threw the dispute back into the lap of the parties. Both had violated international law (while in the Meuse case none had done so) and the parallelism of their violations went to the extent of allowing the Court to suggest a "double-zero" solution:

> "[T]he issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counterclaims"[78].

According to the Court, therefore, the 1977 Treaty, despite all evidence, was miraculously still alive but, since the situation on the ground had been fundamentally altered, Budapest and Bratislava must negotiate a way to reconcile the abstract letter of the Treaty not only with hard, or better "concrete" facts, but also with present (and possibly future?) rules of international environmental law.

7.6. The Aftermath of the First Phase of the Gabcíkovo–Nagymaros Dispute.

According to article 5.2 of the Special Agreement, "immediately after the transmission of the judgment the Parties shall enter into negotiations on the modalities for its execution". As to the content of the agreement that Hungary and Slovakia were required to negotiate in compliance with the judgment, it should be said that the Court was as detailed as possible, without violating the contractual freedom of the parties. First, any agreement must, as far as allowed by changed circumstances, achieve all the original objectives of the 1977 Treaty: energy production; enhanced navigation; flood defense; and environmental protection[79]. In other words, the Court preserved the empty shell of the 1977 Treaty by stressing that its letter was flexible enough to allow the parties to adjust its implementation to emerging norms of international law or changing of circumstances[80]. Moreover, the search of a compromise which might accomplish all original goals should be conducted in light of current scientific information, standards and norms of international environmental law[81].

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78 *Gabcíkovo–Nagymaros Project*, Judgment, at 70, para. 153.

79 "As the Court has already had occasion to point out, the 1977 Treaty was not only a joint investment project for the production of energy, but it was designed to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment. None of these objectives has been given absolute priority over the other, in spite of the emphasis which is given in the Treaty to the construction of a system of Locks for the production of energy. None of them has lost its importance. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance and obligations of result". *Ibid.*, at 66, para. 135.

80 "The 1977 Treaty never laid down a rigid system...The Court is of the opinion that the Parties are under a legal obligation, during the negotiations to be held by virtue of article 5 of the Special Agreement, to consider within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty can be best served, keeping in mind that all of them should be fulfilled." *Ibid.*, at 66, para. 138 and 139.

81 "In order to evaluate environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of articles 15 and 19, but even prescribed to the extent that these articles impose a continuing—and thus necessarily evolving—obligation on the parties to maintain the quality if the water of the Danube and to protect nature.... For the purposes of the present case, this means that the parties together should look afresh at the effects on the environment of the operation of the Gabcíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms in both sides of the river". *Ibid.*, at 66–67, para. 140.

In the words of the Court:

> "It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses...What is required in the present case by the rule *pacta sunt servanda*...is that the Parties find an agreed solution within the co-operative context of the Treaty"[82].

Turning these broad statements into practice, it might be concluded that the Court envisaged the conclusion of an agreement that maintains Gabcíkovo in operation but excludes peak-hour functioning of the dam, therefore eliminating the need of the dam at Nagymaros, and gives the parties joint control on the functioning of the Gabcíkovo plant and the by-pass channel. Such an agreement should reflect the state of international environmental law and be concluded only after an extensive environmental impact assessment has been carried out jointly by the parties, although the Court limited itself to calling upon the parties to "look afresh" at the impacts of the project on the environment, and could not actually bring itself to use the words "environmental impact assessment".

Immediately after the Court's judgment, Hungary and Slovakia started negotiations on the modalities for executing it. At the beginning of March 1998, representatives of the two countries initialled a draft Framework Agreement, stipulating, *inter alia*, the construction of a dam on the Hungarian side of the Danube to balance the dam built at Gabcíkovo[83]. The Framework Agreement was approved by the Government of Slovakia on March 10, 1998[84], but, under pressure from the opposition and because of imminent national elections, the Hungarian Government of Dyula Horn postponed its approval. The new cabinet of Viktor Orban elected in May 1998 disavowed the Framework Agreement, allegedly disproportionately detrimental for Hungary[85], and negotiations broke down once again[86].

7.7. The *Gabcíkovo–Nagymaros* Dispute Resurrected? Slovakia's Request of an Additional Judgment

With much foresight (or distrust), in the 1993 Special Agreement which conferred the World Court jurisdiction over the dispute, Hungary and Slovakia provided that, if they could not reach an agreement within six months from the date of the Court's judgment, either party could request the Court to render an additional judgment to

82 *Ibid.*, at 67, para. 141 and 142.
83 "Hungarians Ready to Discuss Gabcíkovo with Slovakia", *CTK National News Wire (Czech News Agency)*, November 18, 1998, available in *Lexis*.
84 Slovakia Requests and Additional Judgment, *ICJ Press Communiqué*, No. 98/28, September 3, 1998.
85 "Hungary and Slovakia to Discuss Gabcíkovo Again", *MTI Econews (Hungarian News Agency)*, November 26, 1998, available in *Lexis*.
86 *Ibid.*

determine the modalities for its execution[87]. Like in the *Nuclear Tests* cases, the door of the court room was left open for a sequel.

Frustrated by the failure of the Framework Agreement, on September 3, 1998 (shortly before elections were due to be held in Slovakia) Slovakia requested the Court to render an additional judgment[88]. In particular, it asked the Court to adjudge and declare that Hungary bears responsibility for the failure of negotiations[89]; that, given that the 1977 Treaty remains in force, the Parties must take all necessary measures to ensure its achievement[90]; that such an obligation applies to the whole geographic area and the whole range of activities provided for by the 1997 Treaty[91]; and that the parties are under an obligation to resume immediately negotiations[92]. To this end, Slovakia asked the Court to declare that Hungary is bound to appoint a plenipotentiary to resume negotiations on the basis of a framework treaty (by January 1, 1999)[93], leading to a final agreement to amend the 1977 Treaty (by June 30, 2000)[94]. Should the parties fail to conclude the framework or the final agreement, Slovakia asked the Court to declare that the 1977 Treaty must be complied with in accordance with its spirit and terms and, upon request of either party, to adjudge on responsibility for breach of the 1997 Treaty and decide upon reparations[95]. Hungary was given until December 7, 1998 to file a written statement of its position on the Slovak request[96].

A few weeks after the filing of the request of an additional judgment, a new Government stepped into office in Bratislava. The populist coalition of Vladimir Meciar, the Movement for a Democratic Slovakia (HZDS), was beaten in the polls and the united opposition came to power after winning three-fifth majority in the parliament. The newly elected Slovak Government, which included an ethnic party representing Slovakia's 600,000 Hungarian speakers, was determined to normalize relations with Budapest[97]. Talks on the implementation of the Court's ruling thus resumed. As a sign of the new spirit at the end of November 1998, with financial support of the EU, Hungary and Slovakia agreed to rebuild the Marie Valerie Bridge, linking the towns of Sturovo and Esztergom, the only bridge on the Danube destroyed during World War II hat had never been rebuilt[98].

On December 7, 1998 Hungary filed its reply to the Slovak's request of further proceedings. On December 11, the President of the ICJ met with the representatives of

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87 1993 Special Agreement, art. 5.3.

88 Slovakia Requests and Additional Judgment, *ICJ Press Communiqué*, No. 98/28, September 3, 1998.

89 *Ibid.*, point 1.

90 *Ibid.*, point 3.

91 *Ibid.*, point 2.

92 *Ibid.*, point 3.a.

93 *Ibid.*, point 3.c and d.

94 *Ibid.*, point e.

95 *Ibid.*, point 4.

96 Hungary to File by December 7, 1998 a Written Statement of Its Position on Slovakia's Request for an Additional Judgment, *ICJ Press Communiqué*, No. 98/31, October 7, 1998.

97 Bauerova, L., "Slovaks and Hungarians Vow to Put Animosities Aside", *The Prague Post*, February 24, 1999, available in *Lexis*.

98 "Ministers Agree to rebuild Danube Bridge Destroyed in Second World War", *CTK National News Wire (Czech News Agency)*, November 30, 1998, available in *Lexis*.

the two countries to ascertain their views as to the continuation of proceedings. Allegedly, Hungary asked to be given another six month period to complete a new round of negotiations[99]. A first round of talks took place in Budapest, in January 1999, and the two delegations agreed to commission a survey on the economic and technical situation at Gabcíkovo and Cunovo, and to carry out an environmental and economic impact study in order to work out joint operational guidelines for the existing hydro-electric facilities[100].

In February, 1999, Hungarian hydrological experts and environmentalists presented a study on restoring the original environment along the Danube between Rajka (north-eastern Hungary) and Sop (south-western Slovakia), a section which, since the opening of the Gabcíkovo hydroelectric plant, has dried up[101]. The plan requires Slovakia to release at least 600 cubic meters of water per second to Hungary. About two thirds of it would be directed to the present riverbed, and 100 cubic meters to the original, meandering riverbed. Fifty cubic meters would be channeled to further branches on both sides of the border. This would result in Slovakia abandoning peak power production and, therefore, giving up a substantial part of electricity thus produced.

As of this writing, negotiations are stalled. A second round was held in Bratislava, in March 1999, to no avail, and a third should be held in Budapest in mid-May. The possibility cannot be excluded that the case may yet return to the ICJ.

7.8. Assessment of the Gabcíkovo–Nagymaros Dispute

It is too early to reach any definitive conclusion on the *Gabcíkovo–Nagymaros* dispute. The determination of whether the International Court of Justice has been instrumental in the resolution of the dispute and in avoiding environmental havoc in the region ultimately depends on the conclusion and eventual characteristics of the agreement the parties will negotiate (if any).

Yet, it is already possible to consider two different criticisms that will be moved against the Court's judgment. First, its dogged defense of the 1977 Treaty and second the scarce attention paid to the scientific data submitted by the parties. Concerning the former, admittedly the Court has deliberately chosen to attribute to the rule *pacta sunt servanda* a special role which put it above not only all other principles of international law but also above parties' behavior. The continuous and reciprocal disregard of the provisions of the 1977 Treaty, indeed, had not been considered by the ICJ as a sufficient cause to justify its termination. Yet the Court is not the only one to be blamed. First, it is not at all newsworthy that the Court is as devoted to the preservation of treaties as the Templars were to Jerusalem. The *Meuse* case in this sense had to be a useful memento for the parties[102]. Second, the parties themselves decided to put the 1977

99 "Hungary Going to Ask for Further delay on Gabcíkovo", *CTK National News Wire (Czech News Agency)*, December 4, 1998, available in *Lexis*.

100 "Hungary and Slovakia adopt Protocol on Danube Dam", *MTI Econews (Hungarian News Agency)*, January 29, 1999, available in *Lexis*.

101 "Hungary Proposes Ways to Improve Water Supply in Danube Dam Region", *BBC Summary of World Broadcasts*, February 27, 1999, available in *Lexis*; "Study on Dividing Danube Water between Hungary and Slovakia", *MTI Econews (Hungarian News Agency)*, February 25, 1999, available in *Lexis*.

102 *Supra*, Ch. III.6.

Treaty at the focus of the judgment, while the Special Agreement asked the Court to answer their questions by applying not only the 1977 Treaty but also "rules and principles of general international law, as well as such other treaties as the Court may find applicable"[103]. Admittedly, the parties stated nothing but the obvious. Indeed, the IJC, by article 38 of its Statute, is called upon to decided disputes submitted to it in accordance with international law and, in doing so, is required to apply, in order: a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom; c) general principles of law; and as subsidiary means d) judicial decisions and the teachings of the most highly qualified publicists[104]. The Court, therefore, could not omit from its judgment the 1977 Treaty and related instruments[105]. But, one can wonder whether, in light of the judgment, the formulation of the Special Agreement did not distort the approach of the Court to the issue of the dispute by overstressing the 1977 Treaty.

Concerning the insufficient consideration the Court gave to the scientific information provided by the parties, again, one might wonder whether the blame is not to be put somewhere else. The choice of the ICJ for a highly technical dispute has not been a fortunate one. The Court is not endowed with the means and competence to master the fine points of hydrology. The judges are all lawyers and lawyers are not usually known for their down-to-earth approach to things. As Judge Bedjaoui quite candidly observed in his separate opinion:

> "Le juriste n'aime pas les effectivités. Elles violent son goût de l'ordonnancement juridique des choses."

The dispute, therefore, probably should not have come before the Court in the first place. It did so because the two Danubian States had been shamed by the international community into settling their dispute in an impartial forum. Going before the ICJ was not only intended to be a signal of their capacity to settle disputes *à l'Européenne* but also of their willingness to break with the past Communist custom of shying away from judicial means[106].

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103 1993 Special Agreement, art. 2.1.

104 Statute of the ICJ, art. 38.

105 For the definition of "related instruments" for the purpose of the Judgment, see *Gabcíkovo–Nagymaros Project*, Judgment, at 23, para. 26.

106 Historically, the Soviet Union and the other socialist countries, because of the socialist doctrine that took for granted friendly relations among socialist countries, constantly refused to have recourse to any means of peaceful settlement other than mere consultation. Caflisch, L., "Le règlement pacifique des différends internationaux à la lumière des bouleversements intervenus en Europe centrale et en Europe de l'Est", *Anuario de derecho internacional*, Vol. 9, 1993, pp. 17–39, at 31; Góralczyk, *op.cit.*. On Marxist and Soviet views on international law and relations, in different historical ages, see, in general, Taracouzio, T.A., *The Soviet Union and International Law: A Study based on the Legislation, Treaties and Foreign Relations of the Union of Socialist Soviet Republics*, New York, The Macmillan Company, 1935; Tunkin, G.I., "Coexistence and International Law", *Hague Academy of International Law Collected Courses*, Vol. 95, 1958–III, pp. 1–82; Kubálková, V./ Cruickshank, A., *Marxism and International Relations*, Oxford, Oxford University Press, 1989, at 158–192; Light, M., *The Soviet Theory of International Relations*, New York, St. Martin's Press, 1988, pp. VI–376; Carty, A. / Danilenko, G.M., *Perestroika and International Law: Current Anglo-Soviet Approaches to International Law*, New York, St. Martin's Press, 1990, pp. IX–231.

C. State Responsibility for Transboundary Environmental Degradation

8. THE *TRAIL SMELTER* DISPUTE (USA V. CANADA)

8.1. Introduction

The origins of the *Trail Smelter* dispute dealt with air pollution that emanated from a private company in British Columbia, Canada, and caused damage to private property in the U.S. State of Washington. Subsequently, the scope of the dispute broadened, escalating to a full international dispute between the U.S. and Canadian Governments. The *Trail Smelter* dispute stretched over a period of 13 years, from 1928 to 1941, during which the U.S. and Canada tried to settle it, with different degrees of success, first through investigation and conciliation by the International Joint Commission, then through *ad hoc* arbitration[1].

The *Trail Smelter* has become a *topos* of international environmental law[2]. For a long time it has been the only instance of an international dispute in which an international adjudicatory body asserted the principle that a State should not permit the use of its territory in such a manner as to cause injury in or to the territory of another (*sic utere tuo ut alienum non laedas*). Yet, it could be reasonably questioned whether the prominent role this arbitration has acquired in the legal canon is

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1 On the *Trail Smelter* dispute, see: *RIAA*, *op.cit.*, Vol.3, 1949, pp. 1903–1982. See also, in general, Read, J.E., "The Trail Smelter Dispute", *Can.Y.I.L.*, Vol. I, 1963, pp. 213–229; Wang, E.B., "Adjudication of Canada–United States Disputes", *Can.Y.I.L.*, Vol. 19, 1981, pp. 158–228; Rubin, A.P., "Pollution by Analogy: The Trail Smelter Arbitration", *Oregon Law Review*, Vol. 50, 1971, pp. 259–298; Dinwoodie, D.H., "The Politics of International Pollution Control: the Trail Smelter Case", *International Journal*, Vol. 27, 1971, pp. 219–235; Mickelson, K., "Re-reading Trail Smelter", *Can.Y.I.L.*, Vol. 31, 1993, pp. 219–233; Kuhn, A.K., "The Trail Smelter Arbitration, United States and Canada", *A.J.I.L.*, Vol. 32, 1938, pp. 785–788; *Ibid.*, Vol. 35, 1941, pp. 665–666; Goldie, L.F.E., "Liability for Damage and the Progressive Development of International Law", *I.C.L.Q.*, Vol. 14, 1965, pp. 1189–1264, at pp. 1226–1231; Handl, G., "Balancing of Interests and International Liability for the Pollution of International Watercourses", *Can.Y.I.L.*, Vol. 13, 1975, pp. 156–194; Madders, K.J., "Trail Smelter Arbitration", Bernhardt, R. (ed.), *Encyclopedia of Public International Law*, *op.cit.*, Vol. 2, at 277–280.

2 Sand challenges the assumption that subsequent international environmental disputes have been settled along the lines of the 1941 *Trail Smelter* arbitration: "Over the past 50 years there have only been two intergovernmental dispute adjudications that could even remotely be compared to Trail Smelter —and even in those cases (the 1957 Lake Lanoux Arbitration and the 1968 Gut Dam Arbitration) concerned classical questions of water use and flood damage, rather than genuine environmental problem". Sand, "New Approaches..", *op.cit.*, at 193.

justified by its judicial weight or merely by its uniqueness[3]. As the years go by, the *Trail Smelter* case has increasingly been de-contextualized and stretched to fit a number of hypothetical circumstances and new situations, thereby breeding over-statement and betraying the original sense of the judgment. Very often that case has been invoked by scholars as authority for a series of principles, reducing the highly complex set of circumstances and interests that caused it and influenced its outcome to a single passage or sometimes an incomplete quotation of a few lines.

Because of the particular approach of this study, which focuses on the description of the machinery for the settlement of disputes and its assessment, rather than on the legal principles emerging from the various cases, the actual judgment will be de-emphasized in order to focus on the peculiar features that have made the *Trail Smelter* arbitration an example for the successful resolution of an environmental controversy.

8.2. The Issue

The *Trail Smelter* dispute revolved around a zinc and lead smelter located in Trail, British Columbia (Canada), on the banks of the Columbia River, about seven miles from the U.S. border. The plant was originally built in 1896 and since 1906 was operated by the Consolidated Mining and Smelting Company of Canada Ltd. (CM&S) which, in turn, was controlled by the Canadian Pacific Railway. The company soon became a focal point for the economic growth of the region, not only because of the large workforce employed at the smelter and in the surrounding mines, but also because of the tax payments it disbursed to Governments at the local, regional and federal levels[4]. The relevance of the smelter in the early life of the city of Trail cannot be overstated. Trail itself was built around the smelter and the smelter itself was, for better or worse, its symbol.

Yet the effects of such industry were not wholly beneficial. The smoke resulting from the smelting of lead and zinc ore contained sulfur dioxide gas, sulfuric acid mist and the dust of metallic compounds, particularly of a heavy pollutant such as lead. Sulfur dioxide was the most patently harmful by-product because of its broad dissemination and its destructive effects, under certain meteorological conditions, on plant tissues. Indeed, vegetation subjected to a prolonged concentration of the smelter's gas in a sunny, moist atmosphere suffered bleaching effects and eventually loss of yield. At high altitude and long distance, when sulfur dioxide mixes with water in clouds, it eventually causes a problem of acid rain.

As activities at the smelter expanded, the impact of polluting emissions in the surroundings increased geometrically, since one ton of sulfur (S) released in the atmosphere, because of the chemical reactions involved in the process, yields two tons of sulfur dioxide ($S+O_2 = SO_2$)[5]. To obviate the problems arising out of

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3 On this point see: Mickelson, *op.cit.*; Rubin, *op.cit.*, at 259.

4 Dinwoodie, *op.cit.*, at 219. See figure 1.

5 In 1916 about 5,000 tons per month of sulfur were emitted (10,000 tons of sulfur dioxide); in 1924, about 4,700; in 1926 about 9,000 and in 1930 about 10,000 (20,000 tons of sulfur dioxide). *RIAA*, Vol. 3, at 1917.

early complaints of nearby Canadian farmers, towards the mid 1920s, CM&S compensated agricultural damage, secured an easing of air pollution and increased the height of the smelter's stack to over 120 meters in order to disperse fumes at a higher altitude and in a larger area. Greatly dependent on the mining industry, British Columbia residents accepted these arrangements and the accompanying defoliation. However, their American neighbors in Northern Stevens County, Washington, who had no direct benefit from the industrial activity in British Columbia, were much less prone to have their fields fumigated. Indeed, despite the new higher stacks, fumes were channeled by prevailing winds through the Columbia River valley, with the mountains rising on each side between 450 and 900 meters above the river. As a result, the town of Northport, located on the east bank of the Columbia River, some 30 kilometers from Trail, as well as small farms on the gravel benches above the river and along its tributary creeks, were periodically visited by intense fumigation that often lasted for several days[6].

8.3. The Dispute

The first formal complaint concerning damage caused by fumes across the boundary was made in 1926 by J.H. Stroh, whose farm was located in Stevens County, a few miles south of the border[7]. Faced with complaints from U.S. farmers, CM&S considered adopting the same tactic employed some years before with Canadian farmers. Because the Constitution of the State of Washington prohibited alien land ownership[8], CM&S was unable to purchase property easements as it had done in British Columbia. Nevertheless, it could still try to settle claims financially. Some of the U.S. farmers accepted, cashed their checks and moved away. Many others, however, considered the CM&S offers inadequate. The most relentless grouped as the "Citizens Protective Association", rejecting individual settlements and appealing to the U.S. Government, through their congressional representatives, for protection[9]. When, in June 1927, the U.S. Government finally took up the issue, a dispute between a group of farmers and a mining company had escalated to an international controversy eliciting intense diplomatic activity. Being unable to find a satisfactory settlement during two years of diplomatic negotiations, in August 1928, the two States agreed to refer the dispute to the International Joint Commission (IJC).

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6 See Map 8.
7 *Ibid.*
8 Read, *op.cit.*, at 223.
9 *RIAA*, Vol. 3, at 1917.

8.4. The First Attempt to Defuse the Dispute: The International Joint Commission at Work

The International Joint Commission is a bilateral body established under article VII of the 1909 Boundary Waters Treaty[10]. While the 1909 Treaty was designed primarily to protect the levels and navigability of the Great Lakes and other boundary waters against unilateral diversion or obstruction, it eventually provided the basis for an increasing involvement by the IJC in pollution, both water and air, and other problems[11].

The IJC is composed of six commissioners appointed by the U.S. and Canadian Governments (three each). Decisions are made by majority vote, irrespective of the commissioner's nationality, with provisions for separate dissenting reports[12]. The responsibilities of the IJC can be grouped under three general headings. First, to regulate and license applications for approval of work that affects water levels or flows in the boundary waters[13]. Second, to investigate and advise on specific questions the two Governments may refer to it[14]. Third, to exercise judicial functions respecting any questions or disputes which the two Governments may specifically refer to it for binding decision[15]. Of the three, only the investigative functions, under article IX, are of some interest. Indeed, while the first is of no relevance to the present study, in almost 90 years of activity the two countries have carefully avoided formal adjudication under article X of the 1909 Treaty.

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10 1909 Treaty Relating to the Boundary Waters and Questions Arising along the Boundary between the United States and Canada, Washington on January 11, 1909, reprinted in Rüster/Simma, *op.cit.*, Vol. X, at 5158. On the International Joint Commission, see, in general, Bloomfield, L.M. /Fitzgerald, G., *Boundary Waters Problems of Canada and the United States: The International Joint Commission 1912–1958*, Toronto, Carswell, 1958, pp. X–264; Spencer, R. / Kirton, J. / Nossal, K. R., *The International Joint Commission Seventy Years On*, Toronto, Centre for International Studies, University of Toronto, 1981, pp. XIV–158; Gulden, *op.cit.*, at 63; Bilder, R., "Controlling Great Lakes Pollution: A Study in United States–Canadian Environmental Co-operation", Hargrove, J.L., *Law, Institutions and the Global Environment*, New York, Oceana, 1972, pp. 294–380; Schmandt, J./ Clarkson J./ Roderick, H., *Acid Rain and Friendly Neighbors*, Durham, NC, Duke University Press, 1988.

11 The Preamble of the 1909 Boundary Waters Treaty leaves enough room for expansion of the IJC competencies beyond water management issues. Indeed, the purpose of the 1909 Boundary Waters Treaty is, as described, " to prevent disputes regarding the use of boundary waters, and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the settlement of all such questions as may hereafter arise".

12 1909 Boundary Waters Treaty, art. VIII, last para. The Rules of Procedure of the Commission can be found at <http://www.ijc.org/agree/water.html> (Site last visited May 5, 1998).

13 *Ibid.*, art. II, IV and VIII

14 *Ibid.*, art. IX.

15 *Ibid.*, art. X.

All disputes, or even mere situations, regarding common environmental issues therefore have been channeled through the non-contentious procedure for investigation and recommendation under article IX[16]. Only national Governments can initiate such investigations. The IJC has no inherent powers of inquiry, except such as may be granted by the Governments *via* reference or otherwise. Moreover, while the Treaty suggests that a single Government may make such reference unilaterally, in practice all of them have been submitted by joint request[17].

The *Trail Smelter* dispute was no exception, as the two Governments jointly asked the IJC to examine and report on the following:

> "1. The extent to which property in the State of Washington has been damaged by fumes from smelter at Trail, British Columbia;
>
> 2. The amount of indemnity which would compensate United States interests in the State of Washington for past damages;
>
> 3. Probable effect in Washington of future operations of smelter;
>
> 4. Method of providing adequate indemnity for damages caused by future operations;
>
> 5. Any other phase of problem arising from drifting of fumes on which the Commission deems it proper or necessary to report and make recommendations in fairness to all parties concerned"[18].

Between 1928 and 1930, the Commissioners carried out a series of inspections and hearings both in the field and in Washington, D.C.. Witnesses were heard, reports of the investigations made by scientists were presented as evidence, counsel for both the United States and Canada were heard, and briefs submitted[19]. However, despite the lengthy and careful investigation of the facts, the dispute did not deflate but rather became further entangled. On the one hand, the Commission, at that time composed of some retired politicians, split along national lines, with the Canadian chairman sympathizing the CM&S view, and the U.S. chairman the U.S. farmers[20]. On the other hand, the Commissioners were puzzled by contradictory expert opinion. Some of the scientific groups consulted attributed defoliation in the area to the fumigation caused by the Trail Smelter. Others attributed it to a variety of causes unrelated to the Trail emissions, like earlier smelt operations in Northport, forest fires, insect infestation, inadequate soil composition and poor farming practices.

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16 "...any other question or matters of difference arising between them involving rights, obligations or interests of either in relation to the other, or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada shall be referred from time to time to the International Joint Commission for examination and report...Such reports shall not be regarded as decisions of the question or matters so submitted either on the facts or on the law, and shall not, in any way, have the character of an arbitral award". 1909 Boundary Waters Treaty, art. IX.

17 Bilder, *op.cit.*, at 303.

18 Bloomfield, *op.cit.*, at 137.

19 *RIAA*, Vol. 3, 1918.

20 For an analysis of the politics of the *Trail Smelter* dispute see, in general Dinwoodie, *op.cit.*

After considerable delay and horse-trading, the two factions avoided public disagreement by issuing a unanimous compromise report. It recommended a $350,000 award for injury up to January 1, 1932, by which time "the damage from such fumes should be greatly reduced if not entirely eliminated", mainly through the operation of new devices installed in the smelter which could convert sulfur dioxide into sulfuric acid, a marketable commodity. However, there being no certainty of the termination of the fumigation problem, the Commission cautioned that, if any further damage should occur after January 1, 1932, that damage should be adjusted by CM&S "within a reasonable time" or deferred to the two Governments for "determination of the amount of the award to be paid by the company".

The settlement proposed by the International Joint Commission turned out to be flawed in many respects. First, the forecast of the Commission that damages should be greatly reduced if not eliminated was wishful thinking[21]. Second, being a mere recommendation deprived of any binding character, it left U.S. farmers dependent on the whims of CM&S for any future control of fumes and compensation. Third, the compensation awarded was far below the level claimed[22]. As a consequence, the United States rejected the IJC recommendation and the Canadians froze the payment of the $350,000 lump-sum.

In the meantime, the economic depression generated by the 1929 stock market crash shattered world economies. Stevens County farmers, marginalized by Roosevelt's New Deal, were relying chiefly on the settlement of their claims against the Trail Smelter to make ends meet. Conversely, large scale unemployment gave the Canadian Government stronger reasons to protect CM&S and to reject any limitation of operations that might affect employment in the region. By 1935, nine years after the first complaints were filed, the situation had not significantly improved. Pollution was still considerable and, because of a combination of economic depression and fumigation, most inhabitants had abandoned Stevens County. After the U.S. considered employing trade measures to force the situation, extensive diplomatic negotiations between the parties led to the conclusion of an *ad hoc* arbitration convention[23].

8.5. The Arbitration

From a formal point of view, there was nothing peculiar about the 1935 Arbitration Convention. Article I required the Canadian Government to pay the $350,000

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21 As a result both of some abatement measures taken by CM&S, and of the economic depression that ensued in 1929, the average monthly quantity of tons of sulfur emitted in the air fell from about 10,000 tons per month in 1930 to about 7,200 in 1931 and to 3,400 in 1932. However, as the depression receded, figures rose again in 1933 to 4,000 tons, in 1934 to nearly 6,300 tons and in 1935 to 6,800. In 1936 it fell to 5,600 tons and in July 1937 was 4,750. *RIAA*, Vol. 3, at 1919. In 1940 it was 3,875 tons. *Ibid.*, at 1948.

22 The IJC received hundreds of claims totaling over $4 million. Dinwoodie, *op.cit.*, at 225.

23 Convention for the Settlement of Difficulties Arising from the Operation of Smelter at Trail, B. C., Ottawa, April 15, 1935, *LNTS*, Vol. 162 at 73–81; Beavans, Ch. I. (ed.), *Treaties and Other international Agreements of the United States of America 1776–1949*, Washington D.C., U.S. Department of State, 1968–1976; De Martens, *op.cit.*, 3 Sér., Vol. 34, at 766.

indicated by the IJC as satisfactory compensation for the damages incurred prior to January 1, 1932. This cleared the table of one of the points of contention and of a major diplomatic hindrance to settlement. Article II provided for the establishing of an arbitral tribunal composed of three arbitrators, according to the classical formula of one plus one plus one. That is to say, one arbitrator was to be appointed by each of the parties (Mr. Robert A.E. Greenshields for Canada; and Mr. Charles Warren for the United States), and a chairman was to be appointed jointly by the parties (eventually Mr. Jan Frans Hostie from Belgium). Finally, articles V to XI were by and large procedural. Among other things, they required the Tribunal to receive or consider evidence, oral or documentary, presented by the Governments "or by interested parties", and it was given the power to administer oaths and carry out investigations.

The most interesting aspects of the Arbitration Convention, however, were found in its substantive aspects. The Tribunal was to "finally decide" these four questions:

> "1. Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January 1932, and, if so, what indemnity should be paid therefor?
>
> 2. In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?
>
> 3. In the light of the answer to the preceding question, what measures or regime, if any, should be adopted or maintained by the Trail Smelter?
>
> 4. What indemnity or compensation, if any, should be paid on account of any decision rendered by the Tribunal pursuant to the next two preceding questions?"

The formulation of the questions asked by the Arbitration Tribunal deserves two comments. First, while damage to U.S. citizens and their property was caused by actions of a private corporation, the liability of Canada, *qua* sovereign State, was taken for granted[24]. The issue was the existence and amount of pollution and not whether the Canadian federal Government held international responsibility for acts committed by individuals. While nowadays this assumption is widely accepted[25], at the time of the *Trail Smelter* arbitration it was not equally obvious. In this sense, *Trail Smelter* laid down a precedent that would ultimately have great impact on the evolution on international law on State responsibility.

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24 "The controversy is between two Governments involving damage occurring in the territory of one of them (USA) and alleged to be due to an agency situated in the territory of the other (Canada) for which damage the latter has assumed by the Convention an international responsibility". *RIAA*, Vol. 3, at 1912.

25 On State responsibility for environmental harm, see Francioni, F./Scovazzi, T., *International Responsibility for Environmental Harm*, London, Graham & Trotman, 1991, XV–499 pp.; Pisillo Mazzeschi, R., "The Due Diligence Rule and the Nature of International Responsibility of States", *G.Y.I.L.*, Vol. 35, 1992, pp. 9–51; Brownlie, I., *State Responsibility*, Oxford, Clarendon Press, 1983, pp. XVI–302.

Second, unlike what had been the case of the questions asked for the International Joint Commission, this time the parties demanded *expressis verbis* the arbitral body to design a regime that could resolve the problem for good. This being so, the decisions of the Tribunal were binding on the parties by virtue of the Arbitration Convention, the Canadian and U.S. Governments relinquished the possibility of designing a regime by way of diplomatic negotiations. This element played a crucial role in the final settlement of the dispute.

