially given that France had already publicly committed itself to signing a "Comprehensive Test Ban Treaty" in 1996.[145] There were other aggravating factors, including the fact that the Cold War had ended (thus removing, in many minds, the need for a highly developed nuclear deterrent) as well as heightened awareness of the effects of nuclear radiation following the 1986 Chernobyl disaster. Reaction in both Australia and New Zealand was exceptionally negative, even by the standards of prior protests.[146]

142. U.N. Secretary General, *Ruling on the Rainbow Warrior Affair Between France and New Zealand*, 26 I.L.M. 1346 (1987). The arbitration clause was resorted to in 1988, when New Zealand claimed that France had failed to enforce the full prison sentences on the various agents convicted of sabotage. In a 1990 award, an international arbitral tribunal found in New Zealand's favor, but limited its remedy to a declaration, *i.e.*, it did not award damages or specifically mandate that the agents be returned to custody. *Rainbow Warrior Arbitration (N.Z. v. Fr.)*, Int'l Arb. Rep., May 1990, Award (ad hoc tribunal Apr. 30, 1990).

143. Alan Riding, *France Suspends its Testing of Nuclear Weapons*, N.Y. Times, Apr. 9, 1992, at A5.

144. Kwiatkowska, *supra* note 4, at 124. The stated rationale of the new testing was that, although France was committed to a comprehensive test ban treaty, a further, final series of tests was needed for scientific purposes. *See id.* at 124, 132-33. In later interviews given in 1995, President Chirac stated that "France had searched for the least populated place possible and had constructed its site at Mururoa where the pollution effects of the tests were less than they would have been if conducted around Paris." *Id.* at 132. This probably did not win too many supporters in Sydney and Auckland.

145. "Clearly, President Chirac underestimated the opposition and hostility he would be faced with by countries in the Pacific and around the world." Catherine Giraud, *French Nuclear Testing in the Pacific and the 1995 International Court of Justice Decision*, 1 Asia Pacific J. Envtl. L. 125, 126 (1996); *see also* id. at 126-27; Romano, *supra* note 3, § 9.6 (world reaction "was bitter and immediate"); Kwiatkowska, *supra* note 4, at 131-32.

146. In Australia, not only was there immense political reaction (Prime Minister Keating called the first test "an "act of stupidity," Kwiatkowska, *supra* note 4, at 131, but there was also an upsurge of popular protest, along with some extremely regrettable individual acts of vandalism. It must be said that France was the subject of far more popular vitriol than the People's Republic of China, which had resumed nuclear testing a few months earlier (in May 1995). *Chinese Conduct Nuclear Bomb Test*, N.Y. Times, May 16, 1995, at A13.

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New Zealand decided to examine its legal options. With the aid of some of the legal team from 1973-74 (Sir Elihu Lauterpacht and Kenneth Keith, plus Don MacKay of the New Zealand Foreign Affairs Department), the New Zealand government devised a strategy to reopen the case and seek to enjoin the new tests, based upon paragraph 63 of the 1974 judgment (quoted above), which had somewhat enigmatically suggested that the Court would "examine the situation" in the event of future noncompliance by France with its 1974 undertakings. This was a highly innovative (and uncertain) approach: as Prime Minister Jim Bolger acknowledged at the time publicly, it was "clear [to the New Zealand Government] that there would be considerable legal difficulty in taking such a step," but there was "a strong view in the New Zealand Parliament, and in the wider community, that all possible means should be attempted in an endeavor to prevent the resumption of French testing."[147] This was an innovative, indeed audacious claim, facing obvious legal hurdles – but on the other hand, there was little to lose. Moreover, the composition of the ICJ (and its willingness to tackle tough cases) had changed significantly since 1974, especially following the end of the Cold War.

On August 21, 1995, New Zealand thus brought an application for an "examination of the situation" concerning French nuclear testing.[148] Using paragraph 63 of the 1974 judgment as its jurisdictional premise,[149] New Zealand argued that the resumption of the test program threatened imminent environmental harm in the South Pacific.[150] It sought to present evidence that the underground testing had led already to pollution and increased radiation levels in the region (as measured by plutonium levels), and that radioactive material from the underground "detonation chambers" had occasionally leaked into the surrounding waters.[151] It argued that this posed a threat to migratory species and other forms of marine life in the South Pacific, and further argued that this implicated several customary norms of environmental law, including the so-called "precautionary principle" mandating that states refrain from taking action that would harm the nationals of other states (or their property).[152] New Zealand thus argued that France should be ordered to refrain from further testing until it had conducted a full "Environmental Impact Assessment" of the proposed tests' effects on the local marine ecosystem.[153] New Zealand sought

147. MacKay, *supra* note 4, at 1870.

148. *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.) Case* ("*Request for an Examination*"), Application of August 21, 1995, *available at* http://www.icj-cij.org/docket/files/97/7187.pdf ("NZ 1995 Request").

149. "There was no precedent for reopening a case in the way that New Zealand was now attempting. Procedurally this raised novel issues. It was even unclear as to by what procedure New Zealand could move to reopen the case. The rules of Court set out clear cut procedures for initiating cases by way of Application. New Zealand avoided such a procedure, however, to quash any suggestion that New Zealand was seeking to initiate proceedings *de novo*. The team found it also necessary to avoid any procedure which might suggest that New Zealand was seeking an interpretation or revision of the earlier judgment, since this would now be time barred. The team therefore decided that the most appropriate action would be to lodge with the Court a document entitled 'Request for the Examination of the Situation,' "since this followed precisely the opening left by the Court in paragraph 63." MacKay, *supra* note 4, at 1871.

150. NZ 1995 Request at 13-14.

151. *Id* at 17.

152. *Id.* at 50-51.

