Nuclear Tests

Student Materials

- Decided by the International Court of Justice in December 1974
- Key topics: making international law (other important factors); upholding international law (international legal enforcement)

Learning Objectives

- Understand and apply:
  - unilateral declarations
  - general principles of law
- Analyze and evaluate:
  - when unilateral declarations can become binding legal obligations
  - why international legal bodies sometimes refuse to rule on legal questions

Background Information

In the early 1970s, both Australia and New Zealand grew upset at France for testing its nuclear weapons in the atmosphere above the South Pacific. They were concerned about the safety and environmental impact of the tests on their countries. Additionally, political organizations worldwide were pushing countries to reduce their nuclear arsenals. Australia and New Zealand each filed a lawsuit at the ICJ in May 1973 and convinced the Court to order France to temporarily cease all future atmospheric nuclear tests until litigation ended.[1] France quickly announced that it would not follow the ICJ order and it continued its nuclear tests. Then over the course of a few months, France changed course, and announced publicly that it would not conduct future atmospheric nuclear tests. This reversal was likely driven by two factors. First, the French government faced both domestic and international political pressure after it

[1] International Court of Justice, *Nuclear Tests Case*, Order on Interim Measures of Protection of 22 June 1973.

broke the ICJ's order. Second, technological developments allowed France to shift from atmospheric to underground nuclear tests. Australia and New Zealand were not satisfied by this outcome and continued to push on with their cases.

France vehemently argued that the Court lacked jurisdiction to hear the case and refused to participate in the trial. France's absence placed the ICJ in a very difficult position. The Court had been asked to rule against a major world power on an important political question. But the political impact of a judgment against France likely would have been limited given that France refused to participate. The ICJ's ultimate decision was to refuse to rule on the merits of the case. The ICJ argued that France's announcement that it would not conduct future atmospheric test meant that Australia and New Zealand had achieved their desired goal: to end the tests. Therefore, the Court reasoned, the dispute between these states no longer existed, meaning that any judicial ruling would be without object or purpose. *Nuclear Tests* was (and continues to be) a highly controversial ruling. Six of the Court's 15 judges opposed the ruling, viewing it as a thinly veiled attempt to avoid a difficult political situation. The redacted judgment below comes from the lawsuit filed by New Zealand. The judgment for the case filed by Australia is nearly identical.

Relevant Legal Texts

None. (The Court rules based on diplomatic exchanges and public statements that are included below in the judgment.)

Majority Judgment

After introducing the case, the majority began by asking: what was New Zealand's objective in suing France? The Majority argued that New Zealand's objective was to end atmospheric nuclear tests:

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

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

Furthermore New Zealand [wrote] in connection with discussions held in April 1973 between the two governments that:

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

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

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

[During oral proceedings, New Zealand's Attorney-General] stated: "New Zealand has not been given anything in the nature of an unqualified assurance that 1974 will see the end of atmospheric nuclear testing in the South Pacific". The Attorney-General continued:

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

> It is clear from these statements … that if [New Zealand received] "an unqualified assurance that 1974 [would] see the end of atmospheric nuclear testing" by France "in the South Pacific", or if the President of the Republic … did "resolve to put an end to [that] activity", [New Zealand] would have regarded its objective as having been achieved.
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> Subsequently, on 1 November 1974, the Prime Minister of New Zealand … said:
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> > "It should … be clearly understood that nothing said by the French government, whether to New Zealand or to the international community at large, has amounted to an assurance that there will be no further atmospheric nuclear tests in the South Pacific. The option of further atmospheric tests has been left open. *Until we have an assurance that nuclear testing of this kind is finished for good, the dispute between New Zealand and France persists*" (Emphasis added.)
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> The passage italicized above clearly implies that an assurance that atmospheric testing is "finished for good" would, in the view of New Zealand, bring the dispute to an end … New Zealand's case has been argued mainly in relation to atmospheric tests; and [its] statements … show that an assurance "that nuclear testing of this kind", that is to say, testing in the atmosphere, "is finished for good" would meet the object of the New Zealand claim. The Court therefore considers that, for purposes of the Application, the New Zealand claim is to be interpreted as applying only to atmospheric tests, not to any other form of testing, and as applying only to atmospheric tests so conducted as to give rise to radio-active fall-out on New Zealand territory …

The majority then catalogued numerous statements in which French officials said that they would be ending the atmospheric nuclear tests:

> It will be convenient to take [France's] statements … in chronological order. The first statement is contained in the communiqué issued by the Office of the President of the French Republic on 8 June 1974, shortly before the commencement of the 1974 series of French nuclear tests:
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> > "The Decree reintroducing the security measures in the South Pacific nuclear test zone has been published in the Official Journal of 8 June 1974."

> "The Office of the President of the Republic takes this opportunity of stating that in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed."

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

> "It should be pointed out that the decision taken by the Office of the President of the French Republic to have the opening of the nuclear test series preceded by a press communiqué represents a departure from the practice of previous years. This procedure has been chosen in view of the fact that a new element has intervened in the development of the programme for perfecting the French deterrent force. This new element is as follows: France, at the point which has been reached in the execution of its programme of defence by nuclear means, will be in a position to move to the stage of underground firings as soon as the test series planned for this summer is completed."
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> "Thus the atmospheric tests which will be carried out shortly will, in the normal course of events, be the last of this type."
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> "The French authorities express the hope that the New Zealand government will find this information of some interest and will wish to take it into consideration." …

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

> "In present circumstances, it is at least gratifying for me to note the positive reaction in your letter to the announcement in the communiqué of 8 June 1974 that we are going over to underground tests. There is in this a new element whose importance will not, I trust, escape the New Zealand government."