In answering the questions asked by the parties under article IV, the Tribunal of Arbitration was to apply:

> "the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice".

Admittedly, it was a rather peculiar formulation for a proper law clause. As has already been said, the *Trail Smelter* dispute took place prior to the emergence of international environmental law. At that time there were few if any rules to prescribe State behavior in issues of transboundary pollution. While the U.S. and Canadian negotiators were fully aware of that legal vacuum, they were equally determined to have the issue settled by adjudication and were not interested in the possibility of the Arbitral Tribunal dismissing the issue because of a *non liquet*. This explains the unusual reference to domestic law as proper law to settle an international dispute, as well as the formulation of the sentence which established a kind of preeminence, in an ideal hierarchy of applicable law, of domestic law over international law. Finally, the choice of U.S. law over Canadian law was justified by the attempt of Canadian negotiators to avoid the precedents set by Canadian courts, by and large unfavorable to industrial enterprise[26].

Yet the Arbitral Tribunal was not only to apply "the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice", but was required by the same article to do so giving "consideration to the desire of the High Contracting Parties to reach a solution just to all parties concerned". This is another odd formulation. The dispute was a strictly inter-State issue[27]. However, the last sentence of article IV required the Tribunal to take into consideration the points of view and interests of those entities which, though not being formally parties to the dispute, were at its very core: CM&S and the Stevens County farmers[28]. Private parties played a fundamental role in the development of the dispute and its settlement. They fully exploited the opportunity afforded by article VIII to have their views examined by the arbitrators[29]. Moreover, CM&S management was involved at all stages of the dispute. While an officer of the Canadian Secretary of State for External Affairs played the role of Agent, the

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26 Read, *op.cit.*, at 227.

27 The dispute is still a dispute between two sovereign states. "The Tribunal is not sitting to pass upon claims presented by individuals or on behalf of one or more individuals by their Government, although individuals may come within the meaning of "parties concerned", article IV and of "interested parties" in article VIII of the Convention". *RIAA*, Vol. 3, at 1912–1913.

28 Note the shift, within the same sentence, from "High Contracting Parties" to "all parties".

29 "The Tribunal shall hear such representations and shall receive and consider such evidence, oral or documentary, as may be presented by the Governments or by interested parties…".

CM&S General Counsel was made Counsel of the Canadian team[30]. This was instrumental to having the farmers and most of all CM&S, the one who had to suffer the burden of regulations, accept the award as a satisfactory settlement.

After written pleadings had been exchanged, and after a preliminary meeting for the adoption of the rules of procedure and hearing of preliminary statements, the Tribunal proceeded to the examination of the questions. The members of the Tribunal traveled extensively over the region and inspected the area involved in the controversy (the northern part of Stevens County) as well as the smelter at Trail. This on-site visit was no casual survey (unlike in the case of the visits of the World Court to the Meuse and Danube Rivers[31]). The arbitrators examined closely many of the farms, orchards and forests. Therefore, when they heard the evidence, the witnesses and experts were talking about places and conditions familiar to them. Such a keen attention to issues of fact, often of highly technical character, is probably one of the most peculiar aspects of the *Trail Smelter* arbitration. Besides the parts of the final decision which deal with the questions of *res iudicata* and international liability, the great majority of the judgment rendered by the Tribunal was focused on sulfur sensing devices and precipitation tables. Because the Tribunal conceived its mandate as mainly aimed at designing a new international regime to avoid transboundary air pollution in the region rather than determining the extent of Canada's liability, it placed great emphasis on issues of fact and scientific aspects of the dispute rather than on specific points of law. The Tribunal's concern with designing a new international regime is reflected in the observation that, quite at variance with international judicial practice, it split its judgment into two parts. It rendered an interim judgment in 1938 and the final judgment three years later, in 1941, after three consecutive growing seasons had allowed for the testing of a temporary regime and further scientific investigation.

8.6. The Award

On April 16, 1938, the Tribunal rendered its judgment on the first question as well as two interim decisions on the second and third questions, and provided for a temporary pollution control regime thereunder[32]. Regarding the first question (i.e. whether damage caused by the Trail Smelter in the State of Washington occurred since the first day of January 1932, and, if so, what indemnity should be paid), the Tribunal rejected the great part of U.S. claims[33], labeling the damage claimed as

30 Read, *op.cit.*, at 228.

31 *Infra*, Ch. III.6 and 7.

32 Trail Smelter Arbitral Tribunal, Decision Reported on April 16, 1938, to the Government of the United States of America and to the Government of the Dominion of Canada under the Convention signed April 15, 1935, *RIAA*, Vol. 3, at 1911–1937.

33 The United States claimed compensation for damages suffered by: a) cleared land and improvements; b) uncleared land and improvements; c) livestock; d) property in the town of Northport; e) violation of United States sovereignty as measured by cost of investigations from January 1, 1932, to June 30, 1936; f) interests on the sum of $350,000 agreed in article I of the Arbitration Convention but not yet paid by Canada; g) business enterprises. The U.S. claims amounted to $2,100,011.17.

indirect, remote, intangible and too uncertain to be appraised. The Tribunal limited Canadian liability to damages inflicted to cleared and uncleared land for a total sum of $78,000 to cover the period of January 1, 1932 through October 1, 1937. Only significant damage for which pecuniary loss could be proved was included in the assessment of the Tribunal.

As for the remaining questions, the Tribunal provided for further and "more adequate and intensive study" during which elaborate measurements of emissions, air flow and weather patterns were to be made under the supervision of two technical consultants appointed by the two Governments[34]. The designing of the future regime took some time. A temporary regime was agreed to, during which the smelter was to be permitted to operate at a reduced level in the spring and at other times of the year at a level to be determined by reference to various weather and pollution factors. The Canadian Government was to remain liable for any damage caused by the smelter in the interim period.

The final judgment was rendered on March 11, 1941, 15 years after the first claim, or 10 years since the IJC report and three years after the date for which indemnity had been reckoned by the preliminary award[35]. In the meantime the great majority of the farmers who initiated the dispute and in defense of whose interest the U.S. acted, were either dead or had moved to some other region. The Tribunal began the substantive part of its final judgment by refusing a plea by the U.S. that the issue of damage be reopened and the award increased to take account of the expenses incurred by the U.S. Government in accumulating evidence and presenting its case for damages. After rejecting the U.S. contention by applying the doctrine of *res iudicata* to the decision rendered in 1938[36], the Tribunal found that no significant damage had occurred from October 1, 1937 to October 1, 1940[37].

With regard to the second question, whether the smelter should be required to refrain from causing damage to the State of Washington, the answer was that

> "under principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein"[38].

Therefore, "considering the circumstances of the case, the Tribunal [held] that the Dominion of Canada [was] responsible in international law for the conduct of the Trail Smelter"[39]. This is the famous passage so often quoted in international legal literature. This principle has become the cornerstone of international environmental law, and in this sense the attention given to it has been unconditionally

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34 "The Governments may each designate a scientist to assist the Tribunal". Article II of the Arbitration Convention.

35 Trail Smelter Arbitral Tribunal, Decision Reported on March 11, 1941, to the Government of the United States of America and to the Government of the Dominion of Canada under the Convention signed April 15, 1935, *RIAA*, Vol. 3, at 1938–1982.

36 *Ibid.*, at 1948–1957.

37 *Ibid.*, at 1957–1959.

38 *Ibid.*, at 1965.

39 *Idem*

deserved[40]. However, if one looks at the "ifs" and "buts" attached to this bold statement, the Tribunal's redoubtably progressive attitude is much less impressive. Indeed, the Tribunal felt compelled to specify that a State is liable for the use or permission to use its territory in such a manner as to cause injury in or to the territory of another or the properties or persons therein only "when the case is of serious consequence and the injury is established by clear and convincing evidence"[41]. Moreover, it required that "the damage...and its extent [must be] such as would be recoverable under the decisions of the courts of the United States in suits between private individuals"[42]. In other words, according to the Tribunal, as long as polluting activities did not do injury for which the 1941 U.S. federal law assessed damages (i.e., direct injury measurable in money terms), Canada could not be hold liable. All in all, while the Tribunal applied to the case a rule of strict liability (i.e. the USA was not required to prove negligence, much less design, before Canadian responsibility was engaged), at the same time it mitigated its effects by limiting its purpose to pollution giving rise to tangible injury translatable into provable money damages. As a commentator remarked, "...the general international law of trespass was replaced by the American law of nuisance"[43].

The third question was what measures or regime, if any, should be adopted and maintained by the Trail Smelter. As was said above, designing a new regime became the utmost concern of the Tribunal. To that effect, with the 1941 judgment it imposed an articulated and detailed regime of control over the emission of sulfur dioxide fumes from the smelter which included, *inter alia*, the maintenance of several automatic pollution recorders in the affected areas; maintenance of sulfur dioxide concentration records at the smelter which should be forwarded monthly to the two Governments; a minimum height of the stacks and maximum permissible sulfur emissions at different times of the day, seasons and given atmospheric conditions[44].

Despite the scale and complexity of the new regime, the Tribunal recognized that it might nonetheless prove insufficient to abate the nuisance, as had happened after the IJC report. Accordingly, the Tribunal called for a further test period of two growing seasons. What if the conditions after this second test period warranted amendment or suspension of the regime? In the opinion of the Tribunal, the Arbitration Convention had empowered it to do so. Indeed, the Tribunal reasoned that if

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40 Nowadays, the principle that States are obliged to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction is regarded as customary international law. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ILM*, Vol. 35, 1996, para. 29, at 821. In a non-environmental context, see: *Corfu Channel*, Merits, Judgment, at 22. The principle is incorporated in Principle 21 of the Stockholm Declaration. Sands, *Principles*, *op.cit.*, at 190–194.

41 *RIAA*, Vol. 3, at 1966.

42 *Idem*. As Rubin acutely remarked "...the word 'damage' [in this passage] seems to have been interpreted [by the Tribunal] to mean that for which damages are paid or injunctive relief given in the tort law of the United States. Since 'damage' and 'damages' are inextricably intertwined in the logic of the Tribunal, some confusion exists as to the meaning of both words...It seems clear that the Tribunal was in fact not defining damage at all with its language, but defining 'damages'—the extent to which there should be monetary recovery for 'damage'". Rubin, *op.cit.*, at 265–266 and 268.

43 Rubin, *op.cit.*, at 273.

44 *Ibid.*, at 1974–1977.

it was given the power to establish a regime, it must equally possess to the power to provide for alteration, modification or suspension. Otherwise, the solution reached would not be "just to all parties concerned"[45]. Consistently with such reasoning, the Tribunal prescribed a machinery to amend or suspend the regime, consisting of a clause providing for compulsory arbitration by a Commission of Scientists[46].

Finally, answering to the fourth question (i.e. what indemnity or compensation, if any, should be paid on account of any decision), the Tribunal decided that an indemnity would have to be paid in the event of future damage and that the United States was to be reimbursed reasonable costs of investigation, up to $7,500 in any one year, as compensation.

8.7. The Aftermath

By many accounts the Trail Smelter dispute had been satisfactorily settled. Those who had suffered damage had eventually obtained some compensation. The amount disbursed by Canada under the award of the Arbitral Tribunal amounted to $428,179.51 ($350,000 recommended by the IJC as suitable compensation for damages suffered up to January 1, 1931, plus $78,179.51 for damages caused between January 1, 1932 and October 1, 1937). Yet a final accounting of the amounts distributed by the U.S. Government to claimants was not made until 1949, when Canada received a refund of $8,828.19 that had not disbursed since the beneficiaries had either died or were untraceable[47]. Alas, many of the original claimants who had suffered the fumigation had long since been replaced by their heirs or executors.

The new regime imposed a great burden on CM&S. In order to comply, the company was compelled to remove from the smoke cloud over the stacks more sulfur dioxide than was emitted from the stacks of all other smelters in North America combined[48]. The cost of adjusting to the new regime amounted to some $20 million; an incredibly large sum for the 1940s that by far outweighed the sum disbursed to compensate for the damages caused[49]. Despite this, the Trail Smelter not only remained an economically viable enterprise but did not stop growing.

More than 100 years after it opened, the smelter continues to operate. It is still owned by the same company (in 1966 CM&S was renamed Cominco Ltd.), and it has become the world's largest zinc and lead smelting complex. In addition to those two metals, which were the main output of the plant at the time of the dispute, the production line now turns out silver, gold, bismuth, cadmium and indium. Moreover, because of technical developments, the sulfur dioxide emanating from the stacks of the plant could be converted into a variety of sulfur

45 *Ibid.*, at 1973.
46 *Ibid.*, at 1978.
47 Exchange of Notes constituting an Agreement between the United States of America and Canada Supplementing the Convention of April 15, 1935, Relating to Claims on Account of Damages caused by Fumes Emitted from the Smelter at Trail, British Columbia, Washington, November 17, 1949, and January 24, 1950, *UNTS*, Vol. 151, at 171–177.
48 Read, *op.cit.*, at 221.
49 *Ibid.*, at 221.

products and agricultural fertilizers, which CM&S succeeded in selling for substantial profit.

However, if a match had been blown out, a much larger fire was still burning. Because of the industrial expansion following the end of World War II, air pollution became a problem that eventually affected the entire industrialized world. It was no longer an issue of local air pollution from an easily identifiable source to be dealt with on a small scale, as in the case of the Trail Smelter, but one that had to cope with hundreds of electric power plants and smelters and millions of households and cars emitting noxious substances. Smoke emanating from the stacks of industries in Illinois drifted to Canadian territory and vice-versa. Acid rain, caused by sulfur dioxide and nitrogen oxides, became an important issue in the relations between Canada and the United States as it did throughout Europe.

To address this challenge, in 1979, under the aegis of the United Nations Economic Commission for Europe, the Convention on Long-Range Transboundary Air Pollution (LRTAP) was concluded[50]. While not being European States, Canada and the United States signed it[51]. The LRTAP eventually became the pivot agreement of a large legal regime to address air pollution in the industrialized world[52]. In 1991, outside and beyond the framework of the LRTAP, Ottawa and Washington concluded the Air Quality Agreement[53]. The Agreement contains specific reduction targets for sulfur dioxide and nitrogen oxides as well as specific strict monitoring programs. While improvements have been made to reduce acid rain precursors and put legislative arrangements in place in both countries, it is not unlikely that in the future the Canada–United States Air Quality Agreement will be expanded to include smog, ground-level ozone, toxic air contaminants, inhalable particulate matter and acid aerosols.

The dispute resolution provision of the Air Quality Agreement is noteworthy because it distinguishes itself from the dispute settlement clauses described in the second chapter of this study and because of its somewhat baroque character. Articles XI, XII and XIII are respectively dedicated to "consultations", "referrals", and "settlement of disputes". The Agreement seems to distinguish between "general issues or disputes" and "disputes over its interpretation and/or implementation". Concerning general issues and disputes, the parties are first required to hold consultations no later than 30 days from the date of the receipt of the request[54]. If these issues remain unresolved after consultation, the parties shall "refer the matter to an appropriate third party"[55]. Yet, the Agreement does not specify who or which institution this third party might be.

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50 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP), (65).

51 Canada ratified the LRTAP on December 15, 1981; the United States on November 30, 1981.

52 The Protocols to the LRTAP are: 1985 Sulphur Protocol, (80); 1988 Protocol Concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes, (91); 1991 Volatile Organic Compounds Protocol, (98), 1994 Protocol to the LRTAP on Further reduction of Sulphur Emissions, Oslo, June 14, 1994, in Burhenne, *op.cit.*, 979:84/E.

53 United States–Canada Air Quality Agreement , Ottawa, March 13, 1991, *ILM*, Vol. 30, 1991, pp. 676–692. On the 1991 Air Quality Agreement, see: Roelofs, J.L., "United States–Canada Air Quality Agreement: A Framework for Addressing transboundary Air Pollution Problems", *Cornell International Law Journal*, Vol. 26, 1993, pp. 421–454.

54 1991 Canada–USA Air Quality Agreement, art. XI.

55 *Ibid.*, art. XII.

Conversely, for disputes arising over the "interpretation or the implementation" of the Agreement, a separate process applies. For these disputes, the Agreement directs the parties, after consultations, to "commence negotiations" in order to resolve the dispute[56]. One cannot but notice that, unlike in the case of METs and most international treaties outside the environmental domain, where consultations and negotiations are usually employed as synonyms, here the negotiators evidently meant (or thought to mean) something different. It is difficult to see, however, how the two processes might be distinguished from a practical point of view and what the legal consequences might be. If the parties fail to resolve the dispute by negotiations, they must consider whether to submit the dispute to the IJC, in accordance with either article IX (fact-finding, non-binding procedure) or article X (binding judicial procedure), or to "another agreed form of dispute resolution" (e.g. arbitration as in the case of the Trail Smelter)[57]. Finally, article IX.2 also provides that the parties may refer to the IJC any other matters "as may be appropriate for the effective implementation of this Agreement".

Should another dispute between Canada and the United States occur in the future such that precipitated by the Trail Smelter in the 1930s, it will probably be addressed, managed, settled and resolved within the regulatory framework either of the LRTAP regime or the Air Quality Agreement. Referral to arbitration, as happened in 1935, will probably remain a unique event.

8.8. Assessment of the Trail Smelter Dispute

The *Trail Smelter* arbitration is usually pointed at as an example of successfully resorting to international adjudication. Successful it was, for a dispute between neighboring States was settled and fumigation of the Columbia River Valley was halted. Nonetheless, there are many factors which make it a *rara avis* and its record hardly duplicable. International adjudication is usually defined as the settlement of disputes between States by a binding award, on the basis of law, as a result of an undertaking voluntarily accepted[58]. The *Trail Smelter* arbitration was indeed the result of an undertaking voluntarily accepted, and resulted in a binding award which the parties carried out in good faith. Yet, the similarities with international adjudication seem to end here because the role played by law in the settlement process was extremely marginal if not a mere ruse.

In the *consideranda* of the 1941 award, the Arbitral Tribunal made it perfectly clear that its function was not to apply law, U.S. or international, to a set of facts and draw a conclusion on the rights and duties of the parties, but to find a middle ground between conflicting interests. Such a transaction was to take place not only between the legal interests of two sovereign States

56 *Ibid.*, art. XIII.1.
57 *Ibid.*, art. XIII.2
58 *Supra*, Ch. II.4.

> ("while for the United States' interests may now be claimed to be injured by the operations of a Canadian corporation, it is equally possible that at some time in the future Canadian interests might be claimed to be injured by an American corporation"[59])

but also between two different sectors of their domestic economies

> ("it would not be the advantage of the two countries concerned that industrial effort should be prevented by exaggerating the interests of the agricultural community. Equally, it would not be to the advantage of the two countries that the agricultural community should be oppressed to advance the interest of industry"[60]).

In the eyes of the arbitrators, their task was not to establish whether Canada, through the agency of CM&S, had violated the rights of the United States, but rather to strike the right balance between industry and agriculture. It was not even a matter of balancing the merits of U.S. agriculture in Steven County against those of the Canadian industry in Trail. It was rather a fine tuning of the equilibrium between the two sectors of the economy all along the thousands of miles of the common border. For, if one day the Tribunal could be called to decide upon whether British Columbia industry should be restrained to protect agriculture in the State of Washington, another day it might be asked to strike a balance between the steel industry in Illinois and the wheat fields of Ontario. In this framework, rules of law become a mere accident, a fig leaf to justify the achievement of some equilibrium. In other words, because the rationale of the arbitration was to reach a settlement "just to all parties concerned"[61], a rule prohibiting Canada from causing significant damage to or on U.S. territory had to be found, and if it did not exist it had to be invented, because this was the legal hindrance between the submission of the dispute and the establishment of the regime for air pollution control in the region. If there was no duty not to cause transboundary harm, there would be no need for a legal regime.

Canada was found "responsible in international law for the conduct of the Trail Smelter"[62], and the obligation to compensate originated from the fact that:

> "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another of the properties or persons therein..."[63].

How did the Tribunal reach that conclusion? Not by looking at State practice, since the Tribunal, by its own admission, could not find any international precedent[64]. In its search for something to cling to, the Tribunal cited as international case-law the

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59 *RIAA*, Vol. 3, at 1938–1939.

60 *Idem*

61 1935 Convention for the Settlement of Difficulties arising from the Operation of Smelter at Trail, art. IV.

62 *RIAA*, Vol. 3, at 1965.

63 *Ibid.*

64 "No case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal nor does the Tribunal know of any such case. The nearest analogy is that of water pollution. But, here also, no decision of an international tribunal has been cited or has been found". *Ibid.* at 1963.

Alabama case[65] (which, incidentally, stems from an international dispute but was adjudged by the U.S. Supreme Court) and another case relating to the use of shooting establishments located at the boundary of two Swiss cantons (Soleure and Argovia)[66]. Somewhat more pertinently, the Tribunal moved to cite several cases regarding water and air pollution between U.S. States[67]. Had the Tribunal relied on the proper law clause contained in the 1935 Convention[68], which explicitly authorized it to refer to U.S. law and judicial practice to adjudicate the case, this would have been enough to establish Canada's responsibility under American law. However, the arbitrators, not content with this solution, struggled to dignify the no-harm rule by elevating it to principle of international law. And, to do so, they resorted to a presumption, whereby

> "the law followed in the United States in dealing with quasi-sovereign rights of the States of the Union, in the matter of air pollution, whilst more definite, is in conformity with general rules of international law"[69].

It will never be known how the Tribunal could conclude that law followed in the United States was in conformity with the general rules of international law when no such rules was found. Had this been an orthodox arbitration, the agent and counsels of the defendant would have focused their pleadings on this *vacuum legis* to save their client from the duty to compensate. Yet, it did not happen, and the reason for this omission is straightforward. Canada, by agreeing to have the issue settled by arbitration had already implicitly agreed first to the artificial creation of the rule, and second to its own liability. It was only a matter of deciding for how much Canada was liable. The seminal "Trail Smelter rule" came out of the need to have a regulation in that area, for that problem, at that time, and not because it really existed in international law. On that occasion Canada was the defendant, but in order to be able in the future to claim compensation against the United States for acid rain caused by the U.S. industry of the Mid-West, it had to accept the creation of a legal principle.

While the *Trail Smelter* arbitration has typically been remembered for the only principle its arbitrators articulated, quite ironically the Tribunal was concerned more with finding practical solutions satisfactory to "all parties" rather than stating broad legal principles. Much like a conciliator, the Tribunal spent most of its time designing an air pollution control regime which would be acceptable to all parties, which justified the levity with which international law had been approached. This observation helps explain the dismaying outcome of the work of the International Joint Commission as compared to that of the Tribunal. While their *modus operandi* did not substantially differ, they obtained diametrically opposite results, perhaps

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65 "A great number of general pronouncements by leading authorities concerning the duty of a State to respect other States and their territory have been presented to the Tribunal...International decisions, in various matters, from the *Alabama* case onward, and earlier ones, are based on the same general principle...". *Idem.*

66 *Idem.*

67 *Ibid.*, at 1963–1965.

68 1935 Convention for the Settlement of Difficulties arising from the Operation of Smelter at Trail, art. IV.

69 *RIAA*, Vol. 3, at 1963.

because while the mission of the former was limited to diagnosing the problem, that of the latter also included the establishment of an air pollution control regime that could take into account the interests of farmers, the mining industry, Ottawa and Washington.

Another factor that makes the *Trial Smelter* arbitration unique in the international dispute settlement scenery is the central role played by science. The first round of monitoring of the situation was carried out between 1928 and 1932 by the IJC. A second round was conducted by the Arbitral Tribunal between 1935 and 1941. If the two growing-season test periods[70] and the monitoring activities carried out independently by the two Governments are added to these, it turns out that the source, dynamics and impact of fumigation in the Columbia River Valley were studied for no less than 15 years —a scientific research unprecedented in extension and detail.

The length and detail of the investigation of the Trail Smelter problem is hardly repeatable in any judicial context. First of all, international courts and tribunals are reluctant to get involved in such expensive activities, since they might unduly stretch the length of the case. Second, international judicial bodies, unlike the Trail Smelter Arbitral Tribunal, are usually called to decide points of law. Admittedly, facts play a fundamental role in reaching decisions, as international disputes are not abstract issues. Nonetheless, once it has been determined that fumes emanating from A have a detrimental effect on B, and the amount of damage has been determined, the case is ripe for decision. Determining what should be done to prevent fumes from drifting from A to B without curbing the economic viability of A (i.e. designing regimes) is usually not the work of a judicial body. Herein lies the difficulty of reproducing the Trail experience outside the original context.

The third peculiarity of the *Trail Smelter* dispute concerns the role played by non-State entities. While the *Bering Sea Fur Seals* dispute arose out of acts committed by a State (U.S. Customs revenue cutters), which purportedly violated the sovereignty of another (vessels flying the Union Jack), in the case of the *Trail Smelter* the offense was committed by a private corporation (CM&S) against the property of individuals (farmers in Stevens County). States were not directly involved either in carrying out the unlawful act or in suffering its consequences[71].

Again, ambiguities abound in the reasoning of the Tribunal. While it felt obliged to stress that

> "the Tribunal is not sitting to pass upon claims presented by individuals or on behalf of one or more individuals by their Government, although individuals may come within the meaning of 'parties concerned', in article IV and of 'interested parties' in article VIII of the Convention"[72]

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70 *Supra*, Ch.III.8.6.

71 The United States never argued, nor did the Tribunal feel the need to do so, that Canada had a duty to sanction CM&S behavior. Moreover, while the U.S. Government claimed compensation for the violation of U.S. sovereignty (*supra* note 33), the claim had been disallowed by the Tribunal. *RIAA*, Vol. 3, at 1932–1933.

72 *Ibid.*, at 1912–1913.

the Tribunal rejected the majority of U.S. Government claims for damage to federal and State property, labeling the damage as either indirect, remote or intangible and uncertain to be appraised; the Tribunal limited Canadian liability to damages inflicted to cleared and uncleared land, that is to say, to the damage suffered by the farmers[73].

A wrangle between farmers and an industry became a dispute between two sovereign States. Was arbitration the most efficient way to address it? The ordinary course followed by those damaged by fumes from an industrial facility is to bring a suit in the competent national court for damages and for an injunction to prevent future damage. However, this simple, fast and cost-effective opportunity, because of separate U.S. and Canadian judicial systems, was not available to the claimants in the State of Washington. It was general opinion of the lawyers concerned at the time that British Columbia courts, on the basis of the rule laid down by the House of Lords in *British South Africa Company v. Companhia de Moçambique*[74], would be compelled to refuse to accept jurisdiction in suits based on damage to land situated outside of the province. The Stevens County farmers, with very limited financial means, could not fairly be expected to carry a lawsuit through the hierarchy of courts to the Privy Council in the hope that it would reject the precedent laid down by the House of Lords[75]. Because of this, the only way the farmers had to find redress to the torts suffered was by way of diplomatic protection. Through espousal, the claims of a fistful of stubborn farmers, who had refused financial settlement, became the claims of the U.S. Government and hence, a sore spot in the relations between the two countries.

The perverse amplification of a local squabble into an international dispute, as it happened in the *Trail Smelter* case, nowadays has become much more unlikely. On the one hand, as regional integration expands at all latitudes, individuals are increasingly given *locus standi* in foreign courts[76]. On the other hand, non-state entities are increasingly granted access to international courts and tribunals[77]. Redress through these means is still much wanting, but it is undeniable that in comparison to the late 1930s, borders are a much less formidable barrier to justice.

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73 *Ibid.*, at 1924–1933.

74 House of Lords, Appeal Cases, *British South Africa Company v. Companhia de Moçambique*, 1893, *The Law Times Report*, Vol. 69, January 6, 1894, at 604.

75 Read, *op.cit.*, at 222.

76 On the issue see: Kumin, J., "Transfrontier Environmental Disputes and National Courts: An Approach for Western Europe", *The Fletcher Forum*, Vol. 3, 1978, pp. 24–46.

77 *Supra*, Ch. II.4.2.3.

9. THE *NUCLEAR TESTS* DISPUTE (AUSTRALIA, NEW ZEALAND *ET AL.* V. FRANCE)

9.1. Introduction

The *Nuclear Tests* dispute involved on the one side France and, on the other, a number of South Pacific States, foremost among them New Zealand and Australia. Since 1963, when the French Government announced its decision to move its nuclear firing ground from Reggane, in the Algerian Sahara, to the atolls of Mururoa and Fangataufa, in French Polynesia, nuclear tests have been an enduring sore spot in the diplomatic relations between France and the nations of the Pacific[1]. The history of the dispute is marked by two different series of judgments rendered by the International Court of Justice, the first in 1973–1974[2], and the second in

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1 The matter has, in fact, been the subject of intense diplomatic correspondence between New Zealand, Australia and France since 1963, when press reports indicated France' intention to move its test sites to the Pacific. New Zealand Application, *ICJ Pleadings* 1973, Vol. I, Annex III; Australian Application, *ICJ Pleadings* 1973, Vol. II, Annexes 2–14.

2 *Nuclear Tests* (Australia v. France), Interim Protection, Order of June 22, 1973, ICJ Reports 1973, pp. 99–133; *Nuclear Tests* (New Zealand v. France), Interim Protection, Order of June 22, 1973, ICJ Reports 1973, pp. 135–164; *Nuclear Tests* (Australia v. France), Judgment, ICJ Reports 1974, pp. 253–455; *Nuclear Tests* (New Zealand v. France), Judgment, ICJ Reports 1974, pp. 457–528. The first phase of the Nuclear Tests dispute has elicited a large scholarly production. See, *inter alia*, Dupuy, P.M., "L'affaire des essais nucléaires français et le contentieux de la responsabilité internationale publique", *G.Y.I.L.*, Vol. 20, 1977, pp. 375–405; Ruiz, J.J., "Mootness in International Adjudication: The Nuclear Tests Cases", *G.Y.I.L.*, Vol. 20, 1977, pp. 358–374; McDonald, R. St. J./Hough, B., "The Nuclear Tests Case Revisited", *G.Y.I.L.*, Vol. 20, 1977, pp. 337–357; Lellouche, P., "The Nuclear Tests Cases: Judicial Silence v. Atomic Blasts", *Harvard International Law Journal*, Vol. 16, 1975, pp. 614–637; Keith, K.J., "The Nuclear Tests Cases after Ten Years", *Victoria University of Wellington Law Review*, Vol. 14, 1984, pp. 345–336; Kós, J.S., "Interim Relief in the International Court: New Zealand and the Nuclear Tests Cases", *Victoria University of Wellington Law Review*, Vol. 14, 1984, pp. 357–387; McWhinney, E., "International Law-Making and the Judicial Process: the World Court and the French Nuclear Tests Case", *Syracuse Journal of International Law and Commerce*, Vol. 3, 1975, pp. 9–46; Sur, S., "Les affaires des essais nucléaires (Australie c. France; Nouvelle-Zélande c. France) ", *R.G.D.I.P.*, Vol. 79, 1975, pp. 972–1027; Stern, B., "L'affaire des essais nucléaires français devant la Cour internationale de Justice", *A.F.D.I.*, Vol. 20, 1974, pp. 299–333; Elkind, J.B., "French Nuclear Testing and Article 41 – Another Blow to the Authority of the Court?", *Vanderbilt Journal of Transnational Law*, Vol. 8, 1974, pp. 39–84; Frankel, K.D., "International Court of Justice has Preliminary Jurisdiction to Indicate Interim Protection: The Nuclear Tests Cases", *New York University Journal of International Law and Politics*, Vol. 7, 1974, pp. 163–176; Franck, T.M., "World Made Law: The Decision of the ICJ in the Nuclear Tests Cases", *A.J.I.L.*, Vol. 69, 1975, pp. 612–620; Khosla, D., "Nuclear Tests Cases: Judicial Valor v. Judicial Discretion", *Indian Journal of International Law*, Vol. 18, 1978, pp. 322–344; Berg, A., "Nuclear Tests Cases", *Encyclopedia of Public International Law, op.cit.*, Vol. 2, pp. 217–219; De Lacharrière, G., "Commentaires sur la position juridique de la France à l'égard de la licéité de ses expériences nucléaires", *A.F.D.I.*, Vol. 19, 1973, pp. 235–251; Ritter, J.-P., "L'affaire des essais nucléaires et la notion de jugement déclaratoire", *A.F.D.I.*, Vol. 21, 1975, pp. 278–293; Cot, J.-P., "Affaires des essais nucléaires: Demandes en indication des mesures conservatoires. Ordonnances du 22 juin 1973", *A.F.D.I.*, Vol. 19, 1973, pp. 252–271.