153. Id. at 38-39. In this regard, New Zealand relied upon the 1986 "Noumea Convention," requiring parties to take measures to limit environmental damage from nuclear testing. *Id.* at 51; *see also* Convention for the Protection of the Natural Resources and Environment of the South Pacific

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provisional measures to this effect as well as a final order banning tests in their presently proposed form.[154]

The appointment of an ad hoc judge presented another "idiosyncrasy." Since New Zealand was proceeding along the jurisdictional theory that the 1973-74 case was "still alive," it followed that New Zealand's original ad hoc judge, Sir Garfield Barwick, remained in office.[155] Sir Garfield had long since retired from the Australian High Court, but had retained his mental acuity (as his 1995 memoir, "Radical Tory," richly attests).[156] On the resumption of New Zealand's claim, however, he communicated to the ICJ that he would resign his post as an ad hoc judge in that case, leading to his replacement by Sir Geoffrey Palmer, a distinguished lawyer and former New Zealand Prime Minister.[157] The ICJ scheduled oral hearings on New Zealand's provisional measures request on September 11, 1995 – only a week after tests had resumed – and allowed Sir Geoffrey to be sworn in as *ad hoc* judge on the first day of hearing.[158]

Although it did not appoint an agent, France was represented at these hearings by eminent counsel (Professor Alain Pellet, Pierre-Marie Dupuy and Sir Arthur Watts).[159] Their position was relatively simple: they pointed out to the Court that the 1973 New Zealand application had sought to ban "atmospheric" tests, that this claim had been "watched" by France's 1974 declarations (which had been held to be legally binding), and that no further dispute remained extant; thus obviating any basis for interim measures. In response, the New Zealand team argued that paragraph 63 had left open the right to "examine" the situation and the present circumstances warranted such an inquiry.[160]

The New Zealand position had considerable equitable appeal, but the French objections proved persuasive and the Court, in a "notable departure from [its] established habit of taking its time before rendering a verdict,"[161] swiftly proceeded to dismiss the case. On September 22, 1995, the ICJ (by 12 votes to 3) issued an order removing the case from the ICJ General List and, as a consequence, rejecting the provisional measures request.[162] The ICJ essentially accepted in full the French

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Region (Noumea), Nov. 25, 1986, 26 I.L.M. 38 (1987); Romano, *supra* note 3, § 9.6. France was a party to this treaty, with reservations to this particular clause. *See* Giraud, *supra* note 145, at 126-27.

154. Shortly after New Zealand's request was filed, five Pacific states (Australia, Western Samoa, Solomon Islands, Federated States of Micronesia and Marshall Islands) sought to intervene. MacKay, *supra* note 4, at 1875. MacKay considers that Australia's decision to intervene, as opposed to reviving its own application, implicitly recognized that its own claims had merely targeted "atmospheric" tests (not underground tests). *Id.*

155. *Id.* at 1871.

156. *See* Barwick, *supra* note 42.

157. *See* MacKay, *supra* note 4, at 1871.

158. *Request for an Examination*, Verbatim Record of Public Sitting at 13 (Sept. 11, 1995), *available at* http://www.icj-cij.org/docket/files/97/4755.pdf; *see also* MacKay, *supra* note 4, at 1876-77. Nevertheless, the French team (consistent with its position that the proceedings were invalid) addressed Sir Geoffrey Palmer as "M. Palmer" rather than as "judge." *See* MacKay, *supra* note 4, at 1880.

159. Consistent with their government's position that this was an "informal" hearing, France's counsel adopted business attire rather than formal court dress. MacKay, *supra* note 4, at 1880. This later drew some criticism from Judge Schwebel. *See Request for an Examination*, 1995 ICJ 288, 309 (Sept. 22) ("1995 Order") (declaration of Vice President Schwebel).

160. *See generally Request for an Examination*, Verbatim Record of Public Sitting, *supra* note 159; *see also* MacKay, *supra* note 4, at 1878-79.

161. Romano, *supra* note 3, § 9.6.1.

162. 1995 Order, 1995 ICJ at 307; *see also* Kwiatkowska, *supra* note 4, at 154-57. Judges Weeramantry and Koroma dissented, as did Judge ad hoc Palmer. 1995 Order, 1995 ICJ at 317, 363, 381 (dissenting opinions of Judges Weeramantry, Koroma and Palmer). Judge Shahabuddeen issued a

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argument that the 1974 dismissal had finally resolved the case, and that the resumption of underground testing did not alter the situation.

Few (if any) observers were surprised by the ruling.[163] The French testing program continued with further tests (including two of the largest ever detonations at Mururoa) between October 1995 and 1996.[164] But in February 1996, President Chirac pronounced the tests complete, and in March 1996, France signed a Protocol to the "Treaty of Raratonga," also known as the South Pacific Nuclear Free Zone Treaty, including a promise not to test nuclear weapons in the region.[165]

XIV. – The Lasting Relevance of the *Nuclear Tests* Cases

The key merits question in the *Nuclear Tests Cases* was environmental, *i.e.*, they raised the issue of whether nuclear tests unlawfully violated customary norms

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separate opinion expressing sympathy with New Zealand's concerns, but agreeing with the majority vote. *Id.* at 312, 317 (separate opinion of Judge Shahabuddeen). Judge Oda of Japan made a brief but eloquent statement:

> [A]s the Member of the Court from the only country which has suffered the devastating effects of nuclear weapons, I feel bound to express my personal hope that no further tests of any kind of nuclear weapons will be carried out under any circumstances in future.

Id. at 310 (declaration of Judge Oda).