These three statements were all drawn to the notice of the Court by [New Zealand during] oral proceedings … The Court will also have to consider the relevant statements subsequently made by the French authorities …

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

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

On 16 August 1974, … the Minister of Defence said that the French government had done its best to ensure that the 1974 nuclear tests would be the last atmospheric tests.

On 25 September 1974, the French Minister for Foreign Affairs … said:

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

On 11 October 1974, the Minister of Defence held a press conference during which he stated twice, in almost identical terms, that there would not be any atmospheric tests in 1975 and that France was ready to proceed to underground tests. When the comment was made that he had not added "in the normal course of events", he agreed that he had not … The Minister also mentioned that, whether or not other governments had been officially advised of the decision, they could become aware of it through the press and by reading the communiqués issued by the Office of the President of the Republic.

In view of the foregoing, the Court finds that the communiqué issued on 8 June 1974 …, the French Embassy's Note of 10 June 1974 … and the President's letter of I July 1974 … conveyed to New Zealand the announcement that France, following the conclusion of the 1974 series of tests, would cease the conduct of atmospheric nuclear tests. Special attention is drawn to the hope expressed in the Note of 10 June 1974 "that the New Zealand government will find this information of some interest and will wish to take it into consideration", and the reference in that Note and in the letter of 1 July 1974 to "a new element" whose importance is urged upon the New

> Zealand government. The Court must consider in particular the President's statement of 25 July 1974 … followed by the Defence Minister's statement of 11 October 1974 … These reveal that the official statements made on behalf of France concerning future nuclear testing are not subject to whatever proviso, if any, was implied by the expression "in the normal course of events …"

Next, the majority discussed international law relating to unilateral declarations by states. Note that because the majority emphasizes that a state can unilaterally create a legal obligation, regardless of the reactions of other states (such as Australia and New Zealand):

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

The majority then argued that the Court alone must determine whether France has created a legal obligation, and that the Court is not bound by the views of Australia and New Zealand because they are not parties to the unilateral declaration:

> The Court must … form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation, and cannot in this respect be bound by the view expressed by another state which is in no way a party to the text.

The majority then applied its general statements about law to the specific facts of this dispute:

> Of the statements by the French government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French state. His statements, and those of members of the French government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute a whole. Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the state, having regard to their intention and to the circumstances in which they were made.
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> The unilateral statements of the French authorities were made outside the Court, publicly and *erga omnes*, even if some of them were communicated to the government of New Zealand … To have legal effect, there was no need for these statements to be addressed to a particular state, nor was acceptance by any other state required. The general nature and characteristics of these statements are decisive for the evaluation of the legal implications, and it is to the interpretation of the statements that the Court must now proceed …
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> In announcing that the 1974 series of atmospheric tests would be the last, the French government conveyed to the world at large … its intention effectively to terminate these tests. It was bound to assume that other states might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so

> essential in the relations among states. It is from the actual substance of these statements and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect. The Court considers that the President of the Republic, in deciding upon the effective cessation of atmospheric tests, gave an undertaking to the international community to which his words were addressed. It is true that the French government has consistently maintained that its nuclear experiments do not contravene any subsisting provision of international law, nor did France recognize that it was bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements examined above. The Court finds that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration …

The majority then returned to the question of New Zealand's objective in filing the lawsuit. It noted that New Zealand did not seek compensation for damages from the atmospheric nuclear tests.

> Though [New Zealand] has formally requested from the Court a finding on the rights and obligations of the parties, it has throughout the dispute maintained as its final objective the termination of the tests. It has sought from France an assurance that the French programme of atmospheric nuclear testing would come to an end. While expressing its opposition to the 1974 tests, the government of New Zealand made specific reference to an assurance that "1974 will see the end of atmospheric nuclear testing in the South Pacific" … On more than one occasion it has indicated that it would be ready to accept such an assurance. Since the Court now finds that a commitment in this respect has been entered into by France, there is no occasion for a pronouncement in respect of rights and obligations of the parties concerning the past …
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> Thus the Court faces a situation in which the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific.
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> This conclusion is not affected by a reference made by the New Zealand government, in successive diplomatic Notes to the French government from 1966 to 1974, to a formal reservation of "the right to hold the French government responsible for any damage or losses received by New Zealand … as a result of any nuclear weapons tests conducted by France"; for no mention of any

> request for damages is made in the Application, and at the public hearing … the Attorney-General of New Zealand specifically stated: "My government seeks a halt to a hazardous and unlawful activity, and not compensation for its continuance." The Court therefore finds that no question of damages in respect of tests already conducted arises in the present case …

Finally, the majority concluded that it did not need to rule on whether French atmospheric nuclear tests were legal. Because France promised to stop the atmospheric nuclear tests, the majority reasoned, there was no longer a dispute between the relevant states.

> The Court, as a court of law, is called upon to resolve existing disputes between states. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since "whether there exists an international dispute is a matter for objective determination" … The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the final objective which the Applicant has maintained throughout has been achieved by other means …
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> Thus the Court concludes that, the dispute having disappeared, the claim advanced by New Zealand no longer has any object. It follows that any further finding would have no *raison d'être* …
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> The Court has in the past indicated considerations which would lead it to decline to give judgment. The present case is one in which "circumstances that have … arisen render any adjudication devoid of purpose" … The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.
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> Thus the Court finds that no further pronouncement is required in the present case … The object of the claim having clearly disappeared, there is nothing on which to give judgment.