1995[3]. The first phase of the dispute was ended in 1975, when France announced the discontinuance of nuclear testing in the atmosphere[4]. The second ended in March 1996, when France terminated underground nuclear testing[5].

9.2. The Issue

The beginning of the French nuclear program dates back to 1958, when French President Charles De Gaulle decided that France had to develop its own nuclear capability (i.e. its own *force de frappe*, to use the French expression) to avert once and for all the risk of being invaded for the third time in less than one century (1870, 1914 and 1940) and to regain a certain margin of diplomatic maneuver between the two blocs[6]. The first French nuclear test was carried out on February 13, 1960, in the Algerian Sahara Desert, at Reggane. Yet, as at the beginning of the 1960s Algeria was rapidly moving to independence, the French Government had to consider relocating its nuclear firing ground. The South Pacific, to this end, represented an excellent choice. A number of other nuclear States had already used that

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3 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of December 20, 1974 in the Case Nuclear Tests* (New Zealand v. France), Order of 22 September, 1995, ICJ Reports 1995, pp. 288–421. Because of the recent nature of the second phase of the *Nuclear Tests* dispute, there is not yet a number of scholar studies comparable to that evoked by the first phase. See, *inter alia*, Taylor, P., "Testing Times for the World Court: Judicial Process and the 1995 French Nuclear Tests Case", *Colorado Journal of International Environmental Law and Policy*, Vol. 8, 1997, pp. 199–240; Bothe, M., "Challenging French Nuclear Tests: A Role for Legal Remedies", *RECIEL*, Vol. 5, 1996, pp. 253–258; Sands, Ph., "L'affaire des essais nucléaries II (Nouvelle-Zélande c. France): Contribution de l'instance au droit international de l'environnement", *R.G.D.I.P.*, Vol. 101, 1997, pp. 447–474; Gillespie, A., "The 1995 Nuclear Tests Case: The ICJ Fails to Address the Merits of an International Environmental Concern", *The New Zealand Law Journal*, Vol. 1996, 1996, pp. 195–200; Giraud, C., "French Nuclear Testing in the Pacific and the 1995 International Court of Justice Decision", *Asia-Pacific Journal of Environmental Law*, Vol. 1, 1996, pp. 125–133; Dommen, C., "Nuclear Testing: Vaihere Bordes and John Temeharo v. France – Communication No. 645/1995", *RECIEL*, Vol. 6, 1997, pp. 92–94; Torrelli, M., "La reprise des essais nucléaires français", *A.F.D.I.*, Vol. 41, 1995, pp. 755–777; MacKay, D., "Nuclear Testing: New Zealand and France in the International Court of Justice", *Fordham International Law Journal*, Vol. 19, 1996, at 1857–1887; Daniele, L., "L'ordonnance sur la demande d'examen de la situation dans l'affaire des essais nucléaires et le pouvoir de la Cour internationale de Justice de régler sa propre procédure", *R.G.D.I.P.*, Vol. 100, 1996, pp. 653–671; Decaux, E., "Commission européenne des droits de l'homme: Décision du 4 décembre 1995 sur la recevabilité de la requête présentée par MM. Tauira et al. contre la France", *R.G.D.I.P.*, Vol. 99,1995, pp. 741–752.

4 *Infra*, Ch. III.9.5.

5 *Infra*, Ch. III.9.6.2.

6 Pierre Mauroy, President Mitterand's first Prime Minister, said in 1982: "Deterrence for France was made feasible by the equalizing power of the atom. The purpose of deterrence is to prevent war by convincing would-be aggressors that a major action against France would present unacceptable risks with regard to the political aims he is pursuing. Under our strategy of defense by the weak against the strong, France's strategic nuclear forces have the capacity, even after an enemy first strike, to retaliate with a very high degree of credibility and to inflict damage in excess of the demographic and economic potential we present". Quoted in Firth, S., *Nuclear Playground*, Honolulu, University of Hawaii Press, 1987, pp. XII–176, at 109

region of the globe to test nuclear warheads[7]. Two relatively remote atolls, Mururoa and Fangataufa in French Polynesia, were accordingly chosen[8].

While it would be unnecessary to describe here the deleterious effects that radioactivity has on human health and on the ecosystem in general, for they may be considered widely known, it is essential for an understanding of the nature, evolution and outcome of the dispute shortly to explain how nuclear tests were carried out. Technology at the beginning of the 1970s allowed the explosion of nuclear devices both above and underground[9]. Geological factors, however, influence both the feasibility and the cost of underground testing. Because of the peculiar volcanic structure of the atolls of Mururoa and Fangataufa, which require difficult and expensive drilling several hundred meters into the bowels of the islands, the French tests in the South Pacific between 1966 and 1974 were carried out above-ground. Moreover, in order to avoid radioactive fall-out, caused by the interaction between the ball of fire resulting from the explosion and the earth, the blasts were effectuated by means of a balloon at high altitude above the atoll[10]. Nuclear testing at high altitudes avoids the fall-out caused by above-ground explosions, and produces radioactive particles that are of minimal dimension and elevate themselves rapidly into the upper atmosphere or stratosphere. These particles, however, are dispersed by strong high altitude winds over an extremely large area, which eventually covers the whole planet, and remain in suspension for long periods. Underground explosions do not present this kind of problem. Radiation is trapped in the soil, remaining there for thousands of years until a major geophysical event occur, such as an earthquake, but also less catastrophic events, like mere movements of the earth's crust. In this event, accumulated radioactive material might suddenly and massively be released into the environment. In other words, while high altitude atmospheric testing creates an immediate pollution of the environment, diluted over an extremely large area and inferior to that produced by above-ground explosions, underground testing allegedly avoids immediate pollution but creates a risk of massive releases of radioactive material in the medium and long term[11].

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7 *Inter alia*, at Wake, Bikini, Eniwetok and Johnston islands by the U.S.; at Christmas and Malden islands (Kiribati) by the UK. For a general overview of nuclear testing in the Pacific see: Firth, *op.cit.*.

8 Mururoa and Fangataufa, besides being French territory, were relatively distant from inhabited regions: 1,200 kilometers from Tahiti (France); 990 from Pitcairn Island (UK); between 2,500 and 2,800 from Tonga and Fiji; 6,400 from the South American coast; 4,200 from Auckland (New Zealand) and 6,7000 from Sydney (Australia). République Française, Ministère des Affaires étrangères, *Livre blanc sur les expériences nucléaires*, Paris, Ministère des Affaires étrangères – Service de presse et d'information, 1973. See Map 9.

9 Out of the 17 tests carried out at the Reggane Firing Ground, 13 had been underground and four above ground. *Ibid.*, at 3.

10 *Ibid.*, at 3–4.

11 For a sober and concise description of the risk involved in the testing, see *The Impact of Nuclear Testing at Mururoa and Fangataufa*, Report prepared by an international group of scientists for the Meeting of the Ministers for the Environment of the Pacific States, held in Brisbane, Australia, August 1995.

9.3. The Dispute

Since the 1960s, the worldwide movement against the development, testing and proliferation of nuclear weapons had increasingly become bold. In 1963, a partial Test Ban Treaty had interrupted nuclear atmospheric testing for most nuclear powers, with the major exception of France and China[12]. Moreover, a growing series of multilateral treaties[13] and UN General Assembly resolutions call for the discontinuance of these experiments, and growing concerns for the protection of the environment, embodied by the 1972 Stockholm Conference on the Human Environment, were rapidly pushing atmospheric testing into that gray zone between what is morally reprehensible and what is illegal. While both New Zealand and Australia had exposed their concerns first over the transfer of the nuclear testing grounds to South Pacific, and then over the actual carrying out of the tests, until the beginning of the 1970s they never went beyond a mere diplomatic mumbling[14]. The Australian Government, moreover, had officially backed British nuclear armament by providing nuclear testing sites on its own territory until 1963[15]. The first series of French nuclear atmospheric tests above Mururoa took place in 1966. Subsequently, atmospheric tests were carried out in 1967, 1968, 1970, 1971 and 1972[16]. A total of 26 atmospheric tests had been conducted, therefore, in the Pacific until the end of 1972[17].

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12 Multilateral Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outerspace and Under Water, Moscow, October 10, 1963, *UNTS*, Vol. 480, at 43.

13 Until 1972, the following multilateral treaties concerning the testing and use of nuclear weapons had been concluded: Treaty for Prohibition of Nuclear Weapons in Latin America, Tlateloco, February 14, 1967, *UNTS*, Vol. 634, at 364; Treaty on Principles Governing the Activities of States in the Exploration, and Use of Outerspace, Including the Moon and other Celestial Bodies, Moscow, London and Washington, January 27, 1967, *UNTS*, Vol. 610, at 208; Treaty on the Non-Proliferation of Nuclear Weapons, Moscow, London and Washington, July 1, 1968, *UNTS*, Vol. 729, at 161; 1971 Treaty on the Prohibition of the Employment of Nuclear Weapons and other Weapons of Mass Destruction on the Sea Bed or Ocean Floor, (45); 1959 Antarctic Treaty, (21).

14 *Nuclear Tests*, New Zealand Application, at Annex III; *Nuclear Tests*, Australian Application, at II–VIII.

15 Namely, at the Monte Bello Islands, Emu Field and Maralinga. While the British tests officially ended in 1957, they continued secretly until 1963 in what was called the Maralinga Experimental Programme, a fact that the British Ministry of Defense did not admit until the 1980s. While this did not involve large atomic explosions, radioactive materials were first burnt in fires and then spread out over the desert by conventional high explosives in experiments which were supposed to simulate nuclear accidents such as bombers crashes. Firth, *op.cit.*, at 79. The issue of the damages arising out of British tests carried out in these sites has been the object of a lump-sum settlement on December 10, 1993, between Australia and the United Kingdom. The British Government, while maintaining that its legal responsibilities for the clean-up of the sites were discharged in the 1960s, made an *ex gratia* payment of £20 million to the Australian Government in full and final settlement of the claims. Exchange of Notes Concerning the Former United Kingdom's Nuclear Test and Experimental Programme Sites at Maralinga, the Monte Bello Islands and Emu Field, London, December 10, 1993, *United Kingdom Treaty Series*, No. 22, 1994, Cm. 2533.

16 Livre blanc, *op.cit.*, at 3–4.

17 *Ibid.*, at 3. The total of French experiments carried out until 1972 climbs to 43 if the explosions carried out at Reggane are added. *Supra*, note 1. The total number of nuclear tests carried out in the world until 1972 was 869, equally divided between aerial and underground explosions. *Ibid.*

In 1972, long-term, right-wing, conservative Governments that had been committed, since the beginning of the Cold War, to a strong Western military posture *vis-à-vis* the Soviet Union lost power both in Australia and New Zealand. They were replaced by Labour Party Governments with long historical traditions of political neutralism and support of general world disarmament, fundamentally altering, therefore, the official attitude of Australia and New Zealand towards French tests[18]. The announcement of a new series of tests to be carried out during 1973 led the two countries to file a formal protest with the French Ministry of Foreign Affairs, claiming infringement of their rights under international law[19]. Diplomatic talks did not modify substantially the positions of the parties: Australia and New Zealand were seeking a French commitment not to carry out further tests, while France was defending the full legality of its actions. On May 9, 1973, both the Governments of Australia and New Zealand, in anticipation of yet another French atmospheric nuclear test series in the South Pacific and its consequent dispersal of radioactive debris, relying on articles 36.1 and 36.2 of the Statute of the International Court of Justice, instituted proceedings against France[20]. One week later, on May 16, 1973, Fiji, considering itself to have a legal interest that could be affected by the Court's decision in the cases, filed a request to intervene in the proceedings on the basis of article 62 of the Statute [21].

9.4. The Proceedings Before the Court

Both New Zealand and Australia claimed the existence of two concurrent bases of jurisdiction. The first was article 36.1 of the Court's Statute which reads: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for...in treaties and conventions in force". In this particular case, the provision of the treaty in force invoked as a basis for jurisdiction was article 17 of the General Act for the Pacific Settlement of Disputes[22], of September 26, 1928, which provided for unilateral recourse to the Permanent Court of International Justice in the event of disputes between the signatories of the Act. France, New Zealand and Australia all had acceded to the General Act on May 21, 1931[23]. Article 36.1 of the ICJ Statute, moreover, was to be coupled with article 37 of the same Statute, which provided for continuity of jurisdiction from the PCIJ to the ICJ ("whenever a treaty or convention in force provides for reference of a matter

18 Mc Whinney, *op.cit.*, at 12; Khosla, *op.cit.*, at 324.

19 *Nuclear Tests*, New Zealand Application, Annex III, at 29–33; *Nuclear Tests*, Australian Application, Annex 9–14.

20 *Nuclear Tests*, New Zealand Application, at 3–9; *Nuclear Tests*, Australian Application, at 6–15.

21 *Nuclear Tests* (Australia v. France), Application of Fiji for Permission to Intervene, Order of July 12, 1973, ICJ Reports 1973, at 320–322; *Nuclear Tests* (New Zealand v. France), Application of Fiji for Permission to Intervene, Order of July 12, 1973, ICJ Reports 1973, at 324–326. Two other countries, Argentina and Peru, monitored closely the evolution of the case but never got to the point of filing an application for intervention. *Nuclear Tests* (New Zealand v. France), Judgment, at 459, para. 9.

22 General Act for the Pacific Settlement of Disputes, September 26, 1928, *LNTS*, Vol. 93, at 2123.

23 For the text of the reservations attached to France, Australia and New Zealand's accession, see *LNTS*, Vol. 107, at 2123.

to...the Permanent Court of International Justice, the matter shall...be referred to the International Court of Justice").

Alternatively, the applicants cited article 36.2 of the Statute of the Court (the so-called "optional declaration") as a basis for jurisdiction. France had accepted the compulsory jurisdiction of the Court in a declaration dated May 16, 1996 and filed on May 26, 1966[24], while New Zealand had filed on April 8, 1940[25], and Australia on January 6, 1954[26].

New Zealand and Australia's applications were, by and large, similar, but differed on some substantial points[27]. Australia asked the Court to:

> "adjudge and declare that...the carrying out of further *atmospheric* nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law and to order that the French republic shall not carry out further such tests"[28],

whereas New Zealand, instead, requested the Court to

> "adjudge and declare that the conduct by the French Government of nuclear tests in the South Pacific region *that give rise to radioactive fall-out* constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by any further such tests"[29].

From a technical point of view, the two applications differed as to their general aim. Whereas the Australian application sought an injunction, the request of New Zealand was rather for a declaration on the claims presented to the Court[30]. On a more substantive level, two elements distinguish New Zealand's application from Australia's. First, the former, unlike the latter, did not specify the nature of the tests (atmospheric); second, the particular stress of the latter's application was on pollution concerns. The Court failed to appreciate the differences in the two countries' applications and this had, as we will see, enormous consequences for the course of the dispute[31].

The rights that the two States claimed to have been violated by French nuclear tests can be conveniently summarized as follows[32]. First, a right possessed by every State, in virtue of a generally accepted rule of customary international law, to be

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24 For the text of the French Declaration, see *UNTS*, Vol. 562, pp. 72–73.

25 *Ibid.*, at 75

26 *Ibid.*, at 55.

27 Despite a certain similarity in the nature of the rights claimed to be violated by Australia and New Zealand, and the fact that the two States had appointed the same *ad hoc* judge, Sir Garfield Barwick, the Court declined to join the two cases. Judges Forster, Gros, Petrén and Ignacio-Pinto objected to the Court's decision not to join the two claims. *Nuclear Tests* (New Zealand v. France), Interim Protection, at 135, 148–149, 159 and 163. For an analysis of the substantial difference between New Zealand and Australia's applications, see Kós, *op.cit.*, at 370–375.

28 Emphasis added. *Nuclear Tests*, Australian Application, at 14–15.

29 Emphasis added. *Nuclear Tests*, New Zealand Application, at 9.

30 Yet, commenting on this issue Judge Barwick observed: "Any suggestion that the claim must be regarded as either a claim for a declaration or a claim for an injunction would be a false dichotomy". *Nuclear Tests* (New Zealand v. France), Judgment, at 526.

31 *Infra*, Ch.III.9.6.1.

32 *Nuclear Tests*, Australian Application, at 14, para. 49; *Nuclear Tests*, New Zealand Application, at 8, para. 28.

free from nuclear weapon tests that give rise to radioactive fall-out; second, a right, said to be inherent in the principle of territorial sovereignty, to be free from deposits on one's territory and in one's air space, without one's consent, of radioactive fall-out; third, the a right, said to be derived from the character of the high seas as a *res communis*, to have the freedom of the high seas respected by France. These rights were alleged to have been violated by France, first by declaring areas of the high seas surrounding the atolls to be closed to navigation during tests, and second by the pollution of the high seas by radioactive fall-out.

It will never be known with which arguments the French Government intended to rebut Australia and New Zealand's claims[33]. Indeed, on May 16, 1973 the French Government addressed a letter to the President of the Court "respectfully requesting to be so good as to order that the case be removed from the list"[34]. France contested the Court's jurisdiction to hear the case, and, from that moment on, Paris adopted a non-collaborative posture, contesting both bases of the Court's jurisdiction[35]. First, it did not consider itself anymore bound by the 1928 General Act. In the French view, this Treaty had been terminated with the dissolution of the League of Nations, of which it was a product. As a matter of fact, when in early 1973 the possibility of Court proceedings was widely and publicly discussed, France did not use its power to terminate immediately its acceptance of the Act. Second, it considered that the Court manifestly lacked jurisdiction because its acceptance of jurisdiction contained in the declaration of 1966 had a reservation attached that excluded from the reach of the Court disputes concerning activities connected with national defense[36]. It was not by chance that in the same year in which it moved its nuclear firing ground from the Sahara to the South Pacific (1966), it deposited a new acceptance that contained that particular reservation. France foresaw legal trouble and intended to shield itself. However, whether the Court did have jurisdiction was something that, according to the Court's Statute, the Court had to decide by itself[37], and for this reason it proceeded in absentia of France.

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33 To contest the Court's jurisdiction, France filed a lengthy note which *inter alia* contained some of the arguments it would probably have used before the Court. First, it contested the idea that carrying out atmospheric nuclear tests was by itself unlawful. It had not ratified any of the test-ban treaties and contested the claims of the existence of a rule of general international law in that sense. Second, as far as the issues of pollution and modifications of physical conditions of applicant's territory were concerned, it was argued that no damages attributable to the nuclear experiments had been shown. The place had been carefully chosen to avoid that. Moreover, even if damages were shown, the French Government found it hard to see the precise rule that was violated. Finally, as to the charge of violating freedom of the high seas by restricting navigation in certain zones, it pointed out that this was normal practice widely accepted by all nations when explosions were taking place. Livre Blanc, *op.cit.*, Annex BX, at 9.

34 *Nuclear Tests* (Australia v. France), Judgment, at 257, para. 14.; *Nuclear Tests* (New Zealand v. France), Judgment, at 460, para. 14.

35 France's arguments against the Court's jurisdiction are contained in an eighteen-page annex to the letter. Livre Blanc, *op.cit.*, Annex BX, at 91.

36 In particular, "disputes arising out of a war or international hostilities, disputes arising out of a crisis affecting national security or out of any measure or action relating thereto, and disputes concerning activities connected with national defense". *ICJ Yearbook* 1971–1972, at 63.

37 "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court". Statute of the ICJ, art. 36.6. This is the so-called *competence de la competence*.

9.4.1. Provisional Measures

New Zealand and Australia's applications to the Court were accompanied by a request to indicate provisional measures[38]. The first test of the 1973 series was scheduled for July 23, a mere two months from the date of the application, and New Zealand and Australia were determined to prevent a further violation of their rights. Yet New Zealand's and Australia's request put the Court under heavy pressure. The very fact that France was stubbornly contesting jurisdiction and refusing to cooperate in any manner turned any possible decision to indicate provisional measures into a highly delicate issue. Had the Court declined, or merely delayed, asking France to refrain from testing while proceedings were pending, the image of the Court as an effective organ would have suffered. Moreover, there was the risk, although quite remote[39], that the issue of the Court's jurisdiction might be resolved in favor of France and the case be dismissed amid the reprobation of the world community. At a time when the whole world was looking at the Court to see what stance the principal judicial organ of the United Nations would take toward the hot tissue of the development and proliferation of nuclear weapons, dismissing the case for lack of jurisdiction would have been a politically awkward move.

However, a quite consistent case-law provided a way out by allowing the Court to indicate provisional measures before being fully satisfied of the existence of its jurisdiction. Interim orders could be granted on the basis of *prima facie* jurisdiction, without prejudging the question of jurisdiction on the merits of the case[40]. The *Icelandic Fisheries Jurisdiction* case, still pending before the Court, was but the last expression of this practice[41]. In that case, despite Iceland's refusal to appear before the Court (Iceland challenged the Court's jurisdiction, as France was doing in the present case) the Court had held, by an overwhelming majority of 14 votes to one, that "on a request for provisional measures the Court need not...finally satisfy itself that it has jurisdiction on the merits of the case"[42].

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38 *Nuclear Tests*, Australian Application, at 43–148; *Nuclear Tests*, New Zealand Application, at 49–86. Under article 41 of the Statute of the ICJ, the Court has the power to "indicate...any provisional measures that ought to be taken to preserve the respective rights of either party".

39 Considering the Court's record on the maintenance of treaties and their sanctity, the Court, while it would have accepted French objections to its jurisdiction based on art. 36.2 of the Statute, it would probably have ruled in favor of the continued existence of the 1928 General Act and, therefore, of its competence to hear the case. For the ICJ attitude towards the rule *pacta sunt servanda,* see the *Diversion of the Meuse* and the *Gabcíkovo–Nagymaros* cases, *supra,* Ch. III.6 and 7.

40 The Permanent Court of International Justice first granted an interim order in the *Sino–Belgian Treaty* case "pending final decision of the Court in this case...by which decision the Court will either declare that it has no jurisdiction or give judgments on the merits". *Denunciation of the Treaty of November 2, 1865 between China and Belgium*, Orders of January 8, February 15 and June 18, 1927, *PCIJ*, Ser. A, No. 8 (1927), at 7. The second interim order was granted in the case of the *Electricity Company of Sofia*, but only after the Court had determined it had jurisdiction. *Electricity Company of Sofia and Bulgaria*, *PCIJ*, Ser. A/B, No. 79 (1939), at 194–200. The third was in the *Anglo–Iranian Oil Co.* case. In this case the Court did grant interim protection before it had dealt with the issue of its competence, but eventually the Court determined in the merits phase that it lacked jurisdiction. *Anglo–Iranian Oil Co.* (United Kingdom/ Iran), Interim Protection, Order of July 5, 1951, ICJ Reports 1951, pp. 89–98. Incidentally, none of these orders has been complied with.

41 *Supra*, Ch. III.2.

42 *Fisheries Jurisdiction* (United Kingdom v. Iceland), Interim Protection, Order of August 17, 1972, para. 15, at 7; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Interim Protection, Order of August 17, 1972, para. 16, at 7.

In the *Nuclear Tests* cases the Court had the same approach. On June 22, 1973, four weeks after the request had been filed, it ordered the parties to:

> "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 causing the deposit of radioactive fall-out on Australian territory [New Zealand, Cook Islands, Niue and the Tokelau Territory in the case of New Zealand's application]"[43].

This decision was a difficult one to take. It was adopted by a majority of eight votes to six[44], a much narrower vote than the 14 to one decision in the *Icelandic Fisheries Jurisdiction* case. The Court's decision was heavily criticized, within the Court[45] and by scholars[46], not only from a strictly legal point of view, but also as a matter of political opportunity, since it ordered a sovereign State to discontinue an activity that the State considered vital to its security, without demolishing in an articulate and well accounted way its reasonable or unreasonable objections. Judge Forster, who had voted with the majority in the *Icelandic Fisheries Jurisdiction* case, urged the abandonment of the prima facie doctrine in light of the exceptional nature of the Nuclear Tests dispute:

> "The Court should above all have satisfied itself that it really had jurisdiction and not contented itself with a mere probability. It is not a question of approving or condemning the French nuclear tests in the Pacific; the real problem is to find out whether we have jurisdiction to say or to do anything in this case. It was the problem of jurisdiction which it was necessary for us to solve as a matter of absolute priority, before pronouncing upon the provisional measures"[47].

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. The Court decided not to do so, perhaps because a majority of its

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43 *Nuclear Tests* (Australia v. France), Interim Protection, at 106; *Nuclear Tests* (New Zealand v. France), Interim Protection, at 142.

44 The Court was composed as follows: Ammoun (Lebanon), Vice-President, acting President in absence for illness of President Lachs (Poland), Judges Forster (Senegal), Gros (France), Bengzon (Philippines), Petrén (Sweden), Onyeama (Nigeria), Ignacio-Pinto (Dahomey), de Castro (Spain), Morozov (Russia), Jiménez de Aréchaga (Uruguay), Sir Humphrey Waldock (UK), Nagendra Singh (India), Ruda (Argentina); Sir Garfield Barwick (judge *ad hoc* for Australia). The American Judge Dillard was absent due to illness. The fact that the issue was a particularly debated one within the Court is exemplified by the fact that the Court gave the score of the vote but did not specify, contrary to its custom, who actually voted in favor and who against. For some speculative work on who voted in favor and who against, see, McWhinney, *op.cit.*, at 20–21.

45 See the Dissenting Opinions appended to the Order by Judges Petrén, Gros, Forster, Ignacio-Pinto. See also the Declaration of Judge Jiménez de Aréchaga.

46 For criticism of the Court's indication of provisional measures, see: Cot, *op.cit.*; Lellouche, *op.cit.*, at 617–621; Khosla, *op.cit.*, at 335–338; Elkind, *op.cit.*, at 45–53.

47 *Nuclear Tests* (New Zealand v. France), Interim Protection, at 148.

judges feared that threshing the issue of the Court's competence to hear the case might have prevented them to move on to the consideration of the substantive issues[48], or, more likely, because they were simply reluctant to depart abruptly from a doctrine that had just been reiterated, not without criticism, a few months before[49]. As for the argument that since the situation was urgent (tests were supposed to start within a few weeks) the Court was pushed to do something[50], it should be observed that the jurisdictional issue did not, on its face, seem a particularly complex matter or one requiring unusual time for decision[51]. Two months to decide the issue of jurisdiction was, even by ICJ standards, enough time, as the swiftness of the Court in other instances had proved[52].

As a result, since the French Government was not persuaded that the Court had the power to hear the case, it assumed a righteous posture and deliberately violated its order which, in its view, was *ultra vires*. France proceeded with the experiments, blamed by most of world public opinion, and the only thing the Court could do was to take note of it. Nor could Australia and New Zealand ask the UN Security Council, under article 94.2 of the Charter, to make recommendations or decide upon measures to be taken to give effect to the Court's order because France, under article 27.3 of the same Charter, could veto any decision of that organ.

Despite this, the provisional measures stage did not conclude with a complete failure for New Zealand and Australia, for public opinion was mounting both in France and abroad[53]. Latin American countries, such as Chile, Ecuador, Colombia, Venezuela and Argentina, called for an end to the tests, and Peru broke off diplomatic relations with France over the issue[54]. New Zealand dispatched a frigate, the HMNZS *Otago*, to the limits of the territorial sea of Mururoa and well within the French exclusion zone to take pictures of the nuclear mushrooms. Australia, in a

48 Judge Ignacio-Pinto observed that while he remained individually strongly opposed to nuclear tests in general, he found that the decision to indicate provisional measures of protection was legally unjust or in any event without sufficient basis. In his view, however tempted one may be in cases of this nature to be swayed by sentiment or emotion, the question of the Court's jurisdiction must be considered strictly on the basis of existing rules of international law. See Judge Ignacio-Pinto's Dissenting Opinion, *Nuclear Tests* (Australia v. France), Interim Protection, at 128–133.

49 Judge Gros warned against the tendency to consider the Orders of August 17, 1972, in the *Icelandic Fisheries Jurisdiction* cases as a precedent consolidating the law concerning provisional measures of protection. In his view the circumstances in those cases were completely different. In the former, the Court was satisfied of its jurisdiction, urgency was admitted, and the subject of the dispute was clear. Moreover, the right of the applicants was recognized as a right currently exercised, whereas the claim of Iceland aimed at a modification of existing law. In the *Nuclear Test* cases, however, the Court was confronted with a totally different situation. See Judge Gros Dissenting Opinion, *Nuclear Tests* (Australia v. France), Interim Protection, at 115–127. See also the Dissenting Opinion of Judge Ignacio-Pinto, *Nuclear Tests* (Australia v. France), Interim Protection, at 128–133.

50 See Declaration of Judge Jiménez de Aréchaga, *Nuclear Tests* (Australia v. France), Interim Protection, at 106–108.

51 As Judge Gros observed in his Dissenting Opinion, urgency should not be a dominant consideration in a decision on provisional measures. Urgency must be balanced by jurisdiction. See Gros (Dissenting Opinion), *Nuclear Tests* (Australia v. France), Interim Protection. at 120.

52 E.g. in the *Icelandic Fisheries Jurisdiction* case, Ch. III.2.6.2.

53 Firth, *op.cit.*, at 100.

54 Ibid.

show of moral support, sent HMAS *Supply* to refuel the *Otago*[55], while a flotilla of private yachts, including the ship *Greenpeace III*, penetrated the closed zone, forcing French authorities to delay experimenting[56]. The ultimate result of all these actions was the stimulation of intense diplomatic activity to find a way out of an increasingly embarrassing situation.

9.4.2. The Court's First Judgment

Despite the Court's emphasis, in its order of June 22, 1973, on the fact that it was "necessary to resolve as soon as possible the question of the Court's jurisdiction and of the admissibility of the applications"[57], the hearings took place only in July 1974, thirteen months after the order granting interim relief and when France was already engaged in its seventh Pacific tests series[58]. Oral pleadings focused essentially on the issue of jurisdiction and admissibility. Agents and counsel of Australia[59] and New Zealand[60] were heard, whereas France, maintaining its non-collaborative attitude, did not send a team. There was then a long wait for the judgment, a wait of more than five months, as compared to the usual average of three months. This was even more surprising, given the fact that the Court by then must have been quite familiar with the arguments about the General Act, which had been the focus of the provisional measures phase. In the end, the judgments were delivered just before Christmas 1974.

The Court, which in the meantime had recovered from the illness of its President and the U.S. judge[61], was waiting for something to happen that could free it from of its uneasy position. Had the Court ruled against its jurisdiction, this would have been tantamount to admitting that it had been wrong *ab initio* in issuing the order. It then would have followed that France had a strong case for disregarding it[62]. Had the Court ruled in favor of its jurisdiction, this probably would have been even more embarrassing. Indeed, in this case, it would have faced proceedings on the merits of a number of debated issues, from nuclear testing itself to transboundary pollution and international responsibility, and there was a significant risk that by applying the law strictly, and basing itself faithfully on the closed categories of law, the Court might come to the conclusion that there was no legal impediment for France to continue to carry out its nuclear atmospheric tests. This would have had devastating effects on the reputation of the Court. Conversely, had the Court found atmospheric testing illegal, it would have taken the risk of being criticized not only by France, but also by China and possibly all future aspiring nuclear powers.

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55 Ibid.

56 Ibid.

57 *Nuclear Tests* (New Zealand v. France), at 459, para. 6; *Nuclear Tests* (Australia v. France), at 255, para. 6

58 The oral phase was delayed in the first place by the extension of the time limits for the filing of written pleadings and, secondly, by a procedural decision of the Court. See Separate Opinion of Judge Pétren, *Nuclear Tests* (New Zealand v. France), Judgment, at 484–486; *Nuclear Tests* (Australia v. France), Judgment, at 299–301.

59 For Australia, Mr. P. Brazil, Ambassador F.J. Blakeney, Mr. E. Lauterpacht, Mr. Murphy, Mr. Byers and Prof. O'Connell.

60 For New Zealand Prof. R.Q. Quentin-Baxter, Dr. A.M. Finlay and Mr. Savage.

61 *Supra*, note 44.

62 The Court already had faced a similar situation in the *Anglo–Iranian Oil Co.* case.

The blasting of nuclear devices in the atmosphere was to stop only after France had attained a particular degree of technological advance which could allow Paris to move to underground testing without, at the same time, jeopardizing the reliability of the data the tests were intended to provide. The pressure of public opinion probably accelerated this process. On June 8, 1974, before the beginning of that year's series, the French Government issued the following communication:

> "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 defense program 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"[63].