163. *See* Matthew C.R. Craven, *New Zealand's Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, Order of 22 September 1995*, 45 Int'l & Comp. L.Q. 725, 734 (1996) (describing result as "inevitable" and commenting that the ICJ's 1974 decision "never had in mind the possibility that New Zealand might seek to continue the case twenty-one years later on the basis that changes in scientific knowledge and the law had taken place which affected its earlier decision"); Giraud, *supra* note 145, at 132-33 (commenting that the 1995 outcome "was probably to be expected" but noting that it may have contributed to the "pressures" that led to France renouncing tests in 1996). Some remained critical of the ICJ's failure to correct the "mistake" of its 1974 decision in the New Zealand case, namely "that the concern was only about atmospheric testing," and that it lacked the "political will" to examine the "accumulating evidence of environmental damage and a plethora of international and regional documents prohibiting it." Alexander Gillespie, *The 1995 Nuclear Tests Case*, N.Z. L.J., May 1996, at 195, 200; Stephen M. Tokarz, *A Golden Opportunity Dismissed: The New Zealand v. France Nuclear Tests Case*, 26 Denv. J. Int'l L. & Pol'y 745, 757 (1998) (describing the result as "disheartening to proponents of the increased influence of the rule of international law in relations among States" and commenting that the Court had "reach[ed] an unnecessary conclusion limiting the scope of its earlier decision"). Romano argues that "a strict interpretation of the law offered the Court the possibility to remove itself from a highly sensitive case without being accused of having betrayed its mission." Romano, *supra* note 3, § 9.6.1. He also contends that "[f]rom a factual point of view, the Court erroneously had equated New Zealand's claims with those of Australia and, as a consequence, had neglected the absence in New Zealand's application of any reference to the medium in which tests were carried out." *Id.* Interestingly, the very same textual differences in New Zealand's case were also noted keenly by Professor Stern in her 1975 analysis of the claims. *See* Stern, *supra* note 4, at 325-26; *see also* Ritter, *supra* note 115, at 219 n.29. Kwiatkowska considers that the case could be reopened if France were to resume atmospheric testing, *see* Kwiatkowska, *supra* note 4, at 181, and further contends that Judge Weeramantry's dissenting opinion, which deals in depth with the legality of nuclear testing, "will be studied often in the future as a very well structured exposition of both the facts and the law concerning underground nuclear weapons tests in general, and such tests conducted by France in the South Pacific in particular." *Id.* at 190.

164. Kwiatkowska, *supra* note 4, at 169-70, 173-74.

165. *Id.* at 175-76; *see* South Pacific Nuclear Free Zone Treaty, *opened for signature* Aug. 6, 1985, 24 I.L.M. 1442 (entered into force Dec. 11, 1986).

– much the same issues as Myres McDougal and his contemporaries had debated in the 1950s.[166] The ICJ never reached the issue and France's adoption of the Treaty of Raratonga rendered the issue moot in its particular case.[167] The ICJ in *Pulp Mills* at last embraced the principles of transboundary harm previously articulated in *Trail Smelter*, in a case involving riparian rights.[168] And while the Court was willing to issue an advisory opinion in 1996 addressing the legality of the actual use of nuclear weapons[169] (thankfully an issue that has since August 1945 remained purely hypothetical), it has not returned to the issue of nuclear testing.

The key jurisdictional issue in the *Nuclear Tests Cases* was whether the General Act supplied a viable jurisdictional basis for bringing ICJ actions against certifying states. The ICJ never definitively ruled on the issue in *Nuclear Tests*, and the contemporaneous *Pakistani Prisoners of War* case was discontinued before a ruling on that issue could be made in that case. Two subsequent attempts have been made to invoke the General Act: the *Aegean Sea* case (an attempt by Greece to obtain a delimitation of continental shelf claims against Turkey) and the *Aerial Incident of 10 August 1999* dispute between Pakistan and India. In both cases, the applicant states sought to rely upon the 1974 Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock in *Nuclear Tests* (which upheld the vitality of the General Act and held that it had survived the demise of the League of Nations);[170] while the respondent states have included in their objections the same arguments about the General Act's obsolescence that were set forth in France's May 16, 1973 letter to the Registrar in *Nuclear Tests*.[171] Once again, however, a decision on whether the General Act actually remained in force was avoided: in both cases, it was held that, even assuming arguendo the Act remained in effect, the respondent state had either denounced the Act, or could rely upon "reservations" to jurisdiction thereunder.[172] To this day,

166. *See supra* note 8; *see* Dupuy, *supra* note 13, at 389-91 (discussing general issue of the legality of atmospheric testing).

167. As of the present date, the Comprehensive Test Ban Treaty, although endorsed by the United Nations General Assembly in 1996, has not yet entered into force.

168. *Pulp Mills on the River Uruguay (Arg. v. Ur.)*, Judgment, 2010 ICJ 14, 46, § 101 (Apr. 20) ("A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation 'is now part of the corpus of international law relating to the environment.'" (citation omitted)); *see also Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 226, 242, § 29 (July 8); *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No. 17, Advisory Opinion at 41, § 135 (ITLOS, Sea-Bed Disputes Chamber Feb. 1, 2011) (commenting on "precautionary approach" and noting "a trend towards making this approach part of customary international law"), *available at* http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf

169. *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226.

170. *See supra* note 104; *see, e.g., Aerial Incident of 10 August 1999 (Pak. v. India)*, Jurisdiction of the Court, Judgment, 2000 ICJ 12, 19, § 15 (June 21); Memorial of Greece (Question of Jurisdiction) §§ 29, 54, 60, 84, 126, *Aegean Sea Continental Shelf (Greece v. Turk.)* (ICJ July 18, 1977).

171. *See Aerial Incident*, 2000 ICJ at 19, § 14; *Aegean Sea Continental Shelf (Greece v. Turk,)*, Judgment, 1978 ICJ 3, 38, §§ 92-93 (Dec. 19). In the *Aerial Incident* case, India also argued that, as a state that achieved independence in 1947, it never signed or became bound by the General Act. *See Aerial Incident*, 200 ICJ at 19-20, § 17.

172. *See Aerial Incident*, 2000 ICJ at 25, (holding that even if India was bound by the General Act its 1974 communication disclaiming any obligations under the Act had the same effect as a denunciation); *Aegean Sea*, 1978 ICJ at 37, § 90 (holding that Greece was unable to invoke

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the question of General Act jurisdiction (at least as among its extant signatories) remains unresolved.[173]

But two legal issues actually adjudicated by the Court have had lasting relevance in a seemingly unrelated realm: investor-state arbitration.

The first is the Court's holding, in the interim measures decision, that interim measures under Article 41 of the ICJ Statute can be justified as long as there is a "prima facie" showing of jurisdiction, i.e., that injunctive relief can be granted *before* a jurisdictional ruling is made. As noted above, this ruling was controversial at the time, but did have some ICJ and PCIJ precedent.[174] The approach does have some pragmatic value in a system such as the ICJ's, where jurisdictional matters often take years to determine.[175] The ICJ has since applied the same "prima facie" standard in more recent provisional measures applications.[176]

Quite recently, the court has indicated that the an applicant also must show that "the rights asserted by a party are at least plausible."[177] This is generally

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General Act because, even assuming it were in force, Turkey could rely reciprocally upon Greece's reservation to jurisdiction under that Act, which excluded disputes over "territorial status").

173. *See* Merrills, *supra* note 23, at 171 ("[T]he cases in which the [General] Act has been discussed raise substantive issues which are far from trivial, and institutional questions with a vital bearing on the future of the International Court."); Rosenne, *supra* note 36, at 649 (noting that "the original General Act was denounced by several of its parties on the outbreak of the Second World War in 1939, and the status of the revised General Act of 1949 is questionable, very few States having become parties to it. Its invocation has caused discomfort to the Court."). Aside from France and India, a number of other countries (including the United Kingdom) have issued communications that purport to disclaim the General Act. *See Aegean Sea*, 1970 ICJ at 16, § 38; List of Accessions to General Act of Arbitration (Pacific Settlement of International Disputes), *available at* http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-29.en.pdf (last visited Dec. 19, 2013).

174. *See supra* note 60; *see generally* Elkind, *supra* note 60, at 46-47; Kós, *supra* note 16, at 378-81 (discussing in depth the jurisdictional reasoning of the ICJ's 1973 interim measures, and its decision to base jurisdiction on Article 41 of the Statute rather than the General Act).

175. *See* Ris, *supra* note 3, at 128 ("The philosophy is that when there is a possibility that the Court will hear the case, and there is danger of immediate and irreparable injury to one of the parties, it is both prudent and proper to order measures to avoid the injury."); Frankel, *supra* note 13, at 167-68 (discussing test). Of course, there is a logical institutional argument *against* this approach, as illustrated in *Anglo-Iranian*: if the court ultimately finds that there is no jurisdiction (as it did in *Anglo-Iranian*), then this provides retrospective legitimacy to the state that (like Iran in that case) decided to disobey the interim measures earlier adopted. *See* Elkind, *supra* note 60, at 52 (explaining that this was possibly a source of the dissenters' "uneasiness" in the 1973 *Nuclear Tests* interim measures decision); *see also Anglo Iranian Oil Co. (Interim Measures) (U.K. v. Iran)*, 1951 ICJ 89, 97 (July 5) (dissenting opinion of Judges Winiarski and Badawi Pasha) (opining that a mere prima facie test "appears… to be based on a presumption in favour of the Court which is not in consonance with the principles of international law" and considering that interim measures should only be adopted "if there exist weighty arguments in favour of the challenged jurisdiction"); *Fisheries Jurisdiction (U.K. v. Iceland)*, 1972 ICJ 12, 21-22 (Aug. 17) (dissenting opinion of Judge Padilla Nerro) (endorsing Winiarski/Badawi Pasha dissent in *Anglo Iranian Oil*).

176. *See Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Order, 2007 ICJ 3, 10, § 24, (Jan. 23) ("[I]n dealing with a request for provisional measures the Court need not finally satisfy itself that it has jurisdiction on the merits of the case but will not indicate such measures unless there is, prima facie, a basis on which the jurisdiction of the court might be established." (citation omitted)); *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, Provisional Measures, Order, 2002 ICJ 219, 241 § 58 (July 10) (same).

177. *See Questions Related to the Obligation to Prosecute (Belgium v. Senegal), Provisional Measures*, Order, ICJ Rep. 2009 §§ 56-57 (May 28) (court "may exercise th[e] power [to indicate provisional measures] only if it is satisfied that the rights asserted by a party are at least plausible." *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)*, Provisional Measures, ICJ Rep. 2010 § 91 (Mar. 8).

considered to be a new requirement,[178] and its impact thus remains to be fully explored.

Provisional measures applications within ICSID arbitration are governed by Article 47 of the ICSID Convention, which is closely modeled on Article 41 of the ICJ Statute and empowers a tribunal to "recommend any provisional measures which should be taken to preserve the respective rights of either party."[179] In exercising this power, several ICSID tribunals have adopted essentially the same jurisdictional standard as *Nuclear Tests*:

> According to the prevailing and generally accepted opinion, the International Court is satisfied with a "*prima facie* test", and considers itself competent to issue provisional measures *if its absence of competence is not manifest* and if the authorities invoked by the claimant to support the Court's competence indeed confer it "*prima facie*."[180]

The International Tribunal for the Law of the Sea has similarly been prepared to grant provisional measures upon a "prima facie" showing of jurisdiction, i.e. that "at first sight or impression (on its face)," the evidence sufficiently establishes the tribunals' jurisdiction.[181]

Given this practice, the *Nuclear Tests* order of 1973, insofar as it applied the same *prima facie* jurisdictional test, seems less questionable in retrospect than its critics claimed at the time.

The second and more controversial issue relates to the 1974 judgment's holdings concerning unilateral declarations. As noted above, although the ICJ's holding on unilateral declarations had a doctrinal/precedential basis, some commentators did feel that it represented an advance in the development of public international law.[182]

In 1996 – only a year after the conclusion of the 1995 phase of the *Nuclear Tests* case, the International Law Commission recommended that "'unilateral acts of States should be included as a topic appropriate for the codification and progressive development of international law."[183] This culminated in the ILC's publication in

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178. *See, e.g.*, Jacob Katz Cogan, Current Developments: The 2011 Judicial Activity of the International Court of Justice, 106 Am. J. Int'l L. 586, 599 (2012),

179. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 47, *opened for signature* Mar. 18, 1965, 4 I.L.M. 524; *see* Christoph Schreuer, *The ICSID Convention: A Commentary* 771-74 (2d ed. 2009).