During the following months, the Court monitored attentively every single statement coming from Paris to ascertain whether France was ready to discontinue atmospheric testing. It continued to do so even after the oral phase of the case was ended. As the 1974 series was drawing to an end, the number of declarations by the French President, the Ministers of Defense and Foreign Affairs and the French Ambassador to New Zealand multiplied, all consistently stressing that there would not be any test during 1975 and that, as of the completion of the 1974 series, France would carry out only underground experiments[64].

On December 20, 1974, the Court rendered a judgment that took both the parties and commentators by surprise. Since France had declared that atmospheric testing would have been discontinued, the Court found, by nine votes to six[65], that:

> "no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues in *abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment"[66].

In essence the majority resorted to a syllogism to adjudge the case. Since, in the view of the Court, the objective of the proceedings was to bring atmospheric testing to an end, and considering that France, by making various statements, had

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63 *Nuclear Tests* (Australia v. France), Judgment, at 265; *Nuclear Tests* (New Zealand v. France), Judgment, 1974, at 469.

64 *Nuclear Tests* (Australia v. France), Judgment, at 265; *Nuclear Tests* (New Zealand v. France), Judgment, 1974, at 469–472, para. 35–44.

65 As in the case of the judgment rendered on the request of provisional measures (*supra* note 44), the Court did not provide the names of those who voted in favor and those who voted against. For an educated guess of the composition of the majority, see McWhinney, *op.cit.*, at 22–23. The switch in votes from a majority of eight in favor of exercising jurisdiction, at least for the purpose of issuing an interim order, to a minority of six when the Court, on the final judgment, declined to get into the merits of the case on the argument that the dispute had become moot, was explained by McWhinney as follows: "[T]he crucial switch of votes within the Court to make up the new majority declining to give judgment was the product of political give-and-take and skills of compromise inherent in the exchange in the Court conference room; and in these interpersonal dealings the role of the more senior members of the Court — especially of the President if he combines high juridical expertise and practical political-diplomatic experience — tends to become intellectually persuasive for purposes of the final decision." McWhinney, *op.cit.*, at 27.

66 *Nuclear Tests* (Australia v. France), Judgment, at 272, para. 62.; *Nuclear Tests* (New Zealand v. France), Judgment, at 477, para. 62.

given a unilateral commitment, by which it was bound under customary international law to stop atmospheric testing, the proceedings no longer had any object and the Court, therefore, was not called upon to render a judgment.

Prima facie the Court may seem to have decided not to decide[67]. However, this is not completely true. Indeed, the Court did take a decision, even though it was one that was quite different from what the applicants originally had asked or might have reasonably expected. France, which had always, in an adamant way, rejected the Court's jurisdiction, suddenly found itself legally bound, by virtue of unilateral declarations made by some of its representatives, not to carry out nuclear atmospheric tests. Australia and New Zealand, which had expected the Court first to rule on the jurisdictional issues, and then to move on to deciding on the merits, unexpectedly obtained a tactical victory. In the course of the case, however, it became clear that this was a Pyrrhic victory. Nuclear tests in the region did not stop but were simply moved underground. Was this what the parties wanted to obtain when they decided to refer the issue to the Court? Or rather, was this the maximum they reasonably could hope for? Could not diplomatic negotiations between the three States have led to the same result? On the one hand, France had done what it intended to do. The 1973 and 1974 test series were carried out despite the Court's order, and testing had been moved underground only when France felt confident to do so. Australia and New Zealand, despite their efforts, had borne French tests for two more years. All they obtained was that the environmental impact of nuclear testing could be shifted from an immediate and patent means of diffusion (i.e. the atmosphere) to a more subtle and potential one (i.e. the sea). Nonetheless, both parties were eager to put an end to the dispute and remove a sore spot in the relations between France and the South Pacific States. Further argument was left to legal scholars, and the Prime Ministers of Australia and New Zealand hurried to Paris to seal the end of the controversy.

Scholars bitterly attacked the Court's judgment which, in their view, had as its only merit pragmatism[68]. Indeed, a number of issues made more than one commentator wonder whether the International Court of Justice, instead of behaving as a court of law, had not rather played the part of the auctioneer who seized a favorable bid and hastily closed the sale. *In primis*, the Court was censured for having emitted a verdict without resolving in a satisfactory way the issue of its competence. In order to dispose of the dispute without having the need to tackle first the issue of its jurisdiction, the Court laconically declared that:

> "while examining these questions of preliminary character, the Court is entitled, and in circumstances may be required, to go into another question [e.g. mootness of the dispute] which may not be strictly capable of classification as a matter of jurisdiction and admissibility but are of such a nature as to require examination in priority to those matters."[69]

In the Court's view, the power to shift the focus from the issue of its jurisdiction to other issues derived from its status as "judicial organ established by the consent of

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67 Franck, *op.cit.*, at 613.

68 See, in general, Mac Donald/Hough, *op.cit.*; Franck, *op.cit.*; Khosla, *op.cit.*; Stern, *op.cit.*; Sur, *op.cit.*; Juste Ruiz, *op.cit.*; Lellouche, *op.cit.*.

69 *Nuclear Tests* (Australia v. France), Judgment, at 259, para. 22; *Nuclear Tests* (New Zealand v. France), Judgment, at 463, para. 22.

States"[70], and such power was "conferred upon it in order that its basic judicial functions may be safeguarded"[71]. Admittedly, this was not a sound answer to French objections.

Secondly, the Court was blamed for having manipulated excessively New Zealand and Australia's applications. As a matter of fact, "it is the Court's duty to isolate the real issue in the case and to identify the object of the claim [because] it is one of the attributes of its judicial function"[72]. Moreover, the Court had done so in a number of cases[73]. In the Court's view, Australia and New Zealand's applications were concerned only with atmospheric tests, so conducted as to give rise to radioactive fall-out on their territory, and carried out in a future which was intended to start not at the date of the application but at that of the date of the judgment. Therefore, the *fons et origo* of the dispute was the atmospheric nuclear testing conducted by France in the South Pacific region, and therefore, the original and ultimate objective of the applicants had to be to obtain a termination of those tests[74]. Yet a number of considerations may lead to the conclusion that, by over-interpreting the applicants' declarations, the Court distorted their content[75]. First, although the Court has the power to moot a case, it probably exceeded it by a decision to moot when both sides still maintained their basic contentions. France never said that there was no dispute. It simply stated that the Court was incompetent and that its nuclear tests were conducted in conformity with international law. Similarly, Australia and New Zealand could have withdrawn their claims if they had been satisfied by the French statements announcing the discontinuance of atmospheric tests. By not doing so, the claimants maintained that their request for a declaratory judgment on the legality of test had not disappeared. Second, by stressing the teleological aspects of Australia and New Zealand's applications, the Court neglected to take a hard look at their plain words. In particular, it failed to understand the legal consequences of New Zealand's omission of the word "atmospheric" from its application[76].

A third criticism of the Court's judgment arose out of the observation that the Court had not given the parties the chance to comment on or clarify the content and legal weight of France declarations[77]. In the words of Judges Onyeama, Dillard, Jiménez de Aréchaga and Humphrey Waldock, who filed a joint dissenting opinion:

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70 *Nuclear Tests* (Australia v. France), Judgment, at 263, para. 30.; *Nuclear Tests* (New Zealand v. France), Judgment, at 466, para. 30.

71 Ibid.

72 *Nuclear Tests* (Australia v. France), Judgment, at 259, para. 23.; *Nuclear Tests* (New Zealand v. France), Judgment, at 463, para. 23.

73 *Case Concerning Certain German Interests in Polish Upper Silesia*, *PCIJ*, Ser. A, No. 7 (1926), at 35; *Fisheries* (United Kingdom v. Norway), Judgment, ICJ Reports 1951, at 126; *Minquiers and Ecrehos* (France/United Kingdom), Judgment, ICJ Reports 1953, pp. 47–109, at 52; *Nottebohm* (Liechtenstein v. Guatemala), Second Phase, Judgment, ICJ Reports 1955, pp. 4–65, at 16.

74 *Nuclear Tests* (Australia v. France), Judgment, at 263, para. 30; *Nuclear Tests* (New Zealand v. France), Judgment, at 467, para. 31.

75 Lellouche, *op.cit.*, at 626.

76 *Supra*, Ch.III.9.4, and *infra* Ch.III.9.6.1.

77 See Joint Dissenting Opinions, *Nuclear Tests* (Australia v. France), Judgment, at 312–371; *Nuclear Tests* (New Zealand v. France), Judgment, at 494–523. The dissenting opinion of Judge Barwick, *Nuclear Tests* (Australia v. France), Judgment of December 20, 1974, at 391–455; *Nuclear Tests* (New Zealand v. France), Judgment of December 20, 1974, at 525–528.

> "It is not for nothing that the submissions are required to be presented in writing and bear the signature of the Agent. It is a *non sequitur*, therefore, to interpret such requests for an assurance as constituting an implied renunciation, a modification or a withdrawal of the claim which is still maintained before the Court. At the very least...that Party should have been given an opportunity to explain its real intentions and objectives, instead of proceeding to such a determination *inaudita parte*"[78].

The process which the Court had followed to reach the judgment, therefore, was censured as a breach of principles of natural justice. The Court did not give the parties notice that it was taking up the issue of the mootness of the dispute, or of the declarations it was considering, and the parties did not have the opportunity to appraise statements in the light of legal principles[79].

For all these reasons, the decision that the Court reached in its judgment of December 20, 1974 might appear in retrospect more like a delicate and ultimately unstable compromise between the desire to avoid, on the one hand, a devastating confrontation with the French *raison d'Etat* and, on the other, a repetition of the *débâcle* of the 1966 judgment on the *South-West Africa* cases[80]. In any event, as a partial recognition that the dispute might not have been disposed of completely by French unilateral declarations, the Court left the applicants a crack through which they might eventually try to resume litigation in the future:

> "Once the Court found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, *the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute*"[81]. [emphasis added]

9.5. The Aftermath of the First Phase of the Nuclear Tests Dispute

As bombs began to go off in pits hundreds of meters under the ground rather than in the atmosphere, objections to the tests subsided as well. For a few years little was heard about nuclear tests in the Pacific, except that they were still taking place. Between the judgment of December 20, 1974 and 1992, France proceeded with its nuclear program relatively undisturbed, exploding some 134 nuclear devices underground at Mururoa and Fangataufa (126 at Mururoa and 8 at Fangataufa)[82].

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78 See Joint Dissenting Opinion, *Nuclear Tests* (Australia v. France), Judgment, at 317, para. 13–14; *Nuclear Tests* (New Zealand v. France), Judgment, at 500, para. 13.

79 Keith, *op.cit.*, at 353.

80 For a commentary of the South-West Africa cases, see, in general, the bibliography at the end of Klein, E., "South West Africa/Namibia", *Encyclopedia of Public International Law*, *op.cit.*, Vol. 2, pp. 260–271, at 271.

81 *Nuclear Tests* (Australia v. France), Judgment, at 272, para. 60; *Nuclear Tests* (New Zealand v. France), Judgment, at 477, para. 63.

82 Seventy-eight of these devices (76 at Mururoa and 2 at Fangataufa) were exploded in holes drilled through the coral crowns of the atolls. Fifty-six (50 at Mururoa and 6 at Fangataufa) were detonated in shafts drilled through the central parts of the atolls under their lagoons. Bouchez, J./Lecomte, R., *Les atolls de Mururoa et de Fangataufa (Polynesie Française)*, Vol. II, May 1995, at 73, quoted in New Zealand Request for Examination, letter of 21 August 1995, para. 21.

The main exception to 18 years of business-as-usual attitude was in 1985, when French nuclear tests suddenly reentered the headlines. On July 10, 1985, the *Rainbow Warrior*, a trawler of Greenpeace, an environmental NGO which used to make headlines with its spectacular and daring actions, was bombed and sunk in Auckland, New Zealand. One member of the crew, Fernando Pereira, a Dutch national, was killed. Two agents of the French secret service, the DGSE (Direction Générale de la Sécurité Extérieure), Captain Dominique Prieur and Major Alain Mafart, were arrested by New Zealand police while trying to flee the country[83]. A scandal ensued and the resignation of the Defense Ministry and the Head of the Secret Services did not stop the row.

The bombing became the object of a new dispute between New Zealand and France. On June 19, 1986, the two Governments decided to refer all issues arising from the *Rainbow Warrior* affair to the Secretary-General of the United Nations for a ruling[84]. The ruling, which the parties had previously agreed to respect, was given three weeks later, on July 6, 1986. Mr. Perez de Cuellar's ruling indicated that France should apologize for the actions of its agents, pay $7 million to New Zealand as compensation, and that the two agents were to be transferred to and sequestrated at the French military facility on the remote island of Hao (French Polynesia) for the next three years[85]. The actual transfer took place on July 23, 1986. However, Major Mafart and Captain Prieur abandoned Hao, without New Zealand's consent, on December 14, 1987, and May 5, 1988, respectively, to receive medical treatment in France. The issue of the violation by France of the 1986 ruling was the object of an *ad hoc* arbitration which took place in 1990[86]. The Arbitral Tribunal found that France had committed a (further) breach of international law by violating the ruling of 1986[87]. However, since in this case France's violation had caused only immaterial damage (i.e. of a moral, political and legal nature), the Tribunal did not make an award of monetary compensation, since it held that the declaration by an international tribunal that France had violated international law was a suitable form of compensation[88].

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83 For the details of the bombing of the *Rainbow Warrior,* see Firth, *op.cit.*, at 83–93.

84 Ruling on the Rainbow Warrior Affair between France and New Zealand, *ILM*, Vol. 26, 1987, at 1346. On the ruling of the UN Secretary-General see, *inter alia* Charpentier, J., "L'affaire du *Rainbow Warrior*: le règlement interétatique", *A.F.D.I.*, Vol. 33, 1987, at 873–885; Apollis, G., "Le règlement de l'affaire du *Rainbow Warrior*", *R.G.D.I.P.*, Vol. 91, 1987, pp. 9–43; Pugh, M., "Legal Aspects of the *Rainbow Warrior* Affair", *I.C.L.Q.*, Vol. 36, 1987, pp. 655–669. See Figure 2.

85 *Ibid.*, at 1368.

86 *Rainbow Warrior*: New Zealand v. France, international arbitration award, *International Law Reports*, Vol. 82, 1990, at 499. On the arbitral, award see, *inter alia*: Charpentier, J., "L'affaire du *Rainbow Warrior*: la sentence arbitrale du 30 avril 1990", *A.F.D.I.*, Vol. 36, 1990, at 873–885; Chatterjee, C., "The *Rainbow Warrior* Arbitration between New Zealand and France", *Journal of International Arbitration*, Vol. 9, 1992, pp. 17–28; Davidson, J.S., "The *Rainbow Warrior* Arbitration Concerning the Treatment of the French Agents Mafart and Prieur", *I.C.L.Q.*, Vol. 40, 1991, pp. 446–457; Palmisano, G., "Sulla decisione arbitrale relativa alla seconda fase del caso *Rainbow Warrior*", *Rivista di Diritto Internazionale*. Vol. 73, 1990, pp. 874–910; Pinto, R., "L'affaire du *Rainbow Warrior*: à propos de la sentence arbitrale du 30 avril 1990", *Journal du droit international*, Vol. 117, 1990, pp. 841–896.

87 The Arbitral Tribunal was made up of Jiménez de Aréchaga (President), Sir Kenneth Keith and Professor Bredin. *Ibid.*

88 *Ibid.*, at 574–577.

In the meantime, not only was public opinion increasingly opposed to nuclear armaments, disgusted by the terrorist attack against Greenpeace, but the legal framework within which France was carrying out tests was changing as well. On a general level, since the judgment of 1974, international law on the protection of the environment had developed significantly, both at the regional and global levels[89]. More specifically, regarding the testing of nuclear weapons in the South Pacific region, three developments were significant. Firstly, one month after the assault on the *Rainbow Warrior*, on August 6, 1985, the States of the South Pacific Forum concluded in Rarotonga, Cook Islands, a treaty aimed at the creation of a nuclear free zone in the region[90]. The Rarotonga Treaty prohibits the testing, manufacture, acquisition, and stationing of nuclear explosive devices in the territory of Parties to the Treaty and the dumping of radioactive wastes at sea within the zone[91]. While the nuclear powers of the region, France and the United States, were not parties to it, and therefore not bound by its provisions, the timing of its conclusion, and its wide-spread regional acceptance, was a powerful signal of the mounting opposition in the region to any nuclear testing, atmospheric or not.

Second, in 1986, the South Pacific States, this time the United States and France included, concluded in Noumea, New Caledonia, the Convention on the Protection of the Natural Resources and Environment of the South Pacific[92]. The Noumea Convention was adopted under the aegis of the UNEP Regional Seas Program. The general aim of the Convention was to reduce and control pollution within the area of the Convention, including French Polynesia, where tests were carried out[93]. Yet, five rounds of negotiations were needed to come to a final agreement, as the nuclear testing issue was at the core of the controversy between the nuclear powers (mainly France but also the United States) and the other countries of the region. Dumping of radioactive waste was prohibited[94], even though the right to carry out nuclear tests in the region was implicitly recognized by providing that "the parties shall take all appropriate measures to prevent, reduce and control

89 For an account of the development of international environmental law and the emergence, during the 1980s, of new principles, see Sands, *Principles of International Environmental Law*, *op.cit.*, at 38–61; Kiss, A., *Droit international de l'environnement*, Paris, Pedone, 1989, pp. X–349; Boisson de Chazournes, *op.cit.*, at 37.

90 1985 South Pacific Nuclear Free Zone Treaty, (82). The South Pacific Forum is a regional organization, originally constituted in 1973 as the South Pacific Bureau for Economic Cooperation, by Australia, the Cook Islands, Fiji, New Zealand, Tonga and Western Samoa. Kiribati, the Marshall Islands, the Federated States of Micronesia, Nauru, Niue, Papua New Guinea, the Solomon Islands, Tuvalu and Vanuatu acceded subsequently. The Bureau was replaced in 1991 by the South Pacific Forum Secretariat as the regional organization for economic and political cooperation.

91 See in particular art. 3 (Renunciation of Nuclear Explosive Devices), art. 5 (Prevention of Stationing of Nuclear Explosive Devices), art. 6 (Prevention of Testing of Nuclear Explosive Devices).

92 1986 Convention of the Protection of the Natural Resources and Environment of the South Pacific, (85). The Convention came into force in 1990, and presently has 12 States Parties: Australia, the Cook Islands, the Federated States of Micronesia, Fiji, France, the Marshall Islands, Nauru, New Zealand, Papua New Guinea, the Solomon Islands, the United States of America and Western Samoa.

93 *Ibid.* 5.

94 *Ibid.* 10.

pollution which might result from the testing of nuclear devices"[95]. Last but not least, the Noumea Convention obligated the parties to carry out environmental impact assessments before embarking on major projects that "might affect the marine environment"[96].

Third, since by the end of the 1980s the Cold War was gradually coming to an end, the necessity for an enhanced nuclear deterrent was openly questioned. In 1992, following similar steps undertaken by Russia and the United States, French President François Mitterand declared a moratorium on nuclear tests[97]. This measure was intended to facilitate on the one hand the renewal of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT)[98], to which France had become party in 1992[99], and on the other, the conclusion, under the aegis of the UN Conference on Disarmament, of a Comprehensive Test Ban Treaty. The NPT was eventually renewed for an open-ended period on May 11, 1995[100], only after the States that did not possess nuclear weapons had been reassured both of the genuine commitment of the States which did posses such weapons, France included, to undertake steps towards nuclear disarmament[101] and of the fact that nuclear States would exercise "the utmost restraint" pending the negotiations and the entry into force of the Comprehensive Test Ban Treaty[102].

Finally, at the beginning of 1995, two different requests for advisory opinions concerning the legality of the threat or use of nuclear weapons were pending before the Court. The first had been submitted on August 27, 1993 by the World Health Organization and asked:

> "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"[103].

The second, submitted by the UN General Assembly on December 19, 1994, requested the Court:

> "urgently to render its advisory opinion on the following question: Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[104].

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95 *Ibid.* 12.
96 *Ibid.* 16.
97 *Request for an Examination* (New Zealand v. France), New Zealand Application, para. 57, at 28.
98 *Supra*, note 13.
99 France became a Party to the NPT on August 3, 1992. <http://www.iaea.or.at/worldatom/glance/legal/npt.html> (Site last visited may 17, 1998).
100 NPT/CONF. 1995/L.6, *ILM*, Vol. 34, 1995, at 972.
101 NPT/CONF. 1995/L.5, para. 4(a), *ILM*, Vol. 34, 1995, at 970.
102 Ibid.
103 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* Advisory Opinion, ICJ Reports 1996, at 65–224.
104 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *ILM*, Vol. 35, 1996, para. 1, at 815.

9.6. The Nuclear Tests Dispute Rekindles

It is against this legal background that, taking everybody by surprise[105], on June 13, 1995, French President Jacques Chirac announced *urbi et orbi* that, while France was genuinely committed to banning nuclear tests, a last series of eight underground nuclear explosions, starting September 1995, was necessary to allow scientists to calibrate their instruments before moving to computer-aided simulation[106]. The reaction of world public opinion and of the States of the South Pacific was bitter and immediate[107]. Greenpeace, which despite the 1987 settlement had not yet squared accounts with France for the bombing of the *Rainbow Warrior*[108], started a worldwide media campaign. The leaders of the South Pacific Forum States expressed "extreme outrage at the resumption of French nuclear testing in the Pacific...and demand[ed] that France desist from any further testing in the region"[109].

Legal action followed suit. Between June and September 1995, France was the target of an unprecedented all-out legal attack. Proceedings were instituted by individuals and NGOs before the European Commission of Human Rights[110], the Human Rights Committee[111] and the Court of Justice of the European Communities[112]. Moreover, States of the region considered invoking the activation of the conciliation mechanism contained in article 27.4 and Annex II, Part 2 of the 1992 Biodiversity Convention[113]. National legal remedies were also tried[114]. Finally, on August 21, 1995, twenty years after the first judgment, New Zealand returned to

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105 Admittedly, during the 1995 presidential election campaign Chirac anticipated that nuclear testing could have to resume in the future in French Polynesia. Yet it seems that such a statement was a tactical electoral move (not to lose votes to the center-right candidate Balladur) rather than an actual statement of future French policy. Giraud, *op.cit.*, at 126, note 2.

106 President Jacques Chirac, "Extract from the Press Statement at Palais de l'Elysée (June 13, 1995)", cited in *Request for an Examination* (New Zealand v. France), at 289, para. 1.

107 For an account of public and official reactions to the French intention of resuming testing see: "French Nuclear Testing", <http://gurukul.ucc.american.edu/ted/MURUROA.htm> (Site last visited on November 10, 1997).

108 *Supra*, Ch.III.9.5.

109 Statement made at the 26th South Pacific Forum, held in Madang, Papua New Guinea, September 1995. Quoted in Giraud, *op.cit.*, at 127.

110 The inhabitants of Tahiti and Mangareva claimed violation by France of articles 2, 3, 8, 13 and 14 of the European Convention on Human Rights, and of article 1 of the Additional Protocol (right to property). Decision of 4 December 1995, *Noël Narvii Tauira and others v. France*, No. 28204/95.

111 The plaintiffs claimed violation of article 6 and 17 of the Covenant on Civil and Political Rights. *Vaihere Bordes and John Temeharo v. France*, Decision of 30 July 1996 on Communication No. 645/1995. UN Doc. CCPR/C/57/D/645/1995.

112 Inhabitants of Tahiti challenged, before the Court of Justice of the European Community, the decision of the European Commission not to use the powers it possessed under the Euratom Treaty, in relation to the French tests. The individual rights to life and health protected by the law of the European Communities formed the basis for the action. Order of the President of the Court of First Instance of 22 December 1995, *Danielsson, Largenteau and Haoa v. Commission of the European Communities*, Case T 219/95 R.

113 1992 Convention on Biological Diversity, (106).

114 Conseil d'Etat, 29 September 1995, *Association Greenpeace France, Actualité juridique-Droit administratif*, 10 October 1995, at 749. Cited in Bothe, *op.cit.*, at 257, note 1.

The Hague to request the Court to examine the situation created by the French announcement[115].

As was said above, in 1974 the Court had left the courtroom door open with much foresight[116]. Yet, that original crack had been substantially narrowed by the French denunciation of the General Act and the withdrawal of its acceptance of the Court's jurisdiction[117]. To be sure, the Court had cautioned France from relying on these acts by stating that:

> "[T]he denunciation by France, by letter dated January 2, 1974, of the General Act of the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of such request"[118].

However French denunciations had *de facto* narrowed New Zealand's eventual return to the Court because now the latter had to prove that this was not an attempt to bring a new case before the Court, but a mere continuation of the 1974 case. Paragraph 29 of the 1974 judgment was the main obstacle to overcome.

> "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"[119]

As the 1995 testing series was carried out deep in the bowels of Mururoa, New Zealand's only chance to reopen successfully the case was to convince the Court that the 1973 application concerned, indeed, all nuclear testing, irrespective of the means of diffusion of radiation, whether air or sea. Within these narrow limits, therefore, New Zealand asked the Court to adjudge and declare first that the conduct of the proposed nuclear tests constituted a violation under international law of the rights of New Zealand, as well as of other States, and, second, alternatively, that it was unlawful for France to conduct nuclear tests without previously undertaking an environmental impact assessment in accordance with accepted international standards[120]. Moreover, since tests would have resumed within a few

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115 *Request for an Examination* (New Zealand v. France). This time Australia did not file its own request, even though paragraph 60 of the 1974 allowed it, but rather filed a request to join New Zealand in the proceedings together with Samoa, Solomon Islands, Marshall Islands and the Federated State of Micronesia. Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of December 20, 1974 in the *Nuclear Tests* case (New Zealand v. France), Application by Australia for Permission to Intervene, *ICJ Press Communiqué*, No. 95/23, August 23, 1995; Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of December 20, 1974 in the *Nuclear Tests* (New Zealand v. France), Application by Samoa and Solomon Islands for Permission to Intervene, *ICJ Press Communiqué*, No. 95/24, August 24, 1995; Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of December 20, 1974 in the *Nuclear Tests* case (New Zealand v. France), Application by Marshall Islands and the Federated State of Micronesia for Permission to Intervene, *ICJ Press Communiqué*, No. 95/25, August 28, 1995.

116 *Supra*, Ch.III.9.4.2.

117 *Nuclear Tests* (Australia v. France), Judgment, at 272, para. 60; *Nuclear Tests* (New Zealand v. France), Judgment, at 477, para. 63.

118 *Nuclear Tests* (New Zealand v. France), Judgment, at 477, para. 63.

119 *Ibid.*, at 466, para. 29.

120 *Request for an Examination* (New Zealand v. France), para. 6, at 290–291.

days, New Zealand asked the Court to indicate further (since it was the same case) provisional measures, as it had done in 1973[121].

By a letter dated August 28, the French Government informed the Court that it considered that no basis existed that might substantiate, even *prima facie*, the Court's jurisdiction since the request of New Zealand did not fall within the framework of the 1974 case, and since that case related exclusively to atmospheric tests[122]. France, moreover, doubted the legal nature of this second round of proceedings, held some twenty years after the first. No provision of the Statute envisioned such an eventuality[123]. The Court's answer was that, by allowing the applicant to "request an examination of the situation in accordance with the provisions of the Statute"[124], the Court did not merely restate what was already provided in the Statute (i.e. that the applicant could file a new application[125], request an interpretation of the judgment[126], or request a revision[127]), but rather created a "special procedure"[128] in the event that circumstances "affecting the basis" of the judgment arose[129]. Since the case was a continuation of the 1973–1974 proceedings, during this second stage of the dispute, the written phase was replaced by an exchange of informal *aide-mémoires* on the legal nature of New Zealand's requests and of their effects[130], while the oral phase was substituted by a public sitting held

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121 Namely, to order France to restrain from conducting further tests; to require the preparation of an environmental impact assessment; and to enjoin both parties from taking further actions that might aggravate the present dispute. *Request for an Examination* (New Zealand v. France), Request of Provisional Measures, para. 8, at 291–292.

122 *Request for an Examination* (New Zealand v. France), at 292–293, para. 13.

123 In its aide-mémoire, France pointed out that New Zealand's request could not be brought within any provision of the Statute and that, therefore, the Court, which is bound by its Statute, had to refuse its entry into the General List of cases pending before it. *Request for an Examination* (New Zealand v. France), at 295, para. 23.

124 *Nuclear Tests* (New Zealand v. France), Judgment, at 477, para. 63.

125 Statute of the ICJ, art. 40.1.

126 *Ibid.*, art. 60.

127 *Ibid.*, art. 61.

128 *Request for an Examination* (New Zealand v. France), at 303, para. 53.

129 *Nuclear Tests* (New Zealand v. France), Judgment, at 477, para. 63.

130 The letter accompanying France's aide-mémoire stated that: "This aide-mémoire has been drafted and is sent to you on the purely informal basis laid down by the President of the Court. This text in no way forms part of proceedings governed by the Statute and Rules of the court, concerning as it does a case which has no grounds to exist. The Government of the French Republic would like to point out in the clearest possible terms that the submission of this aide-mémoire in no way constitutes acceptance on its part of the jurisdiction of the Court and that in no way prejudges its future positions". *Request for an Examination* (New Zealand v. France), at 294, para. 21.

Paragraph 2, of New Zealand's aide-mémoire similarly stated that: "This document is not, of course, a complete restatement of New Zealand's position. It should, therefore, be read together with the main Request. New Zealand wishes to emphasize that the present aide-mémoire, being entirely informal in character and being presented at the specific request of the President and, as himself stressed, without any basis in the Statute or the Rules, cannot be regarded as a submission on the material issues sufficient to meet New Zealand's entitlement to a formal, public and proper presentation of its position in relation to the issues raised by the President and by the letter of the French Ambassador dated 28 August 1995. *Ibid.*, at 293, para. 16. New Zealand filed also a supplementary aide-mémoire to comment on certain passages of the French aide-mémoire. *Ibid.*, at 295, para. 26.

"in order to enable New Zealand and France to inform [the Court] of their views" on whether New Zealand's request fell within the provisions of paragraph 63 of the 1974 Judgment[131]. Despite strong objections, France, unlike in 1974, decided to collaborate with the Court to clear up what it regarded as an unfortunate misunderstanding.

New Zealand and France's written and oral arguments can be conveniently summarized as follows. The efforts of the New Zealand team[132] were mainly directed at proving that the effect upon the basis of the 1974 judgment, which paragraph 63 set as a condition of the reopening of the case, did not relate only to the possible resumption of atmospheric testing, but also to any developments that might reactivate New Zealand's concern that French testing could produce contamination of the Pacific marine environment by any artificial radioactive material, and that such developments existed in that instance[133]. Admittedly, in 1974, French testing in the Pacific was atmospheric, and such tests were then New Zealand's primary concern. The Court had matched thus the French unilateral declarations with New Zealand's primary concern and accordingly dismissed the dispute as resolved. However, that would probably not have occurred in 1974 if the shift of testing underground not removed risk of contamination[134]. What New Zealand was seeking was not to move contamination from one environment (i.e. the atmosphere) to another (i.e. the sea), but to avoid radioactive contamination altogether. The Court had rendered its judgment on the assumption that underground testing was safe. However, since the data presented by New Zealand to the Court in this new phase of the case showed that there already had been radioactive leakage, and that there was a significant risk that further tests would cause the atolls to split open or disintegrate in such a way as to discharge into the ocean some part of the radioactive waste accumulated there, the assumption that the abandonment of atmospheric testing would put an end to the risks was erroneous. Thus, the basis of the judgment had been affected by virtue of changes in the factual situation[135].

France's arguments closely mirrored those put forward by New Zealand. The French lawyers contended that the case, if ever there was one, had been closed by the judgment of December 20, 1974[136]. They stressed that both the structure and the words of the judgment showed that according to the Court the dispute between the two States related exclusively to atmospheric tests[137]. The basis of that judgment was the match between, on the one side, the French Government's pledge to discontinue atmospheric testing, and, on the other, New Zealand's claims to that effect[138]. It was France's commitment to refrain from further atmospheric testing, linked to its announcement to move testing underground, which constituted the *ratio decidendi* of the Court's

131 *Ibid.*, at 296, para. 27.
132 Oral statements were presented before the Court on behalf of New Zealand by Paul East, John McGrath, Elihu Lauterpacht, Kenneth Keith and Don MacKay.
133 *Request for an Examination* (New Zealand v. France), at 294, para. 18.
134 *Ibid.*, at 290, para. 4.
135 *Ibid.*, at 298, para. 33.
136 Oral statements were presented before the Court on behalf of France by Marc Perrin de Brichambaut, Pierre-Marie Dupuy, Alain Pellet and Sir Arthur Watts.
137 *Request for an Examination* (New Zealand v. France), at 294, para. 22.
138 *Ibid.*, at 295, para. 22.

decision of December 20, 1974 that the object of the dispute had disappeared[139]. Moreover, France submitted data to demonstrate that underground nuclear testing in atolls is harmless both in the short and long term, and that it actively endorsed the latest requirements of international law in the field of environmental protection[140].