180. *Pey Casado v. Chile*, No. ARB/98/2, Decision on Provisional Measures § 8 (ICSID 2001), 16 ICSID Rev. – F.I.L.J. 567 (2001) (French original), 16 ICSID Rev. – F.I.L.J. 603 (Spanish original), 6 ICSID Rep. 373 (2004) (English translation) (emphasis added). The French original reads:

"Selon l'opinion dominante et généralement admise, la Cour Internationale se contente d'un "*prima facie* test" et se considère comme compétente pour indiquer des mesures conservatoires "*si son absence de compétence n'est pas manifeste* et si les textes invoqués par la partie demanderesse pour fonder la compétence de la Cour la lui confèrent en effet *prima facie*."

Id. (emphasis added); *see also, e.g.*, *Perenco Ecuador Ltd. v. Ecuador*, No. ARB/08/6, Decision on Provisional Measures §§ 18-19, 43 (ICSID 2009) (exercising power to grant provisional relief even though Tribunal "[had] formed, and expresse[d], no opinion on its jurisdiction to entertain this claim, on the facts so far as these are in dispute, or on the merits of the claim"); *Quiborax S.A. v. Bolivia*, No. ARB/06/2, Decision on Jurisdiction §§ 108-10 (ICSID 2010) (applying same test).

181. *M/V "SAIGA" (No. 2) (Saint Vincent v. Guinea)*, Case No. 2, Request for Provisional Measures, 37 I.L.M. 1202, 1221 (ITLOS Mar. 11, 1998).

182. *See supra* note 130.

183. David D. Caron, *The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law, in Looking to the Future: Essays on International Law in Honor of W.*

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2006 of the *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations* (the "2006 Guiding Principles").[184] These statement of principles purport to restate as law many of the principles set forth in *Nuclear Tests* decision, *e.g.*, that "declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations," that the "legal effects" of such declarations must be "determined" in light of all of the "factual circumstances in which they were made" as well as the "reactions to which they gave rise," and that, once made, a unilateral declaration may be made orally in or in writing."[185] The Guiding Principles also attempt to address matters touched upon (but not exhaustively explored) in *Nuclear Tests*, including who within a government has "authority" to make them, and the circumstances in which they may be revoked.[186] Guiding Principle 7 in particular strongly echoes *Nuclear Tests*:

> "A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated."[187]

Like the tests themselves, however, aspects of the Guiding Principles have proven "controversial."[188] The above-quoted Guiding Principle 7, in particular, has featured in a recent series of investment arbitrations dealing with so-called foreign-investment statutes, i.e., national laws of particular countries that extend to foreign investors a series of substantive guarantees to an investor (e.g. a "Hull Formula" clause guaranteeing against expropriation of assets without full payment of market-value compensation), coupled with a commitment to submit future disputes to a neutral system of international arbitration such as ICSID.[189] Such clauses have been construed as a binding "offer" of ICSID arbitration, obligating the host state to submit to arbitration under the ICSID Convention (assuming, of course, that the

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Michael Reisman 649, 654 n.19 (Mahnoush H. Arsanjani et al. eds., 2010) (quoting Rep. of the Working Group §§ 191-94, U.N. GAOR, 49th Sess., U.N. Doc. A/52/10 (1997)).

184. *Available at* http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_9_2006.pdf; *see also* Commentaries, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf; *see* Caron, *supra* note 183 at 654.

185. Caron, *supra* note 183, at 654, 2006 Guiding Principles, *supra* note 184, nos. 1, 3 and 5.

186. 2006 Guiding Principles, *supra* note 184, no. 4 (asserting that "[a] unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so," that "[b]y virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations" and that "[o]ther persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence"); *see also Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, 2006 ICJ 6, 27-28, §§ 47-48 (Feb. 3) (discussing circumstances in which a government minister may bind a state on matters falling within his/her portfolio); 2006 Guiding Principles, *supra* note 184, no. 10 (stating that unilateral declaration may not be revoked "arbitrarily" and then listing circumstances in which declaration may be revoked).

187. 2006 Guiding Principles, supra note 184; no. 7; *see also* Caron, *supra* note 183, at 665-68 (examining the genesis of Principle 7, which is "drawn from the *Nuclear Tests* case").

188. *Mobil Corp. v. Venezuela*, No. ARB/07/27, Decision on Jurisdiction § 82 (ICSID 2010); *see also* Goodman, *supra* note 113, at 45-46 (describing the various discussions/debates at the ILC during the drafting process).

189. *See* Caron, *supra* note 183, at 650.

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foreign national also consents to ICSID arbitration and the other prerequisites of ICSID jurisdiction are satisfied).[190] Nevertheless, several ICSID tribunals have favored the view that an investment statute's offer of ICSID arbitration is to be viewed as a "unilateral act" of a state, to be construed according to the principles of international law applicable to unilateral declarations.[191]

In drafting the Guiding Principles, "neither the Special Rapporteur nor the ILC appeared to contemplate foreign investment laws as an example of unilateral acts" covered by their work.[192] The relationship between the Guiding Principles/ *Nuclear Tests* and foreign investment statutes arose for consideration in the so-called "Article 22" cases: a series of ICSID claims arising from various "nationalizations" by the Chavez regime of foreign-owned assets in the oil, cement and communications sectors.[193] The claimants in those cases sought to assert rights under a [1998] investment statute (the "Venezuelan Investment Law"), which, as well as safeguarding foreign investors against expropriation and unfair or arbitrary treatment of investments, provided (in Article 22) that:

> ...any controversies with respect to which the provisions of the [ICSID] Convention... apply, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so establishes...[194]

The claimants argued that this clause represented a presently-binding consent to ICSID arbitration, while Venezuela argued that it merely contemplated that the host state might give a future consent to ICSID jurisdiction. The differing interpretations required the "Article 22" tribunals to determine the proper standard of interpretation applicable to jurisdictional clauses in investment statutes, in particular the issues of: (1) whether domestic (as opposed to international) law applied to their interpretation; and (2) if the latter, whether *Nuclear Tests* and the

190. *Inceysa Vallisoletana, S.L. v. El Salvador,* No. ARB/03/26, Award § 331 (ICSID 2006) (Article 15 of the Salvadorian Investment Law, providing that "[i]n the case of controversies arising between foreign investors and the State regarding their investments in El Salvador, the investors may submit the controversy to [ICSID], was a unilateral offer of consent to ICSID arbitration"); *Rumeli Telekom A.S. v. Kazakhstan,* No. ARB/05/16, Award § 182 (ICSID 2008) (same for Article 6 of the Kazakh Investment Law); *Zhinvali Dev. Ltd. v. Georgia,* No. ARB/00/1, Award §§ 339-42 (ICSID 2003) (same for Article 16(2) of the Law of Georgia on the Investment Activity Promotion and Guarantees); *Tradex Hellas S.A. v. Albania,* No. ARB/94/2, Decision on Jurisdiction (ICSID 1996), *reprinted in* 14 ICSID Review 161, 186-87 (same for Article 8(2) of the 1993 Albanian Investment Law in respect to any future disputes with investors from an ICSID member state); *S. Pac. Props. (Middle E.) Ltd. v. Egypt,* No. ARB/84/3, Decision on Jurisdiction § 116 (ICSID 1988), 3 ICSID Reports 131 (upholding ICSID jurisdiction under then Egyptian investment law); Caron, *supra* note 183, at 651-52.

191. *See Tidewater Investment SRL v. Venezuela,* No. ARB/10/5, Decision on Jurisdiction § 88 (ICSID 2013) (a national statute providing for ICSID jurisdiction "may be analysed as a unilateral declaration of a state. That is to say, it is a statement made unilaterally by an organ of the state, namely the legislature, which may, according to its proper construction, produce legal effects on the international plane vis-à-vis other states, namely the Contracting States to the ICSID Convention and their nationals."); *accord Mobil Corp. v. Venezuela,* No. ARB/07/27, Decision on Jurisdiction § 85 (ICSID 2010); *CEMEX Caracas Investments B.V. v. Venezuela,* ARB/08/15, Decision on Jurisdiction § 87 (ICSID 2010); *OPIC Karimun Corp. v. Venezuela,* No. ARB/10/14, Award §§ 75-76 (ICSID 2013).

192. Caron, *supra* note 183, at 669.

193. These included *Mobil, CEMEX Caracas, Tidewater, Brandes Investment Partners, L.P. v. Venezuela,* No. ARB/08/3, Award (ICSID 2011); and *ConocoPhillips Petrozuata B.V., v. Venezuela,* No. ARB/07/30, Decision on Jurisdiction and the Merits (ICSID 2013) and *OPIC.*

194. *See Mobil Corp. v. Venezuela,* No. ARB/07/27, Decision on Jurisdiction §§ 67-68 (ICSID 2010) (quoting Article 22).

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ILC Guiding Principles supported a "restrictive" interpretation of the statutes where their meaning was in doubt.[195]

In *Mobil* and *CEMEX Caracas*, the first of the "Article 22" decisions, the tribunals acknowledged the "difficult[y]" the first issue presents,[196] and ultimately held that offers of ICSID arbitration by states were closely analogous to optional declarations issued by states under Article 36(2) of the ICJ statute, which should be interpreted according to international law principles:

> Legislation and more generally unilateral acts by which a State consents to ICSID jurisdiction must be considered as standing offers to foreign investors under the ICSID Convention. Those unilateral acts must accordingly be interpreted according to the ICSID Convention itself and to the rules of international law governing unilateral declarations of States.[197]

Subsequent "Article 22" decisions have adopted substantially similar approaches,[198] as has a recent decision dealing with the Salvadorian investment statute.[199]

On the second issue, however, the "Article 22" decisions declined to apply a restrictive interpretation. Instead, the ICSID tribunals treated jurisdictional declarations as being governed by the same principles as applied to ICJ optional declarations. Under this essentially neutral approach to interpretation, a jurisdictional declaration "'must be interpreted as it stands, having regard to the words actually used,'" with "consideration... given to the intention of the government at the time it was made."[200] Under this approach, the tribunal should not base itself only upon a "'purely grammatical interpretation of the text,'" but also should look to the

195. In some of the cases, Venezuela explicitly invoked ILC Principle 7 as warranting a "restrictive" interpretation, *see, e.g., Tidewater* § 26; in others it sought to emphasize interpretative principles of Venezuelan law that allegedly called for the same approach. In all, Venezuela urged a narrow interpretation.

196. *Mobil* § 84 (identifying "the applicable standard of interpretation" when the "offer" of arbitration is "contained in domestic legislation or other unilateral acts of the State," rather than a treaty).

197. *Id.* § 85; *see also CEMEX Caracas Investments B.V. v. Venezuela*, ARB/08/15, Decision on Jurisdiction § 87 (ICSID 2010); Reisman & Arsanjani, *supra* note 3, at 412 (arguing that unilateral declarations made under article 36 of the ICJ statute are part of a "reciprocally binding regime, in which unilateral declarations are assigned a specific legal-generative force"); Caron, *supra* note 183, at 650.

198. *Tidewater* § 86 ("[A]n ICSID tribunal determining its jurisdiction is not required to interpret the instrument of consent according primarily to national law, but rather has to take into account the principles of international law."); *OPIC Karimun Corp. v. Venezuela*, No. ARB/10/14, Award §§ 75-76, 78-79 (ICSID 2013); *ConocoPhillips*, Decision on Jurisdiction and Merits §§ 236-37. The *Brandes* tribunal viewed Article 22 as a "unilateral declaration" that should be interpreted "initiall[y]" under Venezuelan law, but that "it is necessary to take account of the principles of International Law to reach a definitive conclusion." *Brandes* § 81.