9.6.1. The Court's Judgment on New Zealand's 1995 Application

On September 22, 1995, only ten days after the end of the hearings, the Court rendered its judgment. This was a notable departure from the Court's established habit of taking its time before rendering a verdict. In 1973–1974, more than five months had passed from the end of the hearings to the judgment (19 from application to judgment as compared to four in this second phase). Since this second stage of the case did not present legal problems any easier to solve than those raised during the first, the only explanation could be that while in the 1970s, time was working on the Court's side, now it was playing against it. Indeed, on September 5, 1995, France had exploded the first bomb of the 1995–1996 series. The second test was scheduled for October 1. As the bombs were going off, public outrage increased, and it was becoming more and more problematic for the Court to repeat the acrobatics of 1974 without seriously undermining its credibility.

This time, however, 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. By 12 votes to three[141], the Court reached the conclusion that the 1974 judgment dealt exclusively with atmospheric nuclear tests[142]. This was made patent, not only by the wording of paragraph 63 of the 1974 judgment, but also by statements made by New Zealand's Prime Minister and by the French Government about the possibility of the discontinuance of atmospheric tests[143]. For this reason, it was not possible for the Court to take into consideration questions relating to underground nuclear tests and, as a consequence, the case was to be dismissed[144]. Accordingly, New Zealand's request of provisional measures and the request to intervene of Australia, Samoa, the Solomon Islands, the Marshall Islands and the Federated States of Micronesia were dismissed as well[145].

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139 Ibid.

140 Yet this was done more for the benefit of public opinion than for the proceedings before the Court. France contended that there was not a dispute, and, therefore, it did not need to get into the merits of its actions. Second, in this phase, the Court merely intended to determine whether New Zealand's application fell within the scope of Paragraph 63 of the 1974 judgment. There was, therefore, no actual need to debate the nature, scope and actual existence of radioactive contamination. *Request for an Examination* (New Zealand v. France), at 299, para. 38.

141 President Bedjaoui (Algeria), Vice-President Schwebel (USA), Judges Oda (Japan), Guillaume (France), Shahabuddeen (Guyana), Ranjeva (Madagascar), Herczegh (Hungary), Shi (China), Fleischhauer (Germany), Vereshchetin (Russia), Ferrari Bravo (Italy), Higgins (United Kingdom) voted in favor. Judges Weeramantry (Sri Lanka), Koroma (Sierra Leone) and the *ad hoc* judge Palmer (New Zealand) voted against the decision. Sir Geoffrey Palmer was appointed to replace the joint Australian–New Zealand *ad hoc* judge of the 1974 proceedings, Sir Garfield Barwick. *Request for an Examination* (New Zealand v. France), at 291, para. 7 and 296, para. 27.

142 *Ibid.*, at 306, para. 63.

143 *Ibid.*, at 304–305, para. 55–61.

144 *Ibid.*, at 306, para. 63, and at 307, para. 68.

145 *Ibid.*, at 306–307, para. 67.

Therefore, using the words of Judge Shahabuddeen in his separate opinion,

> "the limits of the dispute, as both positively and negatively defined by the Court in [the 1974 Judgment], still control the debate. The legality of underground tests lies outside of those limits"[146].

Whether those limits had been wrongly placed, both as a matter of fact and/or of legal opportunity, is debatable. From a factual point of view, it is undeniable that in its judgment of 1974, 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. It is equally undeniable that the idea that New Zealand might be satisfied with having radioactive contamination moved from the atmosphere to the sea is illogical. However, given the state of scientific research on radioactive contamination in 1974, and the standards prevailing at the time, underground nuclear testing was considered a safe activity. In addition this was admitted not only by the Court, but also by New Zealand. In 1995, however, the situation had changed. Advancement in scientific knowledge had made known potential or actual risks of contamination that were no longer tolerable, at least according to the standards achieved by the rules of international law on environmental protection in 1995. This fact, by itself, might have justified the Court's revision of the case in the light of the data and principles available in 1995.

Was the Court really called on, in this particular case, to adjudge a mere legal dispute arising out of the actual or potential contamination of the environment (atmospheric in 1974, marine in 1995)? In fact, the issue was a much larger one. The 1995 test series did not substantially differ from the tests which France carried out at Mururoa and Fangataufa, without meeting substantial opposition, between 1975 and 1992. Moreover, the risk of radioactive contamination of the marine environment was not significantly higher in 1995 than in 1992, and the standards dictated by international law in 1995, by which this risk had to be appreciated, were not significantly different from those applicable at the beginning of the 1990s. Yet, what the world, New Zealand *in primis*, could not accept was that the expectations, legitimate or not, raised by the moratorium on nuclear testing declared in 1992 by President Mitterand could be abruptly shattered by President Chirac's decision, in 1995, to resume France's nuclear program. Once the Cold War had come to an end, nuclear rehearsal had become a morally dubious, if not unlawful, exercise. This probably was, therefore, the real *fons and origo*, to paraphrase the Court's 1974 judgment[147], of the second phase of the *Nuclear Tests* dispute.

9.6.2. The Aftermath of the Second (and Last?) Phase of the Nuclear Tests Dispute

All legal actions commenced by New Zealand, NGOs and individuals in four different international jurisdictions did not lead anywhere. All were dismissed

146 See Judge Shahabuddeen's Separate Opinion, at 314.

147 *Nuclear Tests* (Australia v. France), Judgment, at 263, para. 30; *Nuclear Tests* (New Zealand v. France), Judgment, at 467, para. 31.

without the essential legal point being really addressed: Is the creation of a risk for human life and health, as well as for the environment, acceptable under the applicable international legal standards[148]? Political pressure, however, has become somewhat more effective. Many States throughout Asia, the Pacific, Europe and South America have voiced their opposition to French actions. Widespread spontaneous boycotts of French products increased the pressure on the Elysée. All these elements, unsuccessful legal actions included, played their part in accelerating France's final halting of underground nuclear testing. Only six of the eight tests scheduled by the French Government in May 1995 were actually conducted. On January 27, 1996, the sixth and last test was carried out. Two days later, in a television address, President Chirac announced that he had decided to halt further nuclear testing because France could now be assured of a modern and secure nuclear arsenal as a result of data gleaned from the six underground explosions[149]. The testing of nuclear devices could now continue in laboratories through computer aided-simulations. On March 25, 1996, France, together with the United States and Great Britain, signed the three Protocols to the Treaty of Rarotonga[150]. On September 10, 1996, the United Nations General Assembly, after a total of 2,046 nuclear tests had been carried out in fifty-one years all around the globe, adopted the text of the Comprehensive Nuclear Test Ban Treaty[151]. The Treaty, opened for signature on September 24, 1996, has yet to come into force[152].

The dispute, therefore, terminated with the end of the French nuclear testing program, and this, again, revealed the real object of the dispute. Nonetheless, tons or radioactive material still lie, and will lie for thousands of years, deep in the bowels of Mururoa and Fangataufa. Now that no nuclear blasts shake their structure, the risk of the accidental release of radioactive material has been reduced. However, whether diffusion of radioactivity will not take place in the medium to long term is more doubtful[153]. The French Government asserts that the radioactive material is sealed in the atolls as a consequence of a kind of automatic vitrification

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148 Bothe, *op.cit.*, at 257.

149 Drozdiak, W., "Chirac Ends France's Nuclear Test Program: Paris to Take 'Active' Role in Disarmament", *The Washington Post*, January 30, 1996, at 10.

150 Under Protocol 1, the United States, France, and the United Kingdom are required to apply the basic provisions of the Treaty to their respective territories in the zone established by the latter. Under Protocol 2, the United States, France, the United Kingdom, the Russian Federation and China agree not to use or threaten to use nuclear explosive devices against any party to the Treaty or to each other's territories located within the zone. Under Protocol 3, the United States, France, the United Kingdom, the Russian Federation and China agree not to test nuclear explosive devices within the zone established by the Treaty. The Protocols were opened for signature on August 8, 1986, in Suva, Fiji. All five nuclear weapon States have signed the Protocols for which they are eligible. The United Kingdom and France have ratified all three, whereas China and Russia are Parties to Protocols 2 and 3 of the Treaty, but did not accede to Protocol 1, since neither State has territories within the zone. Finally, to date the USA have ratified none. <http://www.iaea.or.at/worldatom/glance/legal/inf331.html> and <http://www.acda.gov/factshee/nwfz/spnwfz .htm> (Sites last visited on May 17, 1998).

151 Comprehensive Nuclear Tests Ban Treaty, opened for signature in New York on September 24, 1996, UNGA Res. A/RES/50/245, UN Doc. A/50/1027.

152 Until December 15, 1997, 149 States had signed the text of the Treaty and only eight had ratified it. <http://www.un.org/Depts/Treaty> (Site last visited on December 15, 1997).

153 *The Impact of Nuclear Testing at Mururoa and Fangataufa*, *op.cit.*.

process which takes place at the explosion site. Under the sudden and intense heat, the surrounding rock melts and forms a glass hull when it cools again. However, whether this process produces a tightly sealed container is not clear. In particular, there is the risk of leakage caused by the migration of the radioisotopes in the porous rock which constitutes the atolls. It is not known if and how long it will take radioisotopes to reach the surrounding water or atmosphere, and whether they will decay naturally before this will happen. Moreover, movements of the Earth's crust might split the cones, causing a massive contamination of marine environment. The Damocles' sword of a legal action arising out of the pollution of the high seas or other areas subject to State sovereignty will keep on hanging over France's head, or whoever might legally succeed to it, for many years to come.

9.7. Assessment of the *Nuclear Tests* Dispute

The declaration appended to the Court's order of September 22, 1995, by the Japanese Judge, Shigeru Oda, probably best summarizes the conflict which tore apart the Court and the conscience of each of its judges[154]. While Oda fully supported the order, which dismissed New Zealand's request to reopen the *Nuclear Tests* case, because he shared the Court's reasoning regarding the procedure leading to the rejection of that request, as a citizen from the only country that has actually suffered the devastating effects of nuclear weapons, he felt bound to express his personal hope that no further tests of any kind of nuclear weapons would be carried out under any circumstances in future.

The *Nuclear Tests* dispute put the Court before a dilemma: To adjudge or not to adjudge? If the Court decided to adjudge, could it condemn only nuclear testing that causes transboundary pollution, endorsing *de facto* the legality of those nuclear experiments which, while they might not have deleterious transboundary environmental effects, nonetheless undermine nuclear disarmament efforts? Could the Court take the risk of finding testing lawful? In either case, the Court would have embarked on a collision course not only with world opinion (against nuclear armaments in general), but also with the United Nations itself, as the General Assembly had pleaded in a multitude of resolutions for the discontinuance of tests and nuclear disarmament. This was even more true in 1995, when the end of the Cold War had caused a widespread expectation for a reduction of nuclear arsenals, and when the negotiations over the extension of the NPT and the adoption of a Comprehensive Test Ban Treaty were underway. Conversely, could the Court meet public expectations by rendering a judgment which, however narrow in its terms, would have been tantamount to declaring nuclear testing unlawful? Could it sustain confrontation with the *raison d'Etat*? Could it ultimately alienate its patrons?

In 1974, the Court happily welcomed the French decision to shift nuclear testing underground, because this gave it a graceful exit from a politically sensitive case. In 1995, it prevented New Zealand from reopening the case, not only because both legal and political considerations advised this, but also because, and perhaps decisively, two requests of advisory opinion about nuclear weapons were pending

154 Declaration by Judge Oda. *Request for an Examination* (New Zealand v. France), at 310.

before it[155]. Tackling the issue of the legality of the threat and use of nuclear weapons in advisory proceedings would have enabled the Court to avoid the stress inherent in contentious proceedings. No need to weigh the reasons of the applicant, who nurtures high expectations, against those of a respondent, who objects to jurisdiction and refuses to cooperate. The conflict between the adversaries of nuclear weaponry and those who consider them an inevitable evil of contemporary society would have been resolved only within the Court itself. However, as the opinion of July 8, 1996, on the *Legality of the Threat or Use of Nuclear Weapons* proved, the conflict would not have been less acute. On that occasion, the Court split exactly in two halves, seven votes to seven[156], and only the casting vote of its President allowed it to decide that

> "while the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict...in view of the current state of international law...the Court cannot conclude definitively that the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake"[157].

A second, much larger dilemma underlay the Court's attitude in the *Nuclear Tests* dispute, that is to say, the clash between those who think that the proper role of the Court is to be the custodian of international law, and those who think that it should also contribute to its enrichment and development. According to the first school (somewhat incorrectly designated as the positivist school), the Court's mission is to apply law as it is, within the limits provided on the one side by State's consent to its jurisdiction and, on the other, by the way in which the case is stated. Conversely, according to the second (referred to as the sociological school), the proper function of judges and international tribunals consists not only in stating what the law is, *jus dicere*, but also in making pronouncements that may lead to its enrichment and development. According to the latter school, therefore, the ICJ should participate in the larger decision-making and consensus-building processes of international society, which come into play when interests compete and values clash.

The whole history of the Court has been characterized by the dialectic between these two schools[158]. At times, the positivist school prevailed, as in the *South-West Africa* case[159], while at others, a more pro-active stance had the upper hand, as in

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155 *Legality of the Use by a State on Nuclear Weapons in Armed Conflict,* Advisory Opinion, ICJ Reports 1996, pp. 65–224; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ILM*, Vol. 35, 1996, pp. 809–938. For an exhaustive analysis of the World Court opinions on nuclear weapons, see Boisson de Chazournes, L. / Sands, Ph., (eds.), *International Law, The International Court of Justice and Nuclear Weapons*, New York, Cambridge University Press, 1999.

156 President Bedjaoui (Algeria) and Judges Ranjeva (Madagascar), Herczegh (Hungary), Shi (China), Fleischhauer (Germany), Vereshchetin (Russia) and Ferrari Bravo (Italy) voted in favor. Vice-President Schwebel (USA) and Judges Oda (Japan), Guillaume (France), Shahabuddeen (Guyana), Weeramantry (Sri Lanka), Koroma (Sierra Leone) and Higgins (United Kingdom), voted against the decision.

157 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ILM*, Vol. 35, 1996, para. 105(E), at 831.

158 See, in general, Taylor, *op.cit.*.

159 *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, ICJ Reports 1966, pp. 6–505.

the advisory opinion on the *Reparation of Injuries Suffered in the Service of the United Nations*[160] and on *Certain Expenses of the UN*[161], in the *Namibia case*[162], where the Court reversed its prior holding in the second phase of the *South-West Africa* cases, or in the *Nicaragua* case[163]. In the *Nuclear Tests* dispute, the positivist school triumphed, the only concession to the sociological school being the dictum that:

> "the present Order is without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment"[164].

Nonetheless, the dissenting opinions of three of its judges appended to the order of September 22, 1995 on the New Zealand's Request[165] will remain as a persuasive demonstration that, where the application of the law contrasts with its development, the choice between the two "depends as much upon implicit judgments concerning the proper scope of the judicial role as upon detailed reasoning"[166].

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160 *Reparation of Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, pp. 174–220.

161 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962, pp. 151–308.

162 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, pp. 16–345.

163 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, Judgment, ICJ Reports 1986, at 14.

164 *Request for an Examination* (New Zealand v. France), at 306, para. 64.

165 *Ibid.*, Judge Weeramantry's Dissenting Opinion, at 317–362; Judge Koroma's Dissenting Opinion, at 363–380; Judge Palmer's Dissenting Opinion, at 381–421. Citing Gerald Fitzmaurice, Weeramantry said that the Court has a duty "to the parties and in the general interest of the law" to go beyond a bare decision. Judge Weeramantry's Dissenting Opinion, at 361.

166 Dissenting Opinion of Judge Palmer, at 414.

10. THE *PHOSPHATES* DISPUTE (NAURU V. AUSTRALIA)

10.1. Introduction

The *Phosphates* dispute lasted from 1968 through 1993 and opposed the Republic of Nauru to the Commonwealth of Australia[1]. It arose out of the mining of phosphate deposits in Nauru between 1919 and 1967, a period during which the island was administered by Australia, first by virtue of a mandate of the League of Nations (1919–1947) and then on the basis of a trusteeship agreement of the United Nations (1947–1968). The issues of the control over the island's phosphate deposits and of the rehabilitation of the mined lands escalated from a disagreement between ward and guardian into an international legal dispute only when, on January 31, 1968, Nauru became a sovereign State[2]. On May 19, 1989, Nauru filed an application with the International Court of Justice instituting proceedings against Australia[3]. However, the World Court did not adjudicate the merits of the case because, on August 10, 1993, Nauru and Australia settled the dispute by reaching a lump-sum agreement[4].

Several aspects make the Phosphates dispute worth studying. It is, indeed, the first case where a former trust territory has sought redress from a former trusteeship authority for the administration of the territory's economic assets[5]. Second,

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1 On the *Phosphates* dispute, see in general Leslie, M.W., "International Fiduciary Duty: Australia's Trusteeship over Nauru", *Boston University International Law Journal*, Vol. 8, 1990, pp. 397–419; Fitzgerald, E.M., "Nauru v. Australia: a Sacred Trust Betrayed?", *Connecticut Journal of International Law*, Vol. 6, 1990, pp. 209–249; Anghie, A., "'The Heart of My Home: Colonialism, Environmental Damage and the Nauru Case", *Harvard International Law Journal*, Vol. 34, 1993, pp. 445–506; Anghie, A., "Certain Phosphate Lands in Nauru", *A.J.I.L.*, Vol. 87, 1993, pp. 282–288; Reyes, R.E., "Nauru v. Australia: The International Fiduciary Duty and the Settlement of Nauru's Claims for Rehabilitation of its Phosphate Lands", *New York Law School Journal of International and Comparative Law*, Vol. 16, 1996, pp. 1–54; Weeramantry, C.G., *Nauru: Environmental Damage under International Trusteeship*, Melbourne, Oxford University Press, 1992, pp. XX–448; McDonald, B., *In Pursuit of the Sacred Trust: Trusteeship and Independence in Nauru*, Wellington, New Zealand Institute of International Affairs, 1988, pp. VIII–94. For a comprehensive and accurate description of the history and politics of Nauru until 1970, see Viviani, N., *Nauru: Phosphate and Political Progress*, Honolulu, University of Hawaii Press, 1970, pp. XIV–215.

2 *Infra*, Ch.III.10.3.

3 *Certain Phosphate Lands in Nauru* (Nauru v. Australia), *ICJ Pleadings*, (not yet published), Nauru's application.

4 *Infra*, Ch.III.10.5.

5 In two instances, the World Court has been called upon to address the issue of trustee's failure to fulfill its duty to move a non-self-governing territory to full independence: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, pp. 16–345; *Northern Cameroons* (Cameroon v. UK), Judgment, ICJ Reports 1963, pp. 15–196. However, this was the first time the Court was called to emit a verdict on the fiduciary's duty to administer the territory in the best interest of the indigenous populations.

not only did it involve issues of international responsibility for environmental damage, but the question of the rehabilitation of the degraded environment, unlike in other cases, is at the center of the dispute. Thirdly, it involves a micro-State as plaintiff and a large regional power as defendant and, therefore, can be regarded as a meaningful test of the capacity of the international legal system of being egalitarian. Finally, it is an excellent example of the fact that the filing of a case with an adjudicative body can induce States to negotiate an agreement to settle their disputes, often regardless of the possible outcome of the judicial process.

10.2. The Issue

Nauru is a tiny island located in southeastern Micronesia, lying some 40 kilometers south of the equator, about halfway between Sidney and Honolulu[6]. It consists of an uplift coral formation of about 21 square kilometers (by comparison, the Canton of Geneva is thirteen times larger), with a central plateau 60 meters high that is covered with beds of phosphate rock. Below the plateau there is a strip of land running around the island and ranging from 150 to 300 meters in width, which contains most of the habitable land. Finally, Nauru is encircled by an unbroken coral reef, which affords the island no suitable anchorage or harbor. In 1996, the Republic of Nauru's population, concentrated in the coastal strip, was about 10,000[7].

Nauru's economy is based entirely on the export of high quality phosphates, a combination of decayed oceanic microorganisms and bird droppings (guano), which are used as fertilizer in agriculture[8]. Since these elements are embedded in the coral and limestone that form the island, mining of the phosphates is an extremely destructive process for the island's soil[9]. Mining operations leave behind deep pits and tall pillars, creating an inhospitable moon-like landscape. Not only does this prevent agricultural activities and exclude the establishment of any viable ecosystem, but it also creates a bare area exposed to direct equatorial sunlight. As a result, hot air rising from the central plateau prevents the clouds from settling over the island, contributing to frequent drought. Nowadays more than 80 percent of the island is a barren wasteland and phosphate deposits are expected to be exhausted around the year 2000[10].

Since phosphates are the only natural resource of the island, Nauru's history is that of the mining of its phosphates. The island was first sighted by Europeans in

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6 Its coordinates are 0° 32' S and 166° 56' E. For a general description of Nauru, see "Nauru", *Encyclopedia Britannica*, 15th ed., Vol. 8; Younger, R.M., "Nauru", *Encyclopedia Americana*, 1994, Vol. 19. See figure 9.

7 CIA, "Nauru", The World Fact Book, in <http://www.odci.gov/cia/publications/factbook/nr.html> (Site last visited on November 10, 1997). See Map 10.

8 *Encyclopedia Britannica*, *op.cit.*; *Encyclopedia Americana*, *op.cit.*

9 Pukrop, M.E., "Phosphate Mining in Nauru", <http://gurukul.ucc.american.edu/ted/NAURU.htm> (Site last visited on November 10, 1997).

10 "The known phosphate resources of the island as recorded by the Nauru Phosphate Commission are likely, at present rates of mining and sales, to run out around 1994". Weeramantry, *op.cit.*, at XIII. See also *Encyclopedia Britannica*, *op.cit.*; *Encyclopedia Americana*, *op.cit.*; Pukrop, *op.cit.* See Map 10 Bis. See figure 10.

1798, and all through the nineteenth century it was occasionally used as supply station by whaling ships operating in the South Pacific[11]. It is only towards the end of the century that the region increasingly attracted the attention of the Western colonial powers. In 1866, the United Kingdom and Germany partitioned the western Pacific into separate spheres of influence[12]. Nauru fell within the German sector and in 1888 was annexed by the *Reich*[13]. However, the real turning point in the history of the island was the year 1900, when a geologist of the Pacific Islands Company, a British trading enterprise, discovered by chance that the whole place was made of phosphates, a natural fertilizer which could dramatically increase agricultural yield[14]. Mining started soon after, first by Jaluit Gesellschaft, a German trading company, and then, as of 1905, by the Pacific Phosphate Company, an Anglo–German consortium[15].

Shortly after the outbreak of World War I, the island was occupied by Australian troops and remained so until the end of the conflict. Despite Australia's desire to directly annex the island, once the conflict ended Nauru became part of the larger debate regarding the future of the colonial territories of the German and Ottoman Empires[16]. Although the Conference of Versailles of 1919 decided in principle to grant the mandate over Nauru to the British Empire[17], it was far from clear what this meant in terms of specific arrangements between Australia and two other main stake-holders, Great Britain and New Zealand. The issue was eventually settled in July 1919 by a treaty which, though formally called "Agreement Relative to the Administration of the Nauru Island", in reality had as its main purpose the apportionment of its phosphates between the three countries[18]. Mining activities resumed soon after, under the control of a three-person panel called the British Phosphate Commissioners[19]. Yet, while Great Britain and New Zealand

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11 For the early history of Nauru, see Viviani, *op.cit.*, at 17–39.

12 Declaration between Germany and Great Britain Relating to the Demarcation of the British and German Spheres of Influence in the Western Pacific, made in Berlin, April 6, 1886, *CTS*, Vol. 167, pp. 397–400.

13 For the reasons of annexation, see Viviani, *op.cit.*, at 22.

14 For an account of the casual discovery of the phosphates, *cf. ibid.*, at 28.

15 Nauru's application, at 4.

16 Weeramantry, *op.cit.*, at 40–54; Viviani, *op.cit.*, at 40–43; Anghie, "The Heart of My Home", *op.cit.*, at 450–451.

17 Pursuant to article 119 of the Treaty of Versailles and article 22 of the League of Nations Covenant, the island was formally conferred to "His Britannic Majesty" as a mandate on December 17, 1920. Mandate for Nauru, *League of Nations Official Journal*, Vol. 2, 1921, at 93.

18 Agreement between Australia, Great Britain and New Zealand Relative to the Administration of Nauru Island, July 2, 1919, *CTS*, Vol. 225, at 431–433.

19 The British Phosphate Commissioners took the legal form of a non-profit corporation, which was given the exclusive authority to work, manage and sell the phosphate deposits of Nauru as well as to exercise administrative and legislative functions concerning the phosphate industry. UNTCOR, 24th Sess., Agenda Item 3(d), at 1, UN Doc. T/1466 (1959); UNTCOR, 8th Sess., Supp., No. 3, at 2–3, UN Doc. T/898 (1951). Fitzgerald, E.M., *op.cit.*, at 217–218. Ownership of the phosphate deposits and all related property was vested in the Commissioners. Prior to the vesting, the three Governments paid a royalty to the Nauruan people to gain control over all previously held title to the deposits and other property. The royalty, which was a percentage of the value of the phosphate exported, was paid into three funds: The Nauru Royalty Trust Fund, The Nauruan Landowners' Royalty Trust Fund and The Nauruan Community Long-Term Investment Fund. These Funds were used to administer the land. UNTCOR, 18th Sess., Annex 1, Agenda Item 5, UN Doc. T/L.720 91956), at 18.

benefited from a share in the phosphate deposits[20], the island was de facto left in control of and administered by Australia[21].

The next major change in the international legal status of the island occurred in 1947, when Nauru was placed under the United Nations Trusteeship system to replace the League of Nations' mandate[22]. Yet, from the practical point of view little changed. Mining operations under the strict supervision of the British Phosphates Commissioners continued after a five-year interruption due to Japanese occupation of the island[23].

The decolonization process, which involved all colonial territories as of the end of World War II, eventually reached the Pacific islands. Nauru was no exception, but here independence more than anywhere else acquired a very precise meaning: control of the revenues flowing from the mining activities on the island. Nauruans' discontent with their exclusion from the economic and political life of the island grew during the 1950s, and the Nauru Local Government Council (NLGC) gave voice to these claims[24]. In 1964, talks were initiated between Australia and the NLGC on a number of key issues, including royalties for the exploitation of the phosphates, rehabilitation of the island's devastated environment, possible resettlement on another island, and eventual independence[25]. On November 14, 1967, common ground was found. The three partner Governments, Australia, New Zealand and Great Britain, agreed to give up the mines by selling them to the NLGC for 21 million Australian dollars[26]. Yet, in order to maintain the flow of a resource essential to the agriculture of Australia and New Zealand at a favorable price, the NLGC agreed to supply exclusively the three Governments with a given amount of phosphate below the market rate under a long-term production contract[27]. The issue of the rehabilitation of the island, however, remained unsettled. Although Australia wanted to include a clause in the agreement settling any claims that Nauru might have to rehabilitation of the phosphate lands, such a clause was rejected by

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20 According to the 1919 Agreement, Australia and the United Kingdom each received 42 percent of the phosphates produced, and New Zealand received the remaining 16 percent. *Supra*, note 18.

21 The predominant role played by Australia in the administration of Nauru can be better understood by considering that the Administrator has always been appointed by Australia, and that virtually all legislation concerning Nauru from 1919 to 1968 was enacted by the Australian Parliament. *Certain Phosphate Lands in Nauru* (Nauru v. Australia), Preliminary Objections, Judgment, ICJ Reports 1992, pp. 240–346, at 256–258, para. 42–47.

22 Trusteeship Agreement for the Territory of Nauru, approved by the UN General Assembly on November 1, 1947, *UNTS*, Vol. 10, at 3–9. For an analysis of the different legal aspects of the mandate system as compared to the trusteeship system, see Chowdhuri, R.N., *International Mandates and Trusteeship Systems: A Comparative Study*, The Hague, Nijhoff, 1955, pp. XV–328. The Nauru Mandate was accordingly replaced with a Trusteeship Agreement for Nauru.

23 For an account of the toll of the Japanese occupation of Nauru, see Garrett, J., *Island Exiles*, Sydney, ABC Books, 1996, 200 pp.; Viviani, *op.cit.*, at 77–87.

24 For an account of the history of the democratic movement in Nauru, see Viviani, *op.cit.*, at 104–131.

25 For a detailed account of these talks, *cf. ibid.*, at 132–158. In the early 1960s, relocation rather than rehabilitation was seen as the solution. The Australian Government offered Nauruans an island off the Queensland coast, but because the offer did not guarantee independence, it was rejected.

26 Weeramantry, *op.cit.*, at 273–274.

27 *Ibid.*, at 272–273; Viviani, *op.cit.*, at 166.

Nauru[28]. Once the control over the mines was lost, control over Nauru itself was lost as well. As a consequence, on December 19, 1967, the trusteeship over Nauru was terminated, and on January 31, 1968, the island became an independent State[29].

10.3. The Dispute

Although the issue of the responsibility of Australia arising out of the management of mining activities during the trusteeship period was central to the talks which led to the independence of the island, it became the object of a truly *international* dispute only once Nauru had become sovereign. All through the 1980s, Nauru tried with no success to convince the three Governments, Australia in particular, to recognize their responsibility for the rehabilitation of the part of the island, about one third, that had been mined out prior to July 1967, when they gave up control of the phosphate industry[30]. In the meantime, since no alternative industry had been developed on the island, and the 1967 Agreement bound Nauru to continue mining operations to provide its former trustees with phosphates, the Nauruans continued mining to maintain the high level of income reached thus far.

In 1986, the Nauru Government unilaterally appointed an international commission of inquiry, chaired by Christopher G. Weeramantry, late judge of the World Court. The Commission of Inquiry into the Rehabilitation of the Worked-out Phosphate Lands of Nauru presented its findings in a ten-volume report that found the three partner Governments responsible for the rehabilitation of the mined lands[31]. Once again, however, Nauru did not have the diplomatic leverage to force any of the former trustees, in particular Australia, its administrator *de facto*, to conclude an agreement.

Judicial means, conversely, could afford Nauru with a viable avenue to obtain redress. Since Australia had accepted in 1975 the jurisdiction of the International Court of Justice without any major reservation[32], Nauru could attempt to institute

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28 Weeramantry, *op.cit.*, at 273. *Certain Phosphate Lands in Nauru*, Preliminary Objections, Judgment, at 247–248, para. 15.

29 *Ibid.*, at 246, para.10.

30 Australia eventually objected to the jurisdiction of the ICJ by arguing that Nauru did not raise the issue between 1968 and 1988 and therefore was estopped from bringing it before the Court. The Court rejected this objection by pointing to a number of documents exchanged during that period. *Certain Phosphate Lands in Nauru*, Preliminary Objections, judgment, at 253–255, para. 31–36.

31 Republic of Nauru, *Commission of Inquiry into the Rehabilitation of Worked Out Phosphate Lands of Nauru: Report*, 1988. The report of the Commission of Inquiry is summarized in a book written by its Chairman. Weeramantry, *op.cit.*

32 The declaration of Australia specifies that it "does not apply to any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement". *Certain Phosphate Lands in Nauru*, Preliminary Objections, Judgment, at 245, para. 8. Australia's submission to the jurisdiction of the Court was formulated without any major reservations mainly because, in the 1970s, the Australian Government believed that it was Australia's duty of good "international citizenship" to accept the ICJ jurisdiction without reservations. On the Australian declaration of acceptance of the ICJ jurisdiction, see the interview made by BBC in London, November 4, 1991, of Senator Gareth Evans, Australian Minister for Foreign Affairs and International Trade, reprinted in *Australian Yearbook of International Law*, Vol. 13, 1990–1991, at 412–413.

proceedings before the Court. Accordingly, on August 21, 1987 Nauru, which at that time was not a member of the United Nations, applied to become a Party to the Statute of the International Court of Justice[33]. On January 29, 1988, it deposited with the UN Secretary General a declaration of acceptance of the Court's jurisdiction which closely mirrored that of Australia[34]. Finally, on May 19, 1989, it filed an application with the ICJ instituting proceedings against Australia[35].