199. *See Pac Rim Cayman LLC v. El Salvador*, No. ARB/09/12, Decision on Jurisdiction §§ 5.32-.34 (ICSID 2012) (endorsing the analysis in *Mobil* and *CEMEX Caracas* and interpreting El Salvador's investment statute according to the same principles as apply to "unilateral acts... formulated in the framework and on the basis of a treaty").

200. *Mobil* §§ 92-93; *see also CEMEX Caracas* § 87 ("'the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned'" (quoting *Fisheries Jurisdiction (Spain v. Can.)*, 1998 ICJ 432, 454, § 48 (Dec. 4))); *S. Pac. Props. (Middle E.) Ltd. v. Egypt*, No. ARB/84/3, Decision on Jurisdiction § 74 (ICSID 1988) (*"SPP"*) ("[T]he starting point in statutory interpretation, as in the interpretation of treaties and unilateral declarations, is the ordinary or grammatical meaning of the terms used."); *Tidewater* § 94; *OPIC* §§ 78-79.

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intent of the declarant party, at least when the text of the relevant declaration is "ambiguous."[201]

By this holding, most "Article 22" tribunals effectively declined to apply the principle of "restrictive" interpretation as stated in *Nuclear Tests* and ILC Guiding Principle 7.[202] The "Article 22" tribunals explained "acts formulated in the framework and on the basis of a treaty" (such as jurisdictional declarations under the ICSID Convention or ICJ Statute) belong in a "different" category from "other acts formulated by States in the exercise of their freedom to act on the international plane" (such as the unilateral declaration encountered in *Nuclear Tests*).[203] Only in the latter category, it explained, is a "restrictive interpretation" to be adopted.[204]

Applying these principles to the text of Article 22 of the Venezuelan investment law, the five ICSID tribunals have (to date) declined to find jurisdiction, holding that it fails to manifest a presently binding consent to ICSID Jurisdiction.[205] Regardless of the textual outcome as regards this particular statute, the general theme of the "Article 22" cases is to exclude jurisdictional declarations from the realm of *Nuclear Tests*-type unilateral declarations.

Caron explains the rationale for the distinction as owing to the ILC's particular focus (and that of the *Nuclear Tests* court): in requiring a "restrictive" approach to interpretation Guiding Principle 7 concerned with "unilateral acts committed through the statements and notes of diplomats" addressing issues like "territorial boundaries," "military practices," or other "weighty" issues in which an "unscripted"

201. *Mobil* § 111 (quoting *Anglo-Iranian Oil Co (U.K. v. Iran)* Preliminary Objections-Judgment, 1952 ICJ 93, 104 (July 22); *Fisheries Jurisdiction (Spain v. Can.)*, 1998 ICJ 432, 454, § 47 (Dec. 4)); *see also CEMEX Caracas* § 103 (same); *Tidewater* §§ 96-98; *OPIC* §§ 78-79. The *Brandes* tribunal adopted an analysis that is broadly similar, under which one began with a textual analysis; if that failed to indicate a clear conclusion; then one considers the "context" of the statement, the "circumstances" of the declaration and the "goals" of the declarant. *Brandes* § 87. As noted above, *supra note* 198, the *Brandes* tribunal took domestic law into account as part of this interpretative process.

202. It bears emphasis that there are other features of the Guiding Principles and *Nuclear Tests* that are potentially unique. Caron notes, for example, that Guiding Principle 3 (which calls for examination not only of the circumstances in which declarations were made, but also "'the reactions to which they gave rise'") is somewhat different to the normal canons of treaty interpretation. Caron, *supra* note 183, at 664-65.

203. *Mobil* § 90; *CEMEX Caracas* § 81-82; *Tidewater* §§ 88-92, 100-02; *ConocoPhilips* § 236; *OPIC* §§ 78-79. The point was not directly addressed in *Brandes*.

204. *Mobil* § 88; *CEMEX Caracas* § 82; *see also SPP* § 63 ("There is no presumption of jurisdiction – particularly where a sovereign State is involved... [and] jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties. This is not to say, however, that there is a presumption against the conferment of jurisdiction with respect to a sovereign State or that instruments purporting to confer jurisdiction should be interpreted restrictively."); *Tidewater* § 99 ("[D]eclarations of a state that fall for assessment in terms of whether they produce effects within the context of a treaty framework – and in particular the effect of submission to the jurisdiction of an international tribunal – are not subject to the restrictive approach to be taken for other kinds of unilateral declarations.") The more recent *ConocoPhillips* stands in possible contrast: it called for a "cautious" approach, and remarked that "[t]he necessary consent is not to be presumed. It must be clearly demonstrated," *id.* § 254, but did not expressly address (let alone endorse) the statements in *Nuclear Tests*, the ILC Guiding Principles concerning "restrictive" interpretation.

205. See *Mobil* § 90; *CEMEX Caracas* § 138; *Brandes* § 115; *Tidewater* § 141; *ConocoPhillips* § 262; *OPIC* §§ 100-07, 146, 159, 178. In *OPIC*, the interpretation question involved more extensive evidence presented in favor of the investor's interpretation (including oral testimony from one of Article 22's drafters), prompting a more extensive analysis as well as a dissent from Arbitrator Guido Tawil, who found this evidence persuasive.

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statement might have unintended meaning.[206] But "this principle does not appear to have been settled upon having in mind, or to appear justified in the case of, the interpretation of a deliberated written piece of legislation pertaining to either a national foreign investment law or a consent to ICSID jurisdiction."[207]

Outside of the strictly jurisdictional context, ICSID/BIT case law has not fully articulated the international status of foreign-investment statutes. Two distinguished commentators have argued that a unilateral statement concerning the level of protection to be afforded private investments should be viewed as a unilateral declaration, binding in international law.[208]

In other contexts, the full boundaries of *Nuclear Tests*-type unilateral declarations have yet to be defined. Recent attempts to invoke the doctrine in other cases before the ICJ have failed.[209] The ILC Special Rapporteur suggested several other examples of "unilateral acts" beyond the French statements of 1974.[210] Of these, five[211] predated *Nuclear Tests* and only two (*Eastern Greenland* and *Temple of Preah Vihear*) were the subject of an actual adjudication.[212]

It thus remains for future cases to reveal whether this area of the law has the "monumental" consequences once predicted by Thomas Franck. It is as well to remember the following tantalizing hypothetical posed by Franck:

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206. Caron, *supra* note 183, at 670-71.