Nauru did not initiate proceedings against the other two trustees, New Zealand and the United Kingdom, because of legal considerations both of a technical and tactical nature. Indeed, New Zealand and the United Kingdom's declarations of acceptance of the compulsory jurisdiction of the Court contained reservations that, if broadly interpreted, could prevent the Court from exercising its jurisdiction[36]. Moreover, Nauru had a stronger argument for the eventual responsibility of Australia than against the other two countries, since the former had de facto ruled the island. Attacking the other two partner Governments would have obliged Nauru to disperse its efforts.

10.4. The Proceedings before the Court

In its application, Nauru requested the Court to adjudge and declare that through its acts and omissions Australia had violated a number of international obligations, both customary and treaty-based. In particular, Nauru claimed that Australia had contravened, first, article 76 of the UN Charter and article 3 and 5 of the Trusteeship Agreement[37]; second, international standards generally recognized as

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33 According to article 93.2 of the Charter, a State which is not a member of the United Nations may become a Party to the Statute of the ICJ on "conditions determined by the General Assembly upon recommendation of the Security Council". For the conditions determined by the General Assembly and the recommendation of the Security Council concerning Nauru's admittance, see: Summary Statement by the Secretary-General on Matters of Which the Security Council is Seized and on the Stage Reached in their Consideration, Addendum, UN Doc. S/18570/Add.42 (1987).

34 Nauru's acceptance of the Court's jurisdiction does not extend to "any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement". *Certain Phosphate Lands in Nauru*, Preliminary Objections, Judgment, at 245, para. 8.

35 Nauru's Application.

36 Paragraph III of the United Kingdom's declaration of January 1, 1969, excludes "disputes in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court". Paragraph II excludes "disputes with the Government of any other country which is a Member of the Commonwealth with regard to situations or facts existing before January 1, 1969". Paragraph II.2 of New Zealand's declaration of acceptance, of September 22, 1977 is identical to Paragraph III of the United Kingdom's declaration. Yet, according to Judge Ago, these reservations did not prevent Nauru from bringing claims against the other two partner Governments. *Certain Phosphate Lands in Nauru*, Preliminary Objections, Judgment, Judge Ago's dissenting opinion, para. 5. For the reason of the exclusion from the ICJ's competence of disputes between members of the Commonwealth, see, in general, Slinn, P., "The Role of the Commonwealth in the Peaceful Settlement of Disputes", Butler, W.E., *The Non-use of Force in International Law*, Dordrecht, Nijhoff, 1989, pp. 119–135.

37 *Certain Phosphate Lands in Nauru*, Preliminary Objections, Judgment, at 243, para. 5.

applicable in the implementation of the principle of self-determination[38]; third, the obligation to respect the right of the Nauruan people to permanent sovereignty over their natural resources[39]; fourth, the obligation under general international law not to exercise powers of administration in such a way as to produce a denial of justice *lato sensu* or to constitute an abuse of rights[40]; fifth and last, the principle of international law by which a State which is responsible for the administration of a territory must not bring about changes in the condition of that territory that might cause irreparable damage to the existing or contingent legal interests of another State in respect of that territory[41]. In addition to these points originally raised by Nauru in its application, in the memorial subsequently filed by Nauru requested the Court to declare that it had a legal entitlement to the Australian share in the overseas assets of the former British Phosphate Commissioners[42].

As a remedy, Nauru requested the ICJ to adjudge and declare that Australia was under a duty to make appropriate reparation in respect of the loss caused by the breach of its legal obligations and its failure to recognize the interest of Nauru in the overseas assets of the British Phosphate Commissioners[43]. Although Nauru provided provisional figures relating to the losses suffered[44], it requested that the issue of reparations be decided in a separate phase of the proceedings, in the absence of an agreement between the parties[45].

Turning to factual issues, Nauru raised two main points. First, Australia had failed to ensure that the Nauruans would benefit appropriately from the exploitation of the phosphates of the island. In its application Nauru alleged that the price paid for the phosphates by the trustees was artificially kept well below the world market price, and, as a consequence, the royalty rate Nauru received between 1919 and 1967 was lower than it would have been in a fair transaction[46]. Furthermore, when in 1967 the NLGC purchased the mines back from the Commissioners, it was obliged to supply the three Governments with two million tons of phosphate per year, all at a previously fixed price well below market levels[47]. Second, Nauru claimed that since about one third of the island had been mined during the Australian administration, Australia was obliged to rehabilitate those lands mined prior to July 1, 1967. Failure to do so would have amounted to a breach of the 1947 Trusteeship Agreement and the UN Charter

38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid.
42 *Ibid.* The assets of the British Phosphate Commissioners on Nauru were transferred to the Government of Nauru in 1970, and its activities thereupon were terminated. Following the entry into force of an Agreement of June 9, 1981 between New Zealand and Australia, which put an end to the functions that the Commissioners had exercised on Christmas Island, Australia, New Zealand and the United Kingdom decided to wind up the affairs of the British Phosphate Commissioners and to divide among themselves the remaining asserts and liabilities of the Commissioners. To that end, they concluded on February 9, 1987 an agreement to terminate the Nauru Island Agreement of 1919. *Certain Phosphate Lands in Nauru*, Preliminary Objections, Judgment, at 263, para. 60.
43 *Ibid.*, at 244, para. 5.
44 Nauru's Application, at 32. The Commission of Inquiry had estimated the cost of rehabilitation of land mined prior to 1967 to AUD72 million.
45 *Ibid.*, at 32.
46 *Ibid.*, at 14. Nauru estimated revenue loss as high as AUD335 million.
47 *Ibid.*, at 12.

because, by physically destroying the homeland of the people of Nauru, Australia had made it impossible for them to exercise their right to self-determination.

Australia's reply to the Nauruan allegations has never been officially known. As will be explained below, the Court was prevented from judging the merits of the case because the two parties reached an agreement out of court[48]. Since the Rules of Court do not allow the disclosure of memorials before the opening of the oral phase[49], Australia's reply could not be published. However, some authors, reading between the lines of statements made by Australian officials, have made some educated guesses as to what Australia's arguments might have been[50]. Australia's case probably included four main points. First, neither the Trusteeship Council nor the General Assembly, the custodians of the Trusteeship System, ever declared Australian administration to be in violation of the Trusteeship Agreement[51]. The Court, therefore, could hardly be in a better position to judge the merits of Australia's actions. Second, if the purpose of the Trusteeship System was to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, then by all standards Australia had accomplished its mission. Not only was the per capita income of the Nauruans one of the highest in the world, but also health care, public services and education all had improved exponentially under Australian administration[52]. Moreover, on the crucial question of rehabilitation, Australia would have argued that since 1967 Nauru had acquired all the benefits of the phosphate industry and therefore could afford to rehabilitate the mined lands without further assistance[53]. Finally, since the beneficiaries of the trust, that is to say the Nauruans, were adequately provided for, the trustee (i.e. Australia) could dispose of the remaining trust assets in whatever manner it pleased[54]. The weaknesses of these points by and large explains why Australia eventually decided to settle.

10.4.1. Preliminary Objections

On July 18, 1989, the Court fixed the time-limits for the written proceedings in the case. Nauru's memorial was due on April 20, 1990 and Australia's counter-memorial on January 21, 1991. Yet a few days before the deadline for counter-memorial filing, Australia filed preliminary objections claiming the inadmissibility of the Nauruan claims and the lack of jurisdiction of the Court. Accordingly, Nauru was given time to prepare a written statement concerning the Australian preliminary objections, which was eventually filed on July 17, 1991. From November 11 through 22, 1991, public hearings were held on these[55].

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48 *Infra*, Ch.III.10.5.

49 Rules of the ICJ, art. 53.2.

50 Reyes, *op.cit.*, at 30–32; Anghie, *op.cit.*, at 463–465. Fitzgerald, *op.cit.*, at 226–228.

51 Anghie, *op.cit.*, at 465; Reyes, *op.cit.*, at 31.

52 Anghie, *op.cit.*, at 464; Reyes, *op.cit.*, at 31; Fitzgerald, *op.cit.*, at 226.

53 Anghie, *op.cit.*, at 464; Reyes, *op.cit.*, at 31.

54 Anghie, *op.cit.*, at 465; Reyes, *op.cit.*, at 31–32.

55 Five agents and counsels of the Australian team addressed the Court during the oral phase: Mr. Griffith; Mr. Jiménez de Aréchaga, Mr. Bowett, Mr. Burmester, Mr. Pellet. The team of Nauru was made by six agents and counsels: Head Chief de Robur, Mr. Mani, Mr. Keke, Mr. Connell, Mr. Brownlie, Mr. Crawford.

The objections to the Court's jurisdiction and to the admissibility of the Nauruan application can be summarized as follows. First, both Australia's and Nauru's declarations of acceptance of the jurisdiction of the ICJ excluded disputes in relation to which the parties had agreed to have recourse to some other method of settlement; disputes between the people of Nauru and the Administering Authority, according to the Australian agents and counsel, fell within the exclusive jurisdiction of the United Nations Trusteeship Council and of the General Assembly. Second, Nauru had implicitly waived any claims to the rehabilitation of lands both with the 1967 Agreement and in statements made in the UN at the time of the termination of the trusteeship. Third, the termination of the trusteeship by UN General Assembly Resolution 2347 precluded subsequent allegations of breach being examined by the Court. Fourth, Nauru's claim had been submitted eleven years after the island became independent. This was an unreasonable lapse of time. Fifth, Nauru had failed to act in good faith because not only it did not start rehabilitation work, but also it continued mining. Sixth, the claim was in reality a claim against the Administering Authority, and any judgment on the question of the breach of the Trusteeship Agreement would involve the responsibility of the other two States (United Kingdom and New Zealand), which had not consented to the Court's jurisdiction. Finally, Australia maintained that Nauru's claim regarding the assets of the British Phosphate Commissioners contained in the Memorial was inadmissible because it was not contained in the original Application.

10.4.2. The Court's Ruling on Australian Preliminary Objections

On June 26, 1992, some thirty-seven months after Nauru's application, and just ten days after the end of the Rio Conference on the Environment and Development, the Court rendered its judgment on Australia's preliminary objections[56]. It rejected all Australian objections with quite an unusual degree of harmony. It found unanimously that since the parties had not agreed to bring disputes among them to any other forum, the reservations contained in their declarations of acceptance of the Court's jurisdiction did not prevent the Court from hearing the case[57]. By 12 votes to one, the Court found that Nauru had not waived its claims regarding rehabilitation[58], that General Assembly Resolution 2347 did not give the Administering Authority a complete discharge in relation to the rights that Nauru might have regarding rehabilitation[59], that Nauru's application had been filed within a reasonable period of time[60] and that its conduct did not amount to an abuse of process[61].

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56 The Court was composed as follows: President Jennings (UK), Vice-President Oda (Japan), Judges Lachs (Poland), Bedjaoui (Algeria), Ago (Italy), Schwebel (USA), Ni (China), Evensen (Norway), Tarassov (Russia), Guillaume (France), Shahabuddeen (Guyana), Aguilar Mawdsley (Venezuela), Ranjeva (Madagascar). Judge Weeramantry (Sri Lanka) did not sit due to a conflict of interest, having been the Chair of the Nauru Inquiry Commission. *Supra*, note 31. Judge Elias (Nigeria) died before the hearings, on 14 August 1991.

57 *Certain Phosphate Lands in Nauru*, Preliminary Objections, Judgment, para. 7–11, and at 268–269, para. 72.

58 *Ibid.*, at 247–250, para. 12–21, and at 268–269, para. 72. Oda dissenting.

59 *Ibid.*, at 250–253, para. 22–30, and at 268–269, para. 72. Oda dissenting.

60 *Ibid.*, at 253–255, para. 31–36, and at 268–269, para. 72. Oda dissenting.

61 *Ibid.*, at 255, para. 37–38, and at 268–269, para. 72. Oda dissenting.

The question of whether the absence in the proceedings of the other two administering authorities (Great Britain and New Zealand) could prevent Nauru from bringing a claim against Australia, however, was the most debated one. The approach of the Court on this point was pragmatic as opposed to legalistic. By nine votes to four the Court found that, since Australia had de facto acted as single administrator, and since the United Kingdom and New Zealand's interests did not constitute the subject-matter of the decision which the Court was asked to give on the merits, the Court could hear the case[62]. Finally, the Court unanimously rejected Nauru's attempt to add to the list of grievances contained in its application claims to the Australian share of assets of the British Phosphate Commissioners[63].

10.5. The Agreement

Following the decision on Australia's preliminary objections, the Court set time-limits for the pleadings on the merits, separating them by generous nine-month periods. Australia filed its counter-memorial on March 29, 1993[64]. Nauru was given until December 22, 1993 to file a reply, and Australia was given until September 14, 1994 to file a rejoinder[65]. Seemingly, the Court was not in an hurry to issue a verdict. At this pace it could not realistically adjudge the case before the end of 1995, more than six years after the original application. Moreover, it was not unlikely that some discreet inputs to slow down the process were given to the Court by the parties[66]. Nauru and Australia, indeed, were working to find an amiable solution out of the courtroom.

While Nauru did not quantify precisely the amount of damages it claimed from Australia in any of the documents submitted to the Court, it is nonetheless possible to use the figure of AUD 72 million put forth by the Inquiry Commission as an estimate of what Nauru intended to claim[67]. Australia, for its part, considering the degree of unanimity reached in the objections phase and the weakness of its arguments on the merits, reasonably feared the possible outcome of the judicial process. Besides the embarrassment of having the principal UN judicial organ finding Australia in violation of a number of international obligations, if the Court had ruled in favor of Nauru, condemning Australia's management of its former trust territory, it would have opened the Pandora's box of claims that former colonies

62 *Ibid.*, at 255–262, para. 39–57, and at 268–269, para. 72. Jennings, Oda, Ago and Schwebel dissenting.

63 *Ibid.*, at 262–267, para. 58–71, and at 268–269, para. 72.

64 *Certain Phosphate Lands in Nauru* (Nauru v. Australia), Order of June 29, 1992, ICJ Reports 1992, pp. 345–346, at 345.

65 *Certain Phosphate Lands in Nauru* (Nauru v. Australia), Order of June 25, 1993, ICJ Reports 1993, pp. 316–317, at 316.

66 In 1995, on the occasion of the fiftieth anniversary of the ICJ, Sir Robert Jennings, President of the ICJ during the *Phosphates* dispute, was asked by Professor Thirlway whether in the event of disputes of a high sensitive content the Court might not need, for political considerations, to render a judgment. Sir Jennings answered that in those cases "going slowly is all I can think of as the useful thing a court could do". Peck/Lee., *op.cit.*, at 96–99.

67 *Supra*, note 31.

and trust territories had against past colonial powers[68]. Not only did Australia have much to lose from such a result, but so did the United Kingdom, France, the United States, Portugal, Netherlands and Italy, to cite but a few, which awaited the Court's judgment with a certain degree of anxiety. Many of them had used past trust territories and colonies as dumping sites for hazardous wastes or as nuclear tests sites, and abundantly profited from their natural resources. There was, in other words, a significant and widespread interest in avoiding a formal ruling.

Accordingly, on August 10, 1993, Australia and Nauru announced that they had put an end to their dispute[69] and decided to normalize their relations[70]. Pursuant to the settlement, Australia agreed to pay Nauru AUD 107 million "in an effort to assist the Republic of Nauru in its preparations for its post-phosphate future"[71]. The settlement payments are due over a twenty-one year period[72]. A total of AUD 57 million has already been paid in three installments[73]. The remaining AUD 50 million is due over the next twenty years in annual installments of AUD 2.5 million each, adjusted for inflation[74]. At the conclusion of the twenty-year period, Australia will continue to provide development cooperation assistance to Nauru at a mutually agreed level[75]. At the end of March 1994, the other two administering powers, the United Kingdom and New Zealand, pitched in AUD 12 million each to help Australia shoulder its compensation package[76]. In exchange, the three States obtained a general release of all claims against them[77]. Finally, the settlement was communicated to the Court on September 9, 1993, and the case was officially removed from its docket on September 13, 1993[78].

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68 Magazanik, M., "Australia: Nauru Claim Tests Australia's Credentials", *The Age (Melbourne)*, December 12, 1992, available in *Lexis*.

69 Australia–Republic of Nauru: Settlement of the Case in the International Court of Justice Concerning Certain Phosphate Lands in Nauru, Nauru, August 10, 1993, *ILM*, Vol. 32, 1993, pp. 1471–1475.

70 On August 10, 1993, in addition to signing the Settlement Agreement, the Australian Government and Nauru signed the Joint Declaration of Principles Guiding Relations between Australia and the Republic of Nauru, which addressed a number of issues of mutual interest between the two countries like trade, diplomatic cooperation and consular representation, financial services cooperation, fisheries surveillance assistance, communication and travel, crime, terrorism and smuggling, and legal cooperation. Joint Declaration of Principles Guiding Relations between Australia and the Republic of Nauru, Nauru, August 10, 1993, *ILM*, Vol. 32, pp. 1476–1477.

71 1993 Settlement Agreement, art. 1.1.

72 *Ibid.*, art. 1.1.d.

73 *Ibid.*, art. 1.1.a–c.

74 *Ibid.*, art. 1.1.d. There is no need of exchange rate adjustments since Nauru's currency is the Australian Dollar.

75 *Ibid.*, art. 1.2.

76 Wright, T., "Nauru: Britain and NZ Compensate Nauru", *Sydney Morning Herald*, March 30, 1994, available in *Lexis*.

77 "The Republic of Nauru agrees that it shall make no claim whatsoever, whether in the International Court of Justice or otherwise, against all or any of Australia, the United Kingdom…and New Zealand, their servants or agents arising out of or concerning the administration of Nauru during the period of the mandate or Trusteeship of the termination of that administration, as well as any matter pertaining to phosphate mining, including matters pertaining to the British Phosphate Commissioners, their assets or the winding up thereof". 1993 Settlement Agreement, art. 3.

78 *Certain Phosphate Lands in Nauru* (Nauru v. Australia), Order of September 13, 1993, ICJ Reports 1993, pp. 322–323.

10.6. The Aftermath

As of today, four-fifths of Nauru has been stripped of any vegetation and soil to mine the phosphate deposits[79]. Although the Nauru Phosphate Company still continues mining the remaining fifth of the land, it does so on a much smaller scale than previously because of the diminished phosphate supply. However, mining phosphate deposits will hardly continue into the twenty-first century. Stripped of phosphates, Nauruans are nonetheless left with substantial financial assets[80]. Since 1967, the Nauru Government has earned about AUD 100–120 million per year by exporting phosphates[81]. Those who own land receive a lump-sum prior to mining; then royalties are earmarked for a trust fund, which will start paying out once phosphates are exhausted[82]. While the Nauru Government provides sketchy figures of the exact amount of the trust fund, cautious estimates are around AUD 1 billion, part of which is invested all around the world in, among other things, golf courses, real estate, fertilizer companies, shipping lines, airlines and musical productions[83].

However, as often happens, such wealth risks becoming more of a curse than a blessing to Nauruan people. Some of the Government's investments have failed, and in other cases the Government has been simply swindled[84]. Indolence, boredom and health problems ravage Nauruans living on the island[85]. Despite the Nauruan population's increase from about 2,000, at the time of independence in 1968, to almost 10,000 in the 1990s, most of the work in the island's mines is carried out by 3,000 immigrants[86]. Moreover, a diet made up of processed imported food, instead of fresh fruits and vegetables, which cannot be cultivated *in situ*, is rapidly damaging the health of the islanders[87].

Nauruans are faced with an alternative. They can either abandon the island and buy land elsewhere, relinquishing their independence, or stay and try to develop an alternative to phosphate mining by rehabilitating the land. What is to be done exactly is an enduring question. One solution is to crush the pillars and import

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79 Shenon, P., "A Pacific Island Nation is Stripped of Everything", *The New York Times*, December 10, 1995, at 3.

80 Schouten, H., "Nauru Waves a Filled Wallet at the Island's Crisis", *The Evening Post (Wellington)*, July 17, 1995, available in *Lexis*.

81 Malik, M., "Ruined Republic", *Far Eastern Economic Review*, Vol. 144, 1989, pp. 23–24.

82 *Encyclopedia Britannica, op.cit.*; *Encyclopedia Americana, ibid.*

83 Callick, R., "Australia to Pay Nauru A$ 107M in Compensation", *Australian Financial Review*, August 10, 1993, available in *Lexis*; "Making Waves in the South Pacific", *The Economist*, August 21, 1993, pp. 31; Malik, *op.cit.*.

84 "Nauru to Divest from Loss-Making Fertilizer Joint-Venture", *Agence France Presse*, November 14, 1997, available in *Lexis*.

85 Just over 5,000 Nauruans live on the island. Many own houses overseas, especially in Melbourne. Callick, *op.cit.*.

86 Schouten, *op.cit.*.

87 "Nauru's health statistics show the country has some of the unhealthiest people in the world. World Health Organization research shows than an average of 78 percent of Nauruans die before they are 65... Nauru has also the world's highest diabetes rate – more than 30 percent of Nauruans over the age of 35 have the disease". "People in Nauru among the World's Least Healthy", *Radio New Zealand International*, Wellington, in English, 0700 GMT, May 12,1997, available in *Lexis*; Halasz I., "Nauru's Wealth Hits its Health", *Reuters World Service*, May 12, 1997, available in *Lexis*; Schouten, *op.cit.*.

topsoil, humus and other nutrients, beginning a long process of regenerating a viable ecosystem. The process is within the financial capacity of the Republic, but it might take more than 30 years and in many respects is unprecedented[88]. Creating an area for agriculture is paramount, and the island, for reasons of at least self-sufficiency, must consider a water filter, fish and pig farms and tree plantations. Moreover, considering the threat of sea-level rising caused by climatic change, moving to the central plateau will be essential. Yet, while rehabilitation might sound attractive to environmentalists, it will hardly allow Nauruans to continue having the current per capita income[89]. For this reason, the Government has considered the possibility of secondary mining, that is to say of removing phosphates which could not be dug out with old technologies[90]. This could continue for some 20 years or more, but it could not be considered a long-term solution.

10.7. Assessment of the Nauru Dispute

The fact that the Court could never render its judgment on the merits somewhat reduces the scope of the conclusions that could be drawn from the *Phosphates* dispute. Indeed, from a legal and academic point of view, one could regret that the Court did not have the chance to render a judgment on a number of issues which have been of immense significance to international legal scholars of the second half of this century (i.e. responsibility for environmental damage, self-determination, permanent sovereignty over natural resources, and colonial exploitation). Yet if the Court as "promoter of international law" was thwarted by the conclusion of the lump-sum agreement, as "peace-maker" it did score a point. As a matter of fact, in many respects, the settlement Australia and Nauru reached can be considered satisfactory. Australia avoided having its image of a model world citizen tarnished, and Nauru received generous compensation which, though it was only a fraction of the amount of money that had enriched Australia during its 43 years of administration of the phosphate industry, it was still well beyond the figure of AUD 72 million, which the Commission of Inquiry indicated as necessary to rehabilitate mined out lands[91].

The Court has certainly played a fundamental role in the settlement of the dispute. Had it not been in place, and had Nauru not had the possibility of bringing its case before it, probably the issue would have never been settled. Yet, the Court could not resolve the huge economic, environmental and social problems of Nauru. Indeed, even if the Court had found Australia responsible for its past actions as administrator of the island, there was not much that could have been done under a Court's order that Australia did not already voluntarily do. Nauru's problem is simply too large to be dealt with satisfactorily by Australians or Nauruans, let alone

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88 Field, M., "Nauru Outlines Plans to 'Recreate the Garden of Eden'", *Agence France Presse*, May 18, 1994, available in Lexis. See figure 10.

89 1993 estimated GDP per capita was $10,000 U.S. dollars. World Factbook, *op.cit.*.

90 Schouten, *op.cit.*.

91 "Nauru's President, Mr. Bernard Dowiyogo, said yesterday he was "more than pleased" with the figure because it was $35 million [Australian dollar] above the rehabilitation figure produced by a commission of inquiry". Callick, *op.cit.*.

by the World Court. Once phosphates run out, nobody can replace them, and even returning the island to its pristine conditions, when Europeans used to call it "Pleasant Island", will not provide the revenue needed to maintain a suitable standard of living but for a few hundreds.

IV. General Conclusions

1. SUMMARY

This study started by investigating the growing concern for environmental problems as relevant potential and even actual threats to international peace and security[1]. The heightened attention towards environmental sources of international instability has progressively been reflected by a growing number of multilateral environmental treaties (used as a significant indicator of a wider trend extending also to bilateral agreements) containing provisions for the settlement of disputes. In 1982, Kiss observed that one-third of the existing agreements contained some dispute settlement provisions[2]. Since then this figure has risen to more than 50 percent[3].

What is more, this mounting attention to environmental issues has engendered not only a quantitative increase but also a substantial modification of the nature of dispute settlement clauses[4]. First, dispute settlement procedures in multilateral environmental treaties have become increasingly articulated, providing a spectrum of options rather than a single means. Second, there has been a move away from *ad hoc* arrangements for dispute settlement toward references to specific institutions and pre-existing procedures. Third, conciliation (the diplomatic means most akin to adjudication) is being resorted to by a growing number of agreements. Fourth, arbitral procedures have been gradually opened to third-party intervention. Last, and foremost, the domain has been revolutionized by the emergence of non-compliance procedures.

This research endeavored to ascertain what the role of international adjudication could be in this rapidly changing context, or, to use the words of Michel Virally, to explore the *champ opératoire de la justice internationale*[5]. To this end, the aspiration of international society to ensure the prevalence of the international rule of law, revealed by the constant expansion of international judicial bodies, has been tested against the crucible of States' practice in the environmental domain. Ten or so cases (which by and large make up the whole international environmental case-law) have been dissected. Admittedly, it is arduous objectively to

1 *Supra*, Ch.I.1.
2 Kiss, "Le règlement des différends", *op.cit.*, at 120.
3 *Supra*, Ch.II.1.2.1.
4 *Supra*, Ch.II.1.2.2.
5 "...c'est-à-dire les categories de différends pour lesquelles les Etats sont intéressés par les possibilités de règlement que leur offer la justice internationale, indépendamment des engagements qu'ils ont pu prendre – ou ne pas prendre – à cet effet". Virally, M., "Le champ opératoire du règlement judiciaire international", *Revue générale de droit international public*, Vol. 87, 1983, pp. 281–314; *idem*, *Le droit international en devenir: Essais écrits au fil des ans*, Paris, Presses universitaires de France, 1990, at 382.

determine whether adjudication can play a pivotal role in the settlement of international environmental disputes. The adjudicative factor can hardly be insulated from its wider political context. Several extra-judicial factors contribute to determining the outcome of disputes. Yet the very schematic summary of those cases and the impact they have had on factual reality can shed light on the capacity of international adjudication effectively to address environmental disputes, and in particular on the relative merits of arbitration and of reliance on the World Court.

The *Bering Sea Fur Seals* dispute was successfully quenched by a seven-member arbitral tribunal[6]. Yet, despite the energies lavished by the Tribunal on the drafting of the regulations concerning seal hunting in the affected area, it took another 18 years and the conclusion of a multilateral agreement before seals could be protected from extinction. The *Lake Lanoux* dispute was brilliantly disposed of by a five-member arbitral tribunal[7]. The regulations concerning the waters of the Carol River, negotiated by the parties with the blessing of the Tribunal, have worked without trouble ever since. The dispute caused by the fumes emanating from the Trail Smelter, after an inconclusive attempt by the International Joint Commission, was successfully brought to an end by a three-member tribunal. Individuals were compensated, fumigation put under control and the company operating the smelter continued business undisturbed[8].

Conversely, concerning the World Court, the picture is much spottier. The *Meuse River* dispute remained unsettled[9]. The problem of the water level of the river, despite the Court's judgment, remained unaddressed for more than 50 years. The ruling in the *Icelandic Fisheries Jurisdiction* dispute was more harmful than beneficial because it convinced Iceland that it could further enlarge its EEZ from 50 to 200 nautical miles without serious consequences[10]. The issue was finally settled by the conclusion of the UNCLOS, which in the end adopted the solution that Iceland had strenuously defended with its coast guard. The *Nuclear Tests* dispute was not settled when it was first brought before the Court, so that it appeared a second time 20 years later, with the same meager results[11]. In both instances technological and political developments (i.e. in the 1970s the decision to move testing underground, and in the 1990s the decision to switch to computer-aided testing) providentially contributed to smothering the dispute before the Court could decide. Similarly, the *Phosphates* dispute was settled by agreement between the parties before the Court could judge[12]. That notwithstanding, the environmental problems affecting Nauru are still unresolved.

Finally, concerning the two most recent environmental differences before to the Court (the *Gabcíkovo–Nagymaros*[13] and *Turbot* disputes[14]), it is definitively too early to reach any conclusions about their outcome. Yet, two observations can

6 *Supra*, Ch.III.1.
7 *Supra*, Ch.III.5.
8 *Supra*, Ch.III.8.
9 *Supra*, Ch.III.6.
10 *Supra*, Ch.III.2.
11 *Supra*, Ch.III.9.
12 *Supra*, Ch.III.10.
13 *Supra*, Ch.III.7.
14 *Supra*, Ch.III.3.

already be put forth. First, because the issue of the exploitation of turbot fisheries in the North West Atlantic has already successfully been addressed by a bilateral agreement between Canada and the EU[15], and by the conclusion of the 1994 Straddling Stocks Agreement[16], the role the Court played in the settlement of the environmental problem that ignited the *Turbot* dispute is nil. All that remained to litigate were the quintessentially legal issues of Canadian responsibility for the seizure of the *Estai* and the amount of damages. Second, after the Court handed down the judgment in the *Gabcikovo–Nagymaros* case, Bratislava and Budapest were (and are still) no closer to resolving the problem of the diversion of the Danube than they were before entering the courtroom in 1993.

2. INTERNATIONAL ADJUDICATION CAN FACILITATE THE SETTLEMENT OF DISPUTES

The first observation arising out of this summary review of the international environmental jurisprudence available is that international adjudication is no panacea for the enormous and complex problems of environmental degradation. It cannot single-handedly tackle the economic forces that have produced industrial fall-out so severe that the planet's climate is threatened, or that have caused over-exploitation to the point of jeopardizing the global commons. Yet it can help[17].

This politically arduous, time– and money-consuming exercise has the capacity to clear the table of most legal uncertainties, paving the way for diplomatic negotiations on a settlement, either by way of lump-sum compensation or by designing an international regime, or both. When it is unclear who is legally right or wrong, there is no incentive to make concessions. When a party is uncertain about whether something can be obtained only by bargaining or rather is due to it by law, the fear of yielding unnecessarily has a chilling effect on negotiations.

Moreover, unlike diplomatic means of settlement, international adjudication has the unique capacity of scaling down disputes from larger matters of principle to narrow technical ones. As a matter of fact, States very often go into litigation not so much to address a narrow issue, but to defend larger principles. When Great Britain, West Germany or Spain brought cases before the World Court against Iceland or Canada, they did so not so much to protect the jobs of a few thousand fishermen in Aberdeen or La Coruña, but rather because what was at stake was the principle of freedom of the high seas, something that could affect the welfare of hundreds of thousands of people across the country. The same holds true for Spain in the *Lake Lanoux* dispute. Metaphorically speaking, Madrid fought a battle over Lake Lanoux not to lose the war for all watercourses along the Pyrenean border.

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15 1995 Agreed Minute on the Conservation and Management of Fish Stocks.

16 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation of Straddling Fish Stocks and Highly Migratory Fish Stocks, (121).

17 For a rather fair assessment, by the Registrar of the ICJ, of what international adjudication, and in particular the World Court, can and cannot accomplish in environmental disputes, see Valencia Ospina, E., "The International Court of Justice and International Environmental Law", *Asian Yearbook of International Law*, Vol. 2, 1992, pp. 1–10.

Only international tribunals can authoritatively and convincingly articulate what the scope of principles such as the freedom of the high seas, the prohibition to cause transboundary damage, the right to self-defense and the respect of treaties. And by doing so they put the dispute in proper perspective.

The clarifying power of international adjudicative bodies does not stop at the psychological level but reaches the factual aspects of disputes. When parties have recourse to international litigation, all cards are placed on the table. Discovery is extensive. Piles of documents and testimonies are presented, by contrast to diplomatic negotiations, where the parties do not reveal all the data they have in their possession, necessarily creating suspicion. Again, only in a courtroom can scientists present evidence free from political harassment, and only there can bureaucratic talk be tested in the crucible of debate.

3. ARBITRATION IS MORE EFFECTIVE THAN THE WORLD COURT IN THE SETTLEMENT OF INTERNATIONAL ENVIRONMENTAL DISPUTES. WHY?

The second notable aspect revealed by a summary review of international environmental jurisprudence is that in the environmental domain there is a chasm between the effectiveness of international arbitration and that of the World Court. All three disputes submitted to arbitration have been settled, to different degrees, and the environmental problem resolved as a direct consequence of the award. Conversely, the record of the World Court is dismaying. Admittedly, in two cases out of six it is too early to reach any conclusion about its effectiveness (i.e. *Gabcíkovo–Nagymaros* and *Turbot*). Yet, of the remaining four, in three cases the judgment rendered has not extinguished the dispute (i.e. *Meuse River*, *Icelandic Fisheries* and *Nuclear Tests*), and in the fourth settlement was reached before the Court could render a verdict (i.e. *Phosphates*).

The reasons for this disparity are numerous. Some can be explained by looking at the different nature of arbitration and of judicial means, while others pertain exclusively to the peculiarity of environmental problems.

3.1. Consent

States' consent is the main obstacle to international adjudication, environmental or otherwise[18]. For international adjudication to take place, States must have provided for its use when negotiating an agreement, or they must have accepted recourse to

18 On the problems arising from the volunteer nature of the international legal system, and their impact on the work of international adjudicatory bodies, see: Lauterpacht, E., *Aspects of the Administration of International Law*, Cambridge, Grotius Publ., 1991, pp. XXXIV–166, at 23–57; Singh, N., *The Role and Record of the International Court of Justice*, Dordrecht, Nijhoff, 1989, pp. XX–443, at 26–35. For an interesting view, albeit focused on the treaty-making process, on the issue of consent in international law, see Simma, B., "Consent: Strains in the Treaty System", McDonald, R.St.J./Johnston, D.M. (ed.), *The Structure and Process of International Law*, The Hague, Nijhoff, 1983, pp. 485–511.

it after the emergence of the dispute. Their consent must remain valid throughout the adjudicatory process, which might last several years, thus often involving different Governments of the same State that do not necessarily share the same political beliefs. When a State stubbornly refuses to cooperate, there is not much a court can do to persuade it that cooperation is in its own interest, let alone that it has a duty to do so. France in the *Nuclear Tests* cases and Iceland in the *Fisheries Jurisdiction* cases are graphical examples. Finally, although strictly speaking the main feature of international adjudication is its binding nature, penalties for violation of the verdict are too often inconsequential.

In a decentralized and egalitarian society made up by sovereign States which do not recognize any superior authority, consent is inevitably a volatile element. However, in this domain *ad hoc* arbitral tribunals have a decisive edge over permanent judicial bodies, because consent is simply written into the genetic code of the former; they cannot come into existence and function unless the parties agree on a number of issues (ranging from the number of judges to the applicable law and the questions to be answered). Although some treaties might include a compromissory clause that provides for settlement by arbitration at the instance of either party, and indicate detailed procedures to establish the tribunal even in default of one of the parties, such clauses are very rarely resorted to[19]. In the environmental field the only exception is the *Southern Bluefin Tuna* dispute, which, despite the opposition of Japan, was referred to compulsory arbitration under Annex VII of UNCLOS by Australia and New Zealand[20].

For States' consent to endure such a lengthy and unpredictable tribulation, there must be the adamant belief that, no matter what the outcome, going to court is the right thing to do. Usually the sentiment that the dispute will eventually be settled can be enough to propel the parties to withstand years of litigation. Yet in the environmental domain, the settlement of the legal dispute is often contingent upon that of the environmental problem which ignited the dispute. In this context, the problem of consent acquires a further and novel dimension.

The paramount importance of the resolution of the environmental problems underlying the dispute, in contrast to the settlement limited to its legal aspects, is better explained by a paradox. As a matter of fact, in environmental disputes States may be willing to enter a courtroom even when they have a weak chance of

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19 According to Pazartzis, while compulsory arbitration is often provided for in international agreements, in practice it is never resorted to. Even when there is the possibility to initiate arbitration unilaterally, States invariably seek the consent of the other party. Pazartzis, Ph., *Les engagements internationaux en matière de règlement pacifique des différends entre Etats*, Paris, Librairie générale de droit et de jurisprudence, 1992, XXIV–349 pp., at 190. In one instance, the Radio Orient case, between the States of the Levant under the French Mandate and Egypt, the compromissory clause contained in the Telecommunication Convention concluded at Madrid on December 9, 1932, (*LNTS*, Vol. 151, at 8), provided that in the event of a disagreement concerning the execution of the Convention and the annexed regulations, the dispute was to be submitted to arbitration. Even though the Egyptian Government objected to the Tribunal's jurisdiction on the ground, *inter alia*, that no *compromis* had been concluded between the two parties, it participated in the proceedings. The Tribunal eventually rejected Egypt's objections and ruled against it on the merits. Sohn, L.B., "Settlement of Disputes Relating to the Interpretation and Application of Treaties", *op.cit.*, at 236–237. For the text of the award: *RIAA*, Vol. 3, at 1873.

20 *Supra*, Ch.III.4.

prevailing on legal grounds. Yet they might accept to head towards legal defeat if they are convinced that this will facilitate the attainment of their political aim (e.g. the preservation of certain marine species). To illustrate, if the United States or Canada, as in the *Bering Sea Furs Seals* and *Turbot* disputes, take the risk of stretching the limits of international law by enforcing protective regulations in areas that are universally considered to be beyond the reach of their laws (according to State practice as interpreted by international legal scholars), they do so because they are convinced that they are better off by challenging international law and, as a consequence, risking being dragged before an international tribunal, rather than remaining passive about the depletion of valuable biological resources[21].

Again, in the environmental domain States do not necessarily wish to prevail on the legal level. They are ready to assume the risk of a negative verdict, with the ensuing obligation to repair damage caused to other States and political embarrassment, as long as in doing so they have created an atmosphere conducive to negotiations to address the problem of over-exploitation of marine living resources, for example[22]. If the prevalent feeling is that the exercise will be materially inconsequential, or that the stakes are too high, as in the case of Iceland in the *Icelandic Fisheries* dispute, States simply will not consent to the process. In a similar predicament, the problem of consent extends beyond the limited procedural aspects and enters into the merits of the decision.

Environmental problems imply delicate social choices. In any environmental quagmire there is always one State imposing a burden (e.g. pollution or curtailment of resources) on another. There are hardly any situations in which both parties can be net beneficiaries, at least in the short to medium term. If France wants a nuclear arsenal, until computer-aided simulations become a viable alternative to live testing, somebody somewhere at sometime to some extent will be irradiated. If Great Britain whishes to keep on consuming fish at a low price, Icelanders will either shrink their share of the catch, enter into fierce fishing competition with the United Kingdom until the last cod has been caught, or try to prevent British trawlers from fishing. If Slovakia wants to yield electric power from the Danube, Hungary will necessarily have to cope with the environmental fall-out of the river diversion.

It follows that, when States refer similar cases to international adjudication, they implicitly ask the judges: Where do we set the balance? How polluted can the drinking water in Budapest be in order to allow people in Bratislava to use microwave ovens? Does the French right to deter aggression outweigh the right of South Pacific States to be free from actual or even only potential radioactive pollution? How much Australian taxpayers' money, which could be used, for instance, to compensate aboriginal people for past vexations, has to be diverted from this use to be transferred to already affluent people in Nauru? Such dilemmas will invariably arise because all these objectives (i.e. self-defense, public health, industrial development, indigenous populations, etc.) are legitimate under international law[23].

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21 *Supra*, Ch.III.1.2; Ch.III.3.3.

22 *Supra* Ch.III.1.6 and 7; Ch.III.3.4.

23 It goes without saying that these kinds of dilemmas would not exist in cases where the goal pursued by one of the parties to the dispute was not valid under international law (e.g. in the event of a dispute between Kuwait and Iraq over the wanton destruction of the Gulf environment during the 1990–1991 war).

Can an international adjudicatory body make these kinds of decisions? Admittedly, domestic courts are called on daily to resolve similar dilemmas. They do so because they are empowered by the tacit pact that allowed modern States to be created. However, in systems where States are sovereign and, therefore, retain the ultimate power to decide on the welfare of their citizens, these kinds of judgments, which are the very nature of environmental litigation, become extremely arduous. In this context, consent becomes an even more burdensome element, to the point of being decisive for the relative effectiveness of arbitration and the inanity of permanent judicial bodies. In other words, consent becomes the Achilles' heel of permanent judicial bodies and a strategic advantage for arbitration.

Indeed, it is not by chance that all three arbitrations surveyed in this study accomplished their mission. The key element was the fact that in all three instances the parties did not merely ask the tribunal questions regarding their respective rights and duties but rather requested it to design a legal regime that could effectively resolve the problem. Moreover, in all these cases a *non liquet* or a judgment that would have left the factual situation unchanged, while legally plausible, was simply not a realistic option.

It follows that, by asking the tribunal to design a legal regime, the parties automatically gave their consent to the redistribution of wealth between themselves, and from one social group to another. Thus, when Canada and the United States set up the Arbitral Tribunal to resolve the *Trail Smelter* dispute, they implicitly agreed that somehow CM&S had to undertake expensive pollution abatement measures to benefit farmers in Stevens County (thereby making the value of their land rise). When Spain and France set up the arbitral tribunal to settle the *Lake Lanoux* dispute, they implicitly consented to having expensive engineering measures imposed on Electricité de France that would not only leave the water flow in the Carol River unfettered, but even improve it by eliminating seasonal fluctuations. Again, when at the end of the nineteenth century the United States and Great Britain convened an arbitral tribunal to address the issue of seal hunting in the Bering Sea, they tacitly admitted that British Columbia sealers had to reduce their hunting activities somewhat in order to allow U.S. sealers to earn a living. In all these instances, a social group in one State benefited financially at the expense of another group in the other State, thereby affecting their respective taxable incomes and the national revenue. In this context, the real aim of the adjudicative process is no longer to decide who is wrong and who is right but rather to find a way legally to validate a complex operation of social engineering.

Conversely, when two States appear before the World Court to settle a dispute, consent on a sweeping redistribution of resources is hardly an explicit or tacit part of the equation. The result is that the Court, fully aware of the fix in which it has been placed, either abdicates in favor of a negotiated settlement (as in the *Meuse* and *Gabcíkovo-Nagymaros* cases[24], or in the *Phosphates, Nuclear Tests* and *Icelandic Fisheries* cases, where it deliberately delayed the verdict in order to avoid upsetting on-going negotiations[25]), or hides itself behind a web of legal reasoning which, while formally watertight, misses the real issue (again, as in the *Meuse, Gabcíkovo-Nagymaros* and *Icelandic Fisheries* cases).

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24 *Supra* Ch.III.6.5; Ch.III.7.5.

25 *Supra* Ch.III.10.5; Ch.III.9.5; Ch.III.2.6.4.

Admittedly, had the ICJ been given the opportunity to select its cases, as the supreme judiciary body of most States can do, it would probably had a more selective docket enabling it to avoid disgracing itself, both in environmental cases and in many other instances. Some of the cases reviewed in this study were simply not fit for adjudication (e.g. the *Meuse* case), or the parties were too polarized, if not overtly hostile to the Court, for the judgment to have any real impact (e.g. the *Nuclear Tests* or the *Icelandic Fisheries* cases). Article 36.6 of the Statute leaves the Court some room for maneuver for withdrawing from poisonous cases[26], but when there are compelling arguments in favor of its jurisdiction, there is not much it can do but proceed to hear the merits.

In such cases States could be given the opportunity to ask the Court to render advisory opinions. Currently, access to the advisory jurisdiction of the Court is reserved for UN organs and some of the UN's specialized agencies. States cannot ask the Court to shed light on the content of international law other except by challenging other States behavior in contentious proceedings. This necessarily narrows the capacity of the Court to make international law advance, international environmental law in particular, obliging it to carry out exegesis of the law only in a conflicting environment. Had Great Britain and West Germany been given the option of asking for an advisory opinion on what was in 1972 the extent of States' jurisdiction over fisheries beyond the territorial waters, the ICJ could have avoided the insult implicit in Iceland's refusal to appear. In a society of sovereigns, the only weapon the World Court has to bring about a change in States' behavior is that of persuasion (article 94.2 of the UN Charter cannot be considered as a stronger instrument[27]). There is no reason to believe that it could not achieve the same result through a well-structured, motivated, and ultimately non-binding opinion, and without diminishing in any way its effectiveness.

3.2. Science

The role played by science is another factor responsible for the superiority of arbitration over the World Court when it comes to disposing of environmental disputes. In the case of all arbitrations surveyed in this study, to different degrees science has been an influential part of the process. In the *Lake Lanoux* dispute, the studies carried out by the International Commission of the Pyrenees, the Commission of Engineers and the Special Mixed Commission between 1949 and 1955, while unable to bring about a settlement of the dispute by themselves, allowed for the shaping of a diversion scheme that would eventually form the basis of the arbitral award and the ensuing regulations[28].

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26 "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court". ICJ Statute, art. 36.6.

27 "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, *if it deems necessary*, make recommendations or decide upon measures to be taken to give effect to the judgment". UN Charter, art. 94.2. Emphasis added.

28 *Supra*, Ch.III.5.4.

In the case of the *Bering Sea Fur Seals* dispute, a joint commission consisting of two commissioners appointed by each Government investigated all the facts relating to seal life in the Bering Sea and the measures necessary for its proper protection and preservation. Even though the Commissioners could not agree on who was to blame for the decrease of the seal population (i.e. British Columbia and pelagic sealing, or U.S. sealers and their raids on the breeding islands), they gathered enough scientific data to allow the Tribunal to launch negotiations on substance in full knowledge of the facts[29]. Finally, in the case of the *Trail Smelter* dispute, the source, dynamics and impact of fumigation in the Columbia River valley were studied for no less than 15 years, resulted in a wealth of information that not only was decisive in the design of the legal regime, but also substantially advanced science[30].

The World Court paid tribute twice to the paramount importance of empirical evidence in the settlement of international environmental disputes[31]. The first was the *Meuse* dispute and the second, almost half a century later, the *Gabcíkovo–Nagymaros* dispute. In both instances the whole bench descended on the *locus delicti* to get hands-on experience of the canalization work undertaken[32]. Yet one could legitimately wonder whether those visits served any practical purpose or were mere lip-service. First, the diversion of a river implies work affecting vast areas. It is impossible to get an overall view without missing something. A lock 50 kilometers away can affect the aquifer of a whole region, and an aquifer cannot be seen but only conceptualized. The only items that can convey the problems affecting the hydrological balance of a vast region are maps or diagrams which can easily be studied in the courtroom. Second, even though the judges had examined all the locks, barrages, feeders, intakes, sluices, and the panoply of hydraulic devices scattered along the Flanders, Limburg or the Pannonian Plain, the judgments they rendered were dismaying because they did not venture beyond the familiar ground of the law of treaties. Were the site visits necessary, when the Court's judgments, in the end, showed no more insight than they did in the *Icelandic Fisheries Jurisdiction* case where the Court delivered its ruling without having embarked on a British trawler?

Site visits can help, but only when their subject is limited in scale and when it can substantially add to the knowledge of the judges. In all other instances, the Court might be better off by confining itself to the courtroom and sending out independent and trustworthy scientific experts. Nonetheless, despite the fact that article 50 of the Statute allows the Court to "entrust any individual, body, bureau,

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29 *Supra*, Ch.III.1.3.

30 *Supra*, Ch.III.8.8.

31 On the issues of evidence-gathering, fact-finding and expert advice before the World Court see White, G.M., *The Use of Experts by International Tribunals*, Syracuse, N.Y., Syracuse University Press, 1965, XV–259 pp.; idem, "The Use of Experts by the International Court", Lowe, V./Fitzmaurice, M. (ed.), *Fifty Years of the International Court of Justice: Essays in Honor of Sir Robert Jennings*, Cambridge, Cambridge University Press, 1996, pp. 528–540; Alford, N.H., "Fact Finding by the World Court", *Villanova Law Review*, Vol. 4, 1958, pp. 37–91; Lillich, R.B. (ed.), *Fact-Finding before International Tribunals*, Ardsley-on Hudson, N.Y., Transnational Publishers, 1992, pp. XVI–338; Highet, K., "Evidence and Proof of Facts", Damrosch, *op.cit.*, pp. 355–375.

32 *Supra*, Ch.III.6.4; Ch.III.7.4.

commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion"[33], it has resorted to this provision in only two cases[34] and has appointed experts pursuant to a provision in a special agreement on two other occasions[35]. Yet none of these four cases was an environmental dispute[36]. Moreover, the Court has twice rejected a party's request that experts be appointed[37], and has decided proprio motu, in other cases, that such appointments were not necessary to assist it in determining the issues[38]. Such a peculiar disdain for hands-on experience is also exemplified by the fact that only very rarely did the Court feel the need to tap the knowledge and expertise of UN bodies and agencies, as well as NGOs, active in the environmental domain, either in the capacity of experts or as *amici curiae*[39].

Article 66.2 of the Statute provides that, when a request for an advisory opinion is received, all States entitled to appear and "any international organization considered...likely to be able to furnish information on the question" shall be notified that "the Court will be prepared to receive...written statements" relating to the question[40]. In relation to contentious proceedings, article 34.2 of the Statute provides that:

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33 ICJ Statute, art. 50.

34 The first time was when the PCIJ appointed experts in the *Chorzów Factory* case (Experts Inquiry), Order of September 3, 1928, *PCIJ*, Ser. A, No. 17 (1928), at 99. The second was in the Corfu Channel, Merits, Judgment, when the Court appointed experts to report on the visibility of any mine-laying operation in the Channel from the Albanian coast.

35 The first instance was the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States), Judgment, ICJ Reports 1984, pp. 246–390. In that case, a Chamber of the Court appointed an expert, Commander Beazley of the Royal Navy (retired), to assist in technical matters, in particular preparing the description of the maritime boundary and the illustrative charts depicting its course. The second was the *Frontier Dispute* (Burkina Faso/Republic of Mali), Nomination of Experts, Order of April 9, 1987, ICJ Reports 1987, pp. 7–8. In this case the experts appointed were an Algerian cartographer, a Dutch geodetic consultant, and a legal expert, a French *conseiller* of the Cour de Cassation.

36 For the reasons why in the past the Court has sparingly resorted to article 50 of the Statute, see Fitzmaurice, M., "Equipping the ICJ to Deal with Environmental Law", Peck/Lee, *op.cit.*, pp. 397–444, at 416; White, "The Use of Experts by the International Court", *op.cit.*, at 536–537; Alford, *op.cit.*, at 37 and 91.

37 The Court rejected a party's request to appoint experts in the Application for Revision and Interpretation of the Judgment of February 24, 1982, in the *Case Concerning the Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports 1985, pp. 191–252, para 65–66, at 228. In the *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras; Nicaragua intervening), Judgment, ICJ Reports 1992, pp. 351–761, the Court rejected a request of El Salvador that it should consider obtain evidence *in situ*, in view of the difficulty in collecting evidence in certain areas relevant to the disputed frontier, due to acts of violence.

38 This is the case of the *Temple* and *Nicaragua* cases. *Temple of Preah Vihear* (Cambodia v. Thailand), Merits, Judgment, ICJ Reports 1962, pp. 6–146, at 53; see also Judge Wellington Koo's Dissenting Opinion, *ibid.*, para. 55, at 100, and Judge Fitzmaurice's Separate Opinion, *ibid.*, at 66; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, Judgment, ICJ Reports 1986, pp. 14–546, para. 61, at 40. On the issue, *cf.* also Judge Schwebel's Dissenting Opinion, *ibid.*, para 132., at 322.

39 On this issue, see in general *ibid.*, at 413–415; Shelton, D., "The Participation of Non-Governmental Organizations in International Judicial Proceedings", *A.J.I.L.*, Vol. 88, 1994, pp. 611–642.

40 ICJ Statute, art. 66.2.

"The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative"[41].

However, by defining in article 69.4 of its Rules the term "public international organization" as "an international organization of States", the Court de jure gave up the possibility of having access to this large, widespread, and often competent, grassroots source of factual information[42].

Yet even if the Court were to amend its rules to allow NGOs to submit information in contentious proceedings, it is very unlikely that this would have any impact on its practice. As a matter of fact, the only case in which the ICJ has ever allowed the submission of information by an NGO was in 1950, in the advisory proceedings on the *International Status of South West Africa*[43]. In that case, the chosen NGO was the International League for Human Rights. But 20 years later, in the 1970–1971 advisory proceedings on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court backed off from it previous progressive stance because it refused to let the same NGO submit information[44]. More recently, in the advisory proceedings on the *Legality of the Use by a State of Nuclear Weapons in an Armed Conflict*[45], the Court refused, as a matter of discretion, a request to submit information made by International Physicians for the Prevention of Nuclear War[46].

This overcautious attitude is even more regrettable if one considers that, by refusing to receive information on the facts at issue from sources other than the parties to the dispute, the Court confines itself to a tense and litigious environment, were all versions of the matter are necessarily partial and polarized. This inevitably reduces the already weak command the Court has of international environmental disputes.

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41 ICJ Statute, art. 34.2.

42 Rules of the Court (as revised on April 14, 1978), art. 69.4. Text in *United Nations Handbook, op.cit.*, Annex III; ICJ Acts and Documents n.4 (1978), at 92, reprinted in Rosenne, S., *Documents on the International Court of Justice, op.cit.*. On the positive role played by NGOs in the environmental domain see, in general, Livernash, R., "The Growing Influence of NGOs in the Developing World", *Environment*, Vol. 34, 1992, pp. 12–43; Peet, G., "The Role of (Environmental) NGOs at the Marine Environment Protection Committee (MEPC) of the International Maritime Organization (IMO) and at the London Dumping Convention (LDC)", *Ocean and Coastal Management*, Vol. 22, 1994, pp. 3–18; Princen, T./Finger, M./Manno, J., "Non-Governmental Organizations in World Environmental Politics", *International Environmental Affairs*, Vol. 7, 1995, pp. 42–58; Sands, Ph./Bedecarre, A., "CITES: The Role of Pubic Interest NGOs in Ensuring the Effective Enforcement of the Ivory Trade Ban", *Boston College Environmental Affairs Law Review*, Vol. 17,1990, pp. 799–822; Tolbert, D., "Global Climate Change and the Role of International NGOs", Churchill, R.R./Freestone, D. (ed.), *International Law and Global Climate Change*, 1991, pp. 95–108; Winter, G., "Access of the Public to Environmental Data from Satellite Remote Sensing", *Journal of Environmental Law*, Vol. 6, 1994, pp. 43–55; Sands, Ph., "The Role of NGOs in Enforcing International Environmental Law", Butler, W.E. (ed.), *Control Over Compliance with International Law*, Dordrecht, Nijhoff, 1991, pp. 61–68.

43 *International Status of South West Africa*, Advisory Opinion, *ICJ Pleadings*, at 324.

44 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *ICJ Pleadings*, Vol. II, at 639–640, 644, 672, 678–697.

45 *Legality of the Use by a State on Nuclear Weapons in Armed Conflict*, Advisory Opinion.

46 Shelton, *op.cit.*, at 624.

4. FACTORS WHICH COULD LIMIT THE FUTURE ROLE OF INTERNATIONAL ADJUDICATION IN THE SETTLEMENT OF INTERNATIONAL ENVIRONMENTAL DISPUTES

Two factors seem to conspire to marginalize the role of international adjudication in the settlement of international environmental disputes: the increasing institutionalization of international environmental regimes and the ensuing emergence of non-compliance procedures, and the changing fabric of the international society. While the former affects arbitration and permanent judicial institutions alike, in the case of the latter the most serious consequences are to be felt by judicial institutions, such as the International Court of Justice, which are still prisoners of the Westphalian tenets.

4.1. International Regimes and Non-Compliance Procedures

So called non-compliance procedures were discussed at length in chapter two[47]. These procedures are a relatively recent phenomenon, dating from the end of the 1980s. They developed mainly because of the manifest shortcomings of classical international adjudication in dealing with environmental issues, such as climate change, ozone depletion and the like, which are quintessentially global, multilateral and symmetrical (i.e. all States are at the same time polluters and polluted). From this limited domain, they gradually expanded to other international regimes much more limited in geographical scope and approach which hitherto had remained aloof of the process. Yet, while the development of NCPs in global environmental regimes was warranted by the intrinsic global and multilateral nature of the environmental problems which those regimes were supposed to address, it still remains to be seen whether the expansion of NCPs to regional and sub-regional environmental regimes is a permanent feature.

Nonetheless, the proliferation of international environmental regimes and the success of NCPs will make submission of disputes to formal adjudication an ever more unlikely event. It is true that international regimes have never been fertile ground for adjudication, not even on a regional scale. Of the 10 disputes expounded in this study, only two arose out of the interpretation or implementation of a multilateral environmental treaty. Disagreement over the Convention on Future Cooperation in the North West Atlantic Fisheries, which created the NAFO, led to the *Turbot* dispute[48], and failure of the 1993 Convention for the Conservation of Southern Bluefin Tuna caused the *Southern Bluefin Tuna* case[49].

Still, one of the main results of the rapid growth of non-compliance procedures has been the gradual blurring of the distinction between dispute avoidance and dispute settlement functions, and, therefore, between institutions within the regime

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47 *Supra*, Ch.II.3.

48 *Supra*, Ch.II.3. Although closer scrutiny reveals that the real subject-matter of the dispute was not the NAFO Convention itself or acts carried out by the organization or member States within the framework of the organization, but several principles of customary international law.

49 *Supra*, Ch.II.4.

(i.e. the various implementation committees and meeting of the parties) and institutions outside the regime (i.e. international courts and tribunals). As the number of functions assumed by regime organs increase, up to the point of creating autarchic legal regimes in which lawmaking, law enforcement and dispute settlement become a continuum, inevitably the room for third-party international adjudicatory bodies is reduced. Indeed, the basis of international adjudication is typically bilateral agreements and customary international law. Yet, as the web of legal regimes gradually covers all ecosystems (deserts, seas, rivers and lakes, forests, etc.) and the various aspects of human interference with them (trade, industrial development, military activities, transport, etc.), the likelihood that international environmental disputes suitable for third-party international adjudication arise necessarily shrinks.

Be that as it may, insofar as the institutionalization of international environmental law will continue, the coexistence, if not symbiotic relation, of NCPs and disputes settlement procedure will most likely endure. Admittedly, international adjudicatory bodies cannot seriously compete with treaty-based organs when it comes to avoiding disputes between member States or to straightening out disagreements over the interpretation and implementation of the regime's norms. Unlike international adjudicatory bodies, treaty-based organs are endowed with all the instruments successfully to dispose of disputes: material and financial resources, in-depth knowledge of the rationale of the dispute, constant contact with the parties (which can take place in an informal, non-adversarial and discreet environment), and most of all the possibility of adapting the regime's normative structure. International adjudicatory bodies, conversely, do not have material means to help the State defeated in the courtroom comply with its obligations; do not know of the dispute until it is formally brought before them (often relying merely on how the parties depict it); they cannot ascertain the view of the parties to the dispute outside formally established frameworks; most of all, unless explicitly authorized to do so, they usually cannot adapt the law to changed circumstances.

However, there is a niche within international regimes that cannot be occupied by non-compliance procedures. Determining a breach of law, quantifying damages and deciding on the proper redress are functions that do not necessarily bring back amicable relations between the litigants. Nor do they, by themselves, restore a degraded ecosystem. But they are paradigmatically legal functions that can be convincingly carried out only by an impartial, third-party body.

Dispute settlement functions and NCPs remain distinct both in doctrine and practice. NCPs' aim is the avoidance of disputes through continuos multilateral discussions and negotiations, in light of factual circumstances, and by consensus. They are pragmatic in approach, constantly operating, and extremely flexible. Yet, what they cannot guarantee (and this is the ultimate reason why non-compliance and adjudicatory procedures will likely continue to coexist in international environmental regimes) is equality of the parties, impartiality, independence and objectivity; in other words: due process, justice and rule of law.

The ultimate rationale for the maintenance of adjudicative means of settlement in environmental regimes is that the more taxing political, social and economic measures to be taken to address international environmental problems are, the more the need of guarantees of legal protection grows. Moreover, the more environmental

regimes will require transfer of decision-making power from a national to an international level, the higher this need will be. Indeed, whereas only very few regional heavy-weights may be able to place confidence in political negotiations within the agreement's regime as a means to settle disputes and protect their interests, or to resort successfully to unilateral acts (i.e., countermeasures, reprisal or withdrawal from the legal regime *tout-court*), the smaller and weaker States have no choice at all. The establishment of adjudicative procedures to which resort, as *ultima ratio*, to prevent a substantial transformation to their detriment of the legal regime thus often becomes the *quid pro quo* for their participation.

Only through international adjudication a State can have its claims heard by a body composed of independent individuals, who do not have vested interests in the dispute, through a strictly codified procedure established *a priori*, on the basis of "hard" international law, and through a binding judgment. NCPs cannot offer this, and this is the reason why non-compliance and adjudicatory procedures, to their mutual benefit, will likely continue to coexist in international environmental regimes.

4.2. The Rise of Non-State Entities on the International Scene

The second factor that might reduce the number of environmental disputes settled through formal international litigation, as compared to the number of environmental disputes dealt with by other means, is the changing fabric of international society[50]. As sovereign States, defined since the Peace of Westphalia as *superiorem non reconoscentes*, are increasingly giving way to a multiplicity of other actors, such as international organizations, transnational and multinational corporations, individuals (alone or grouped in non-governmental organizations, peoples, etc.), litigation before international adjudicative bodies will become a less momentous activity. These entities are gradually supplementing, if not replacing, States in a myriad of functions, and their actions are increasingly taken into account by the international system.

Because of the rise of entities other than sovereign States on the international scene, disputes arising out of environmental problems straddling international borders are much more likely to be addressed by transnational adjudication than through canonical inter-State or, better, international adjudication[51]. A dispute

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50 On the issue of access to international justice by non-State entities, see, in general, Lauterpacht, E., *Aspects of the Administration of International Justice*, Cambridge, Grotius Publ., 1991, at 59–75; Sztucki, J., "International Organizations as Parties to Contentious Proceedings before the ICJ", Muller, A.S./Raic, D./Thuránszky, J,.M. (ed.), *The International Court of Justice: Its Future Role after Fifty Years*, The Hague, Nijhoff, 1997, XXXIV–433 pp., pp. 141–168; Szasz, P., "Granting International Organizations *Ius Standi* in the ICJ", *ibid.*, pp. 169–188; Seidl-Hohenveldern, I., "Access of International Organizations to the ICJ", *ibid.*, pp. 189–204; Janis, M.W., "Individuals and the International Court", *op.cit.*; Garrett, S.M., *op.cit.*

51 On the role played by transnational litigation in the settlement of environmental disputes, see, in general, Sand, "New Approaches to Transnational Environmental Disputes", *op.cit.*; *Idem*, "Transnational Environmental Disputes", *op.cit.*; Kumin, *op.cit.*. For an analysis of its shortcomings, see: Rest, A., "Need for an International Court for the Environment? Underdeveloped Legal Protection of the Individual in Transnational Litigation", *op.cit.*.

such as the Trail Smelter, caused by the fumes of a privately owned smelter in Canada that affected private property in the United States, nowadays would hardly take place. If Electricité de France, a State-owned company, were to attempt to carry out a diversion project such as that pertaining to the waters of Lake Lanoux, farmers on the other side of the border in Spain rather than turning to the Ministry of Foreign Affairs in Madrid would challenge the scheme either before competent French courts or before the Court of Justice of the European Communities on a number of grounds, such as the requirement of a prior environmental impact assessment (the reasoning applies *mutatis mutandis* also in Belgium, Italy or Germany). Violation of the 1866 Treaty of Bayonne and, therefore, international litigation, would hardly be an issue.

In this conjuncture, judicial bodies such as the International Court of Justice, which can only hear cases between States, risk being excluded from much of environmental litigation. As a matter of fact, some modern adjudicative bodies, such as the International Tribunal for the Law of the Sea, permit non-State entities, in limited and well-specified instances, to take part in contentious proceedings[52]. Other bodies, even more recent than the ITLOS, like the World Bank Inspection Panel, have been established solely to allow non-State entities (e.g. individuals and NGOs) to voice their concerns and have them considered in a quasi-judicial context[53].

Enlarging the contentious jurisdiction of the ICJ to non-State entities, or even only to international organizations, not only implies the politically arduous task of amending the Statute, but would also contradict the very nature of the Court. The ICJ is the principal judicial organ of an international organization composed solely by sovereign States. It has been created to serve the needs of peace and justice of *that* particular community. Opening its doors to entities other than States to litigate cases among themselves and/or with sovereign States would introduce dangerous strains and incongruences into the system.