207. *Id.* at 673.

208. *See* Reisman & Arsanjani, *supra* note 3, at 422 ("Where statements are made either orally or distributed in writing in either hard copy or on-line, clearly promising certain conditions or treatment for foreign investors and such statements are made public and are made repeatedly and foreign investors relied on them, and governments do not retrieve or qualify those statements of commitment before the conclusion of contracts with foreign investors, they should, in our view, bind the State."); *cf.* Caron, *supra* note 183, at 649 ("noting that "in investor-state arbitration, even the characterization of a national foreign-investment statute, not to mention an oral declaration, will often be hotly contested, and in this context, a tribunal may lose sight of the fact that a legislative act of a state, like all other acts of a state, can have meaning within several legal systems simultaneously").

209. *See Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, 2006 ICJ 6, 28-29, §§ 51-52 (Feb. 3) (analyzing the statements of a Rwandan Minister for Justice, made at an international forum, which referred to the possibility that her government would withdraw its current reservations to human rights treaties, holding these statements were insufficiently definite to constitute a unilateral declaration); *see also Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ir. v. U.K.)*, Final Award §§ 89-90, 42 I.L.M. 1118 (Perm. Ct. Arb. 2003) (analyzing whether British statement regarding disposal of nuclear fuel could be construed as declaration, but determining it could not be enforced as such in the circumstances).

210. *See* Special Rapporteur, *Eighth Rep. on Unilateral Acts of States*, Int'l Law Common, U.N. Doc. A/CN.4/557 (May 26, 2005) (by Victor Rodríguez Cedeño) ("Eighth Report"); *see also* Caron, *supra* note 183, at 669 n. 62.

211. These were: (1) the 1919 Ihlen Declaration that was considered in *Eastern Greenland* (*see supra* note 130); (2) the conduct in the *Temple of Preah Vihear* case (*see supra* note 130); (3) President Truman's 1945 proclamation concerning the extent of United States continental shelf claims; (4) a 1952 statement by Colombian officials concerning certain maritime claims; and (5) President Nasser's 1957 declaration regarding navigation in the Suez Canal. *See* Eighth Report, *supra* note 210, at 5-32; *see also* Goodman, *supra* note 113 at 2.

212. As encapsulated by Caron, the remaining four examples were: (1) a "Declaration of the Minister for Foreign Affairs of Cuba of 4 April 2002 (concerning the supply of vaccines to the Eastern Republic of Uruguay)"; (2) a "Statement by the King of Jordan on 31 July 1988 (waiving claims to the West Bank territories)"; (3) "Protests by the Russian Federation against Turkmenistan and Azerbaijan (concerning boundaries and the status of waters of the Caspian Sea)"; (4) "Statements made by nuclear-weapon States (guaranteeing the non-use of such weapons against non-nuclear-weapon States)." Caron, *supra* note 183, at 669 n. 62.

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a statement by President Nixon to President Thieu of South Vietnam to the effect that the United States would "react vigorously" to a new North Vietnamese offensive in violation of the Paris Peace accords, which was an inducement to get Thieu's consent to the agreement, would clearly constitute a case of unilateral commitment followed – if it is, indeed, a necessary element – by reliance. The upshot is, therefore, a binding legal undertaking by the United States, made by the President endowed with the ostensible as well as constitutional authority to make such a commitment. The subsequent action of Congress in limiting the President's power to carry out his promise is irrelevant to vested international legal rights.[213]

This hypothetical appears to have been intentionally ironic, because Saigon had already fallen (and South Vietnam had effectively ceased to exist) at the time of Franck's article. But it displays the potential (and, to date untested) breadth of the *Nuclear Tests* judgment of 1974.

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Although the *Nuclear Tests* decision of 1974 may have seemed anti-climactic at the time, it managed to produce the leading decision on "unilateral declarations." Its contribution to jurisprudence in ICSID/BIT cases, while controversial, has also been significant. As Franck remarked in 1975, "cases need not have monumental outcomes to make monumental law."[214]

The other noteworthy fact concerns the actors. The *Nuclear Tests* cases not only involved some of the more towering figures of Australian, French and New Zealand politics and public international law. It is an interesting coincidence that, if the *Rainbow Warrior* case is included, *all but one* of the Venezuelan Article 22 tribunals included an arbitrator from France or New Zealand who had been either counsel or judge in one of the various cases relating to French nuclear testing in the South Pacific.[215] Individuals do count in legal history, and these disputes are no exception.

213. Franck, *supra* note 2, at 620 (footnote omitted).

214. *Id.* at 612.

215. Specifically: (1) *Mobil* and *CEMEX Caracas* both involved Judge Gilbert Guillaume of France as presiding arbitrator, who had sat as an ICJ judge on the 1995 *New Zealand v. France* phase; (2) *Brandes* and *Tidewater* involved Professor Brigitte Stern as one of the arbitrator, who was counsel to France in the *Rainbow Warrior* case (and had written extensively on the 1974 *Nuclear Tests* judgment); (3) *Conocophillips* involved Judge Kenneth Keith as presiding arbitrator, who had been counsel to New Zealand in both the 1973-74 and 1995 hearings of *Nuclear Tests* as well as a member of the *Rainbow Warrior* tribunal. Additionally, Professor Jiménez de Aréchaga, the presiding arbitrator in *SPP*, was both presiding arbitrator in *Rainbow Warrior* and an ICJ judge in the 1973-74 phase of *Nuclear Tests*.