At most, standing in contentious proceedings could be extended to specialized agencies of the United Nations (which are part of the wider organization and are made up of sovereign States, thus avoiding the above-mentioned

52 The ITLOS has exclusive jurisdiction, through its Sea-Bed Disputes Chamber, with respect to disputes relating to activities in the international seabed Area. These matters include disputes between States Parties concerning the interpretation or application of the provisions of the UNCLOS, along with those of the Agreement relating to the Implementation of the Part XI of the Convention, New York, July 28, 1994, *ILM*, Vol. 33, 1994, pp. 1309–1392, concerning the deep seabed Area; disputes between a State Party and the International Seabed Authority; disputes between parties to a contract, being States Parties, the International Seabed Authority or the Enterprise, state enterprises and natural or juridical persons; disputes between the Authority and a prospective contractor who has been sponsored by a State or a contractor and the International Seabed Authority. United Nations Convention on the Law of the Sea, (73), Part XI, section 5, art. 187. Incidentally, it should be noticed that this is the first instance, outside the context of European Community Law, of an international tribunal before which an international organization (i.e. the International Seabed Authority), can bring proceedings against sovereign States and vice versa.

53 On the World Bank Inspection Panel, see *supra* Ch.II.4.2.3, note 182.

problems)[54]. Nonetheless, aside from presenting complicated legal aspects, formal litigation between a UN body or agency and a sovereign State would be sporadic events[55]. It would be much more useful to permit international organizations to ask the Court for advisory opinions. Not only would this bypass many of the shortcomings inherent in international adjudication described above (essentially the problems associated with the requirement of State consent[56]), but it might eventually become the ultimate tool for the development and strengthening of international environmental law[57]. At the present time, the following nine specialized agencies of the United Nations, which carry out functions actually or potentially connected with environmental issues, have access to the ICJ for advisory opinions: ILO, FAO, UNESCO, WHO, IBRD, WMO, IMO, IFAD, and UNIDO[58]. The IAEA, which is not a UN specialized agency, has also been authorized to request such opinions[59]. Yet, the list does not include several key-players in the environmental domain. Among them, the absence of UNEP, UNDP and the various regional economic commissions (e.g. UN–ECE) is particularly striking. Outside the UN system, the secretariat or the meeting of the parties of certain pivotal environmental

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54 "As regards the environment, the international community should certainly contemplate the day when international obligations under, say, conventions for the prevention of ozone layer, will take the form of proceedings initiated before the Court at the insistence of the United Nations Environment Program or some other agency more specifically endowed with responsibilities for securing compliance with obligations owed to the international community generally. One of the merits of an internationalized, or de-internationalized, approach to enforcement would of course be that because no particular state would need to be plaintiff or complainant, the respondent would be unable to invoke —as the facts would so often warrant now— a *tu quoque* argument to the effect that the conduct of the plaintiff was as culpable as that of the defendant". Lauterpacht, E., *Aspects of the Administration of International Justice*, Cambridge, Grotius Publ., 1991, at 63. See also, Fitzmaurice, M., "Equipping the ICJ to Deal with Environmental Law", *op.cit.*, at 414–415.

55 On this issue, see the Report of the Study Group Established by the British Institute of International and Comparative Law as a Contribution to the UN Decade of International Law, by D. Bowett, J. Crawford, I. Sinclair, and A.D. Watts, reprinted in Bowett, D. (ed.), *The International Court of Justice: Process, Practice and Procedure*, London, British Institute of International and Comparative Law, 1997, at 66–68; Szasz, *op.cit.*, at 174–178.

56 *Supra*, Ch.IV.3.1.

57 Sohn, L. B., "Broadening the Advisory Jurisdiction of the International Court of Justice", *American Journal of International Law*, Vol. 77, 1983, pp. 124–129, at 124. The instance of the request of advisory opinion submitted in 1993–1994 by the World Health Organization and the UN General Assembly concerning the use of nuclear weapons, gives a sense of what the role of UNEP in the enforcement of environmental obligations could be. Legality of the Use by a State on Nuclear Weapons in Armed Conflict, Advisory Opinion; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion.

58 According to the UN Charter (art. 96) only the General Assembly, the Security Council, and the specialized agencies of the United Nations can request ICJ advisory opinions. The Economic and Social Council, the Trusteeship Council, the Interim Committee of the General Assembly and the Committee for Applications for the Review of Judgments of the UN Administrative Tribunal have been authorized (respectively, UNGA Res. 89(I), December 11, 1946; UNGA Res. 171 (II), November 14, 1947, para. B; UNGA Res. 196 (III), December 3, 1948, para. 3; UNGA Res. 957 (X), November 8, 1955, art. 11). In addition, 15 of the 16 UN specialized agencies have been authorized (the exception is the Universal Postal Union).

59 UNGA Res. 1146 (XII), November 14, 1957.

agreements (e.g. climate change, biodiversity, desertification, hazardous wastes conventions, etc.) might equally benefit from having access to the legal wisdom of the Court[60].

As compared to the International Court of Justice, arbitration will suffer much less from the transformation of the fabric of international society because it is open to entities other than States. Multinational companies regularly arbitrate with States. International organism, such as the International Centre for the Settlement of Investment Disputes, have been created exactly for this purpose[61]. Recently, the Permanent Court of Arbitration has offered its services to non-State entities, too. Since 1994 the PCA has facilitated disputes between an Asian company and a Asian State-owned company; an African State and two foreign nationals; a company, on the one hand, and, on the other hand, the Taraba State and the Federal Government of Nigeria; an Asian State-owned enterprise and three European enterprises[62]. Moreover, in the 1990s it adopted the *Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State*, the *Permanent Court of Arbitration Optional Rules for Arbitration involving International Organizations and States*, and the *Permanent Court of Arbitration Optional Rules for Arbitration involving International Organizations and Private Parties*[63]. A number of other institutions, such as the International Chamber of Commerce and the World Intellectual Property Organization, provide services and resources to facilitate arbitration not only between sovereign States and non-State entities, but also among

60 The only instance of multilateral environmental agreement providing for advisory opinions by the ICJ is that of the Comprehensive Nuclear-Test-Ban Treaty. The Conference and the Executive Council are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Comprehensive Nuclear-Test-Ban Treaty Organization. Comprehensive Nuclear-Test-Ban Treaty, (129), art. 6.5.

61 ICSID was instituted by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, D.C., March 18, 1965, *UNTS*, Vol. 575, pp. 159–235. As of July 31, 1995, the Convention had been ratified by 121 States. Pursuant to the provisions of the Convention, ICSID provides facilities for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. On ICSID, see, in general, Hirsch, M., *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes*, Dordrecht, Nijhoff, 1993, XIV–264 pp.; Sinagra, A., *L'arbitrato commerciale internazionale nel sistema del CIRDI ed i suoi recenti sviluppi*, Padova, CEDAM, 1984, VIII–125 pp.; Broches, A., *Selected Essays : World Bank, ICSID, and other Subjects of Public and Private International Law*, Dordrecht, Nijhoff, 1994, XVII–545 pp.

62 Permanent Court of Arbitration, *97th Annual Report*, 1997, The Hague, International Bureau of the PCA, at 33.

63 *Permanent Court of Arbitration, Basic Documents: Conventions, Rules, Model Clauses and Guidelines*, The Hague, International Bureau of the PCA, 1998, at 69–152.

non-State entities[64]. The caseload of these organisms bears witness to the fact that, unlike traditional inter-State litigation, arbitration can effectively satisfy a growing demand for justice transcending national borders and the filter of States[65].

In the environmental field, however, there has arguably been only one arbitration case between States and non-State entities. Presuming that the *Rainbow Warrior* affair is considered an environmental dispute *tout court* rather than, more correctly, the fall-out of an environmental dispute, the resulting 1987 case between France and Greenpeace is the only instance to date[66]. Admittedly, even outside the environmental domain, unlike in the case of multinational corporations, there are extremely few instances of arbitrations between NGOs and sovereign States. This might be due to the fact that the main barrier to overcome before an NGO can successfully initiate arbitral proceedings is obtaining State's consent. Except in very exceptional circumstances such as those of the sinking of the *Rainbow Warrior*, NGOs do not have the same leverage as multimillion-dollar corporations do on Governments, hence the scant case record. Yet the possibility is there and it might be a momentous one.

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64 The ICC was founded in 1920 in Paris, following a decision taken at the International Trade Conference Held in 1919 in Atlantic City, NY. It is Registered by French Ministerial Decree of January 24, 1949, Paris. The ICC adopted its first rules on arbitration in 1992, with the Court of Arbitration being established in 1923. On the Court of Arbitration of the ICC see, in general, Craig, W.L. (ed.), *International Chamber of Commerce Arbitration*, New York, Oceana, 1990, 2nd ed.; Reiner, A., *Handbuch der ICC-Schiedsgerichtsbarkeit: die Verfahrensordnung des Schiedsgerichtshofes der Internationalen Handelskammer unter Berücksichtigung der am 1.1.1988 in Kraft getretenen Änderungen*, Wien, Manz, 1989, 335 pp.. On January 1, 1998 new ICC Rules for Arbitration entered into force. See, International Chamber of Commerce (Court of Arbitration), *ICC Rules of Arbitration in force as from January 1, 1998. ICC Rules of Conciliation in force as from January 1, 1988*, Paris, ICC Pub. S.A., 1997, 54 pp.

The World Intellectual Property Organization was established by the Convention Establishing the World Intellectual Property Organization, Stockholm, July 14, 1967, *UNTS*, Vol. 828, pp. 3–106. On February 20, 1997, 161 States were party to the Convention. In 1994 WIPO established the Arbitration and Mediation Center to offer arbitration and mediation services for the resolution of commercial disputes between private parties involving intellectual property. On the WIPO Arbitration and Mediation Center see in general the organization's web site: <http://www.arbiter.wipo.int> (Site last visited July 1, 1998).

65 As of July 31, 1995, 33 disputes concerning investments in the banking, agriculture, construction, energy, health, industrial, mining and tourism sectors (three of them involving conciliation and the remaining 30 arbitration), had been submitted to ICSID. ICSID, *ICSID Cases*, Washington D.C., ICSID, 1996, (Doc. ICSID/16/Rev. 4, July 31, 1995).

In 1996, the Court of Arbitration of the ICC received its 9,000th submission in 73 years of existence. The number of cases submitted in 1995 only was 427, concerning 1012 parties from 93 different countries. *The ICC International Court of Arbitration Bulletin*, Paris, ICC, Vol. 7, 1996, at 3.

66 The Secretary General's ruling on the *Rainbow Warrior* affair between New Zealand and France referred to France's undertaking to enter into binding arbitration with Greenpeace for reparation of the damages inflicted to the organization. Memorandum of the Government of the French Republic to the Secretary-General of the United Nations, *ILM*, Vol. 26, 1987, at 1358. On the *Rainbow Warrior* affair, see *Supra*, Ch.III.9.5. This 1987 award has not been published, although it is known that the tribunal awarded $8,159,000 to Greenpeace and that France complied with the award. Gray/Kingsbury, *op.cit.*, at 104, note 39. This arbitration is catalogued by Stuyt as "France–New Zealand", but the specific agreement to arbitrate was in reality between France and the Stiching Greenpeace Council, the pleadings were presented by Greenpeace, and the award was made in favor of Greenpeace. Stuyt, *op.cit.*, case no. 447.

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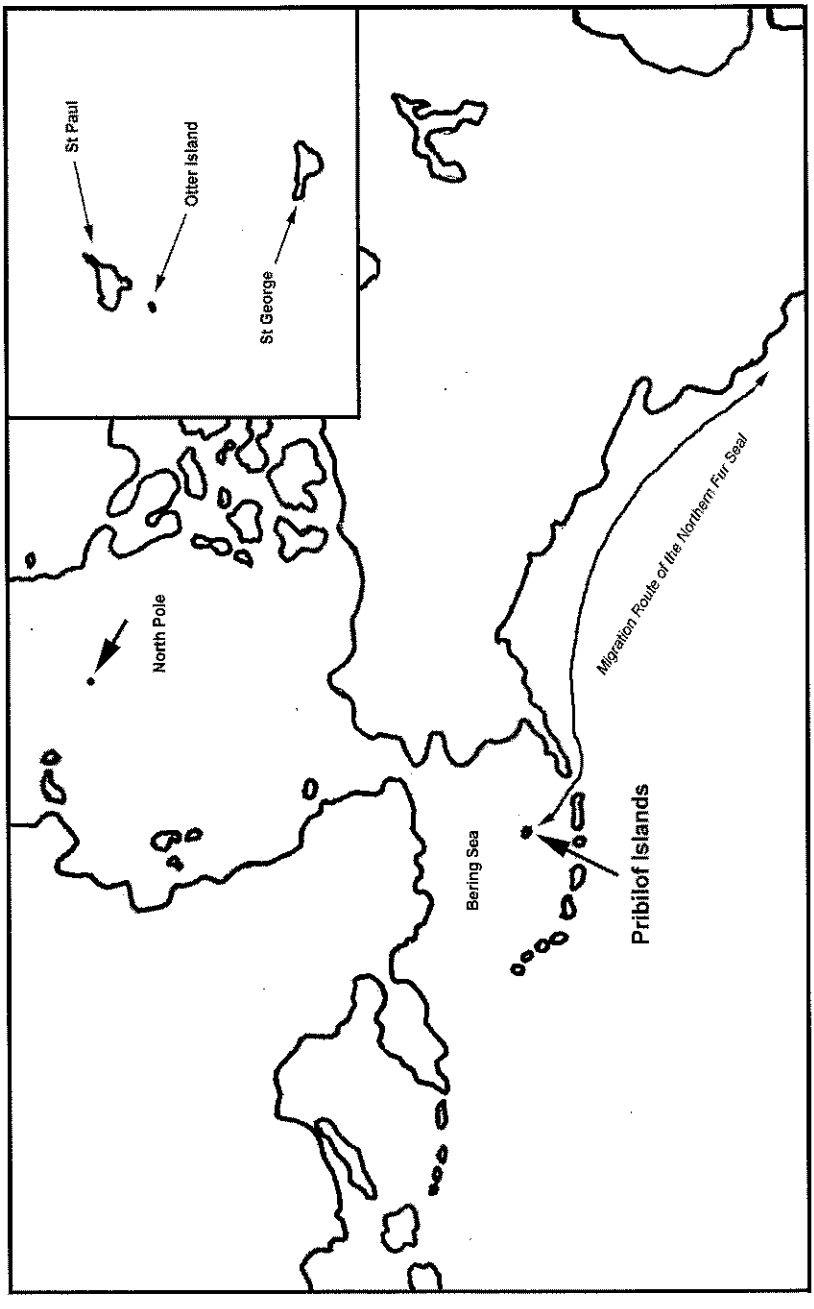

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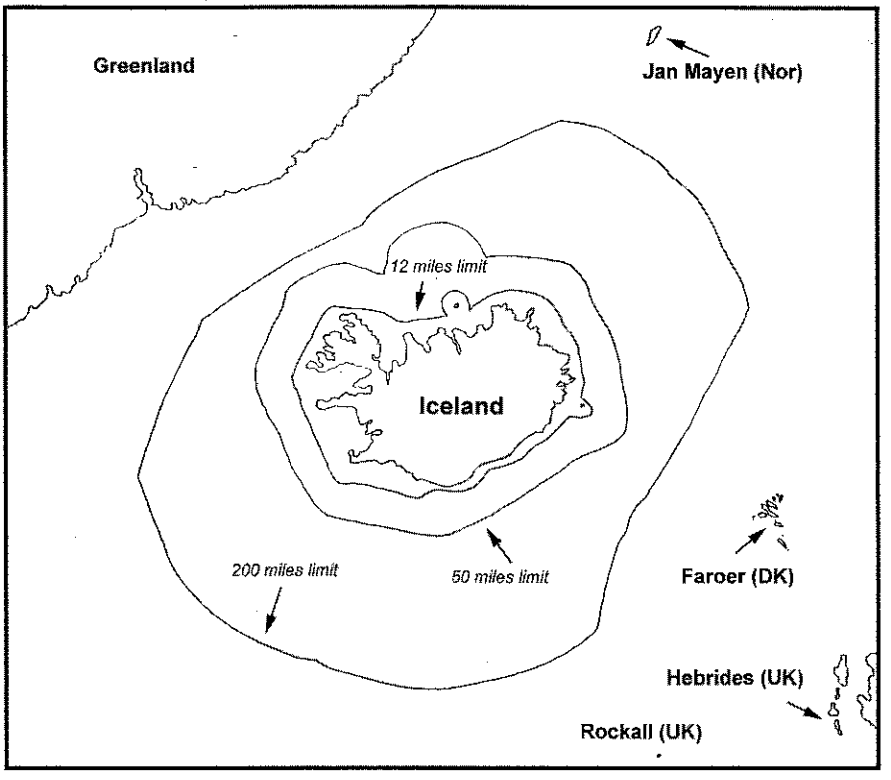

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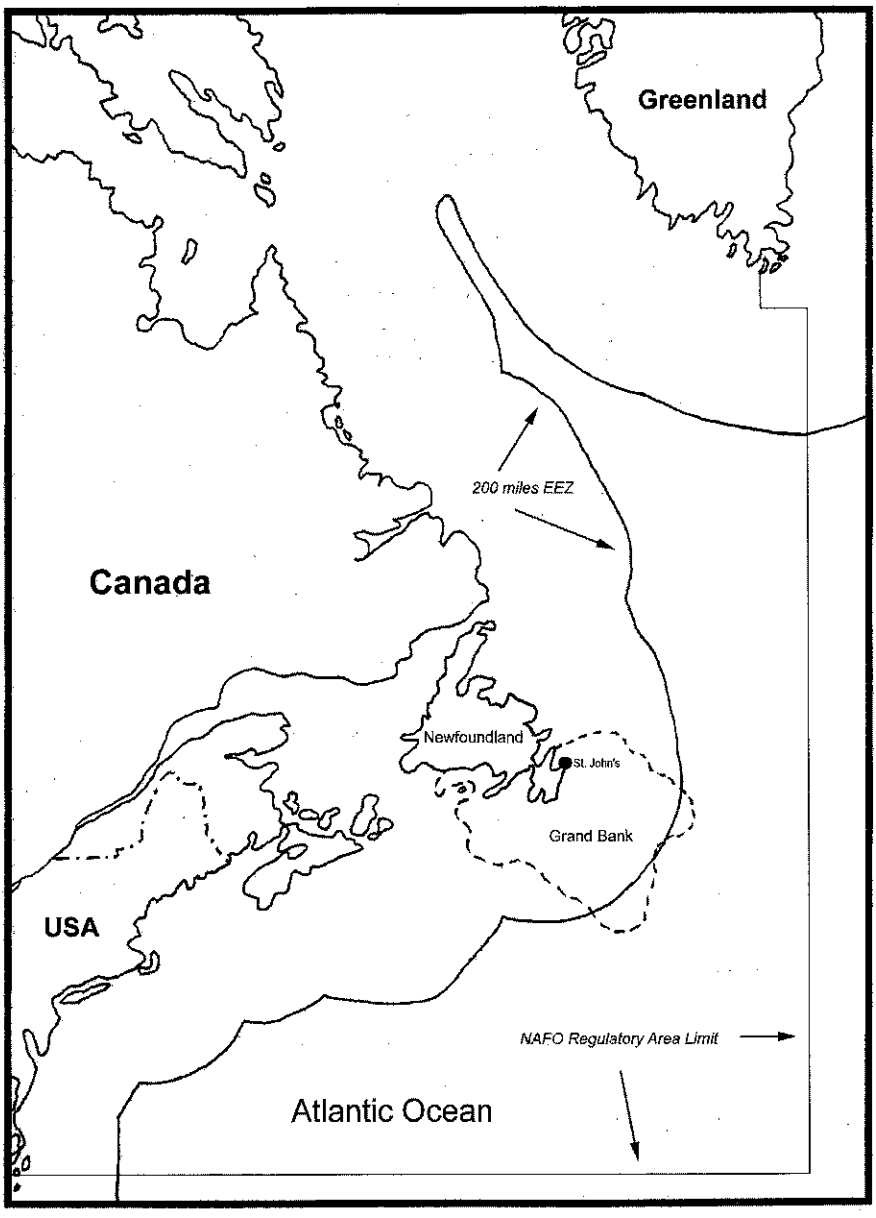
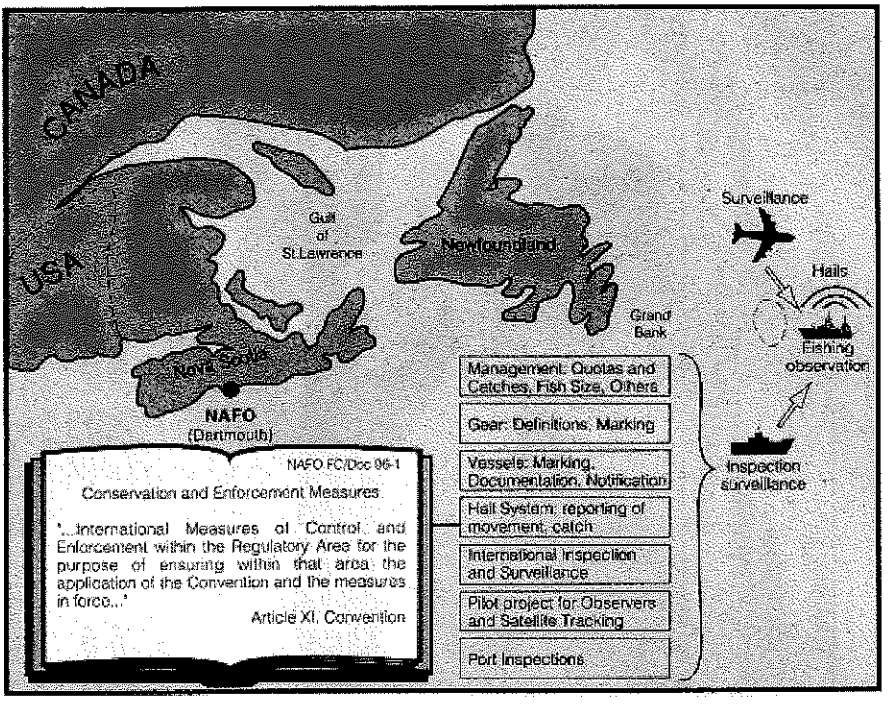
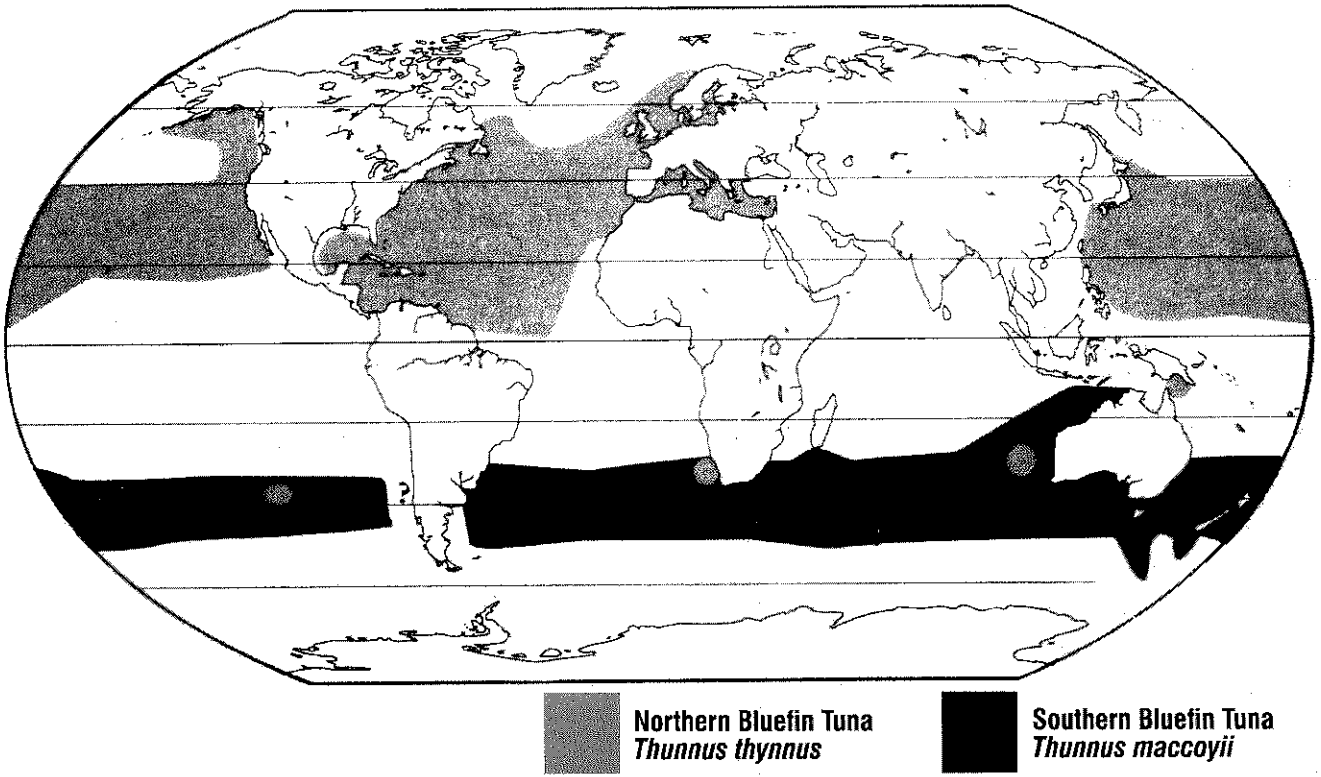


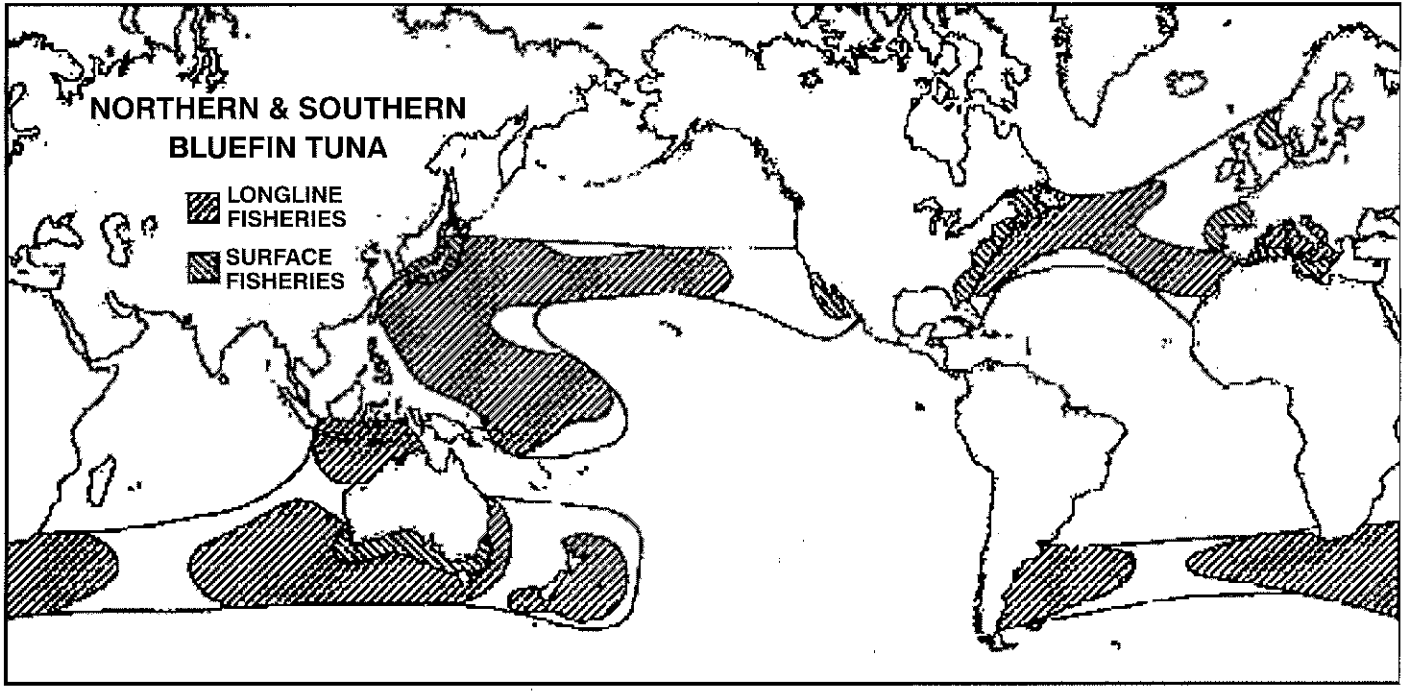
Map 3 NAFO Regulatory Area
Source http://www.nafo.ca



Map 3 bis NAFO's Conservation and Enforcement Measures
Source http://www.nafo.ca

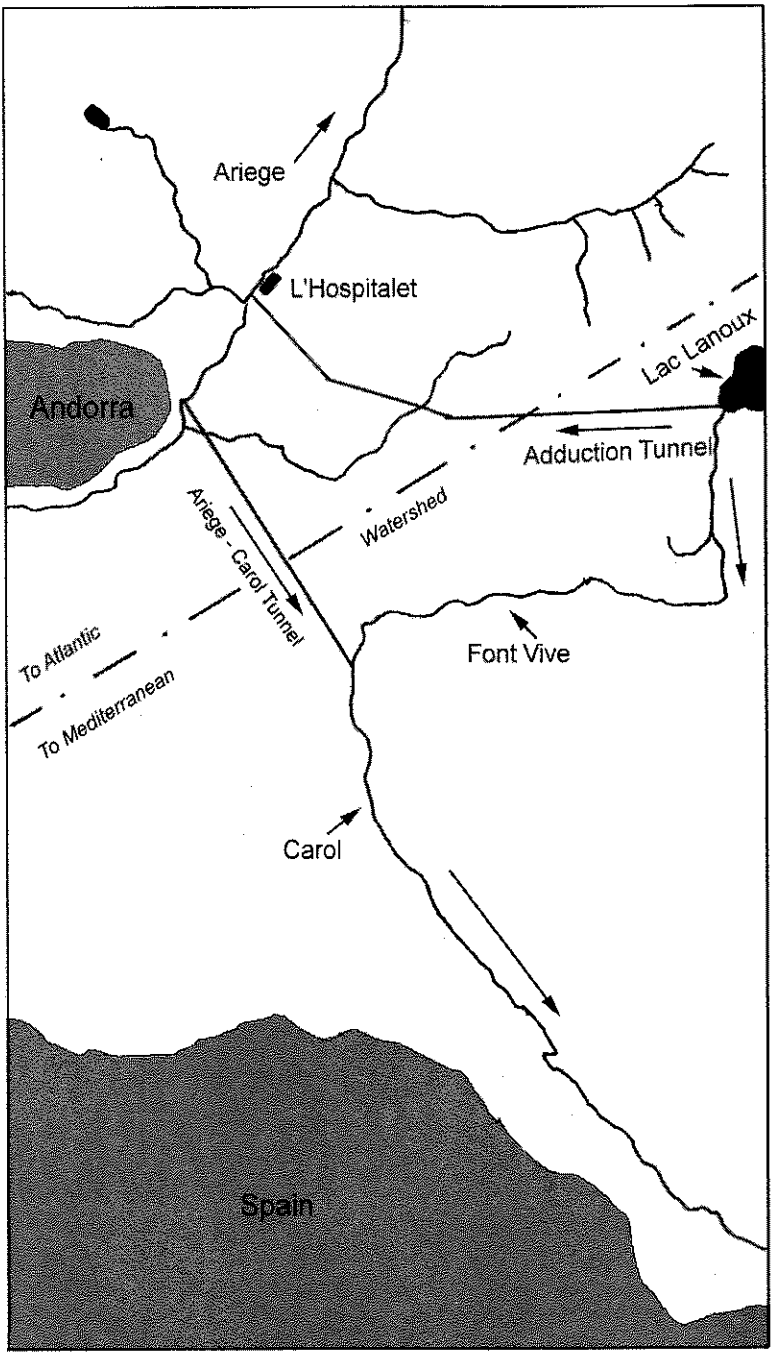


Map 4 Distribution Area of Bluefin Tuna
Source Waller, G., (ed.), *SeaLife: A Complete Guide to the Marine Environment*, Washington, D.C., Smithsonian Institution Press, 1996.



Map 4 bis Fishing Area of the Bluefin Tuna

Source FAO, Review Of The State Of World Fishery Resources: Marine Fisheries, (FAO Fisheries Circular No. 920 FIRM/C920), FAO, Rome, 1997, <http://www.fao.org/fi/publ/circular/c920/figc13.asp (Site last visited, January 22, 2000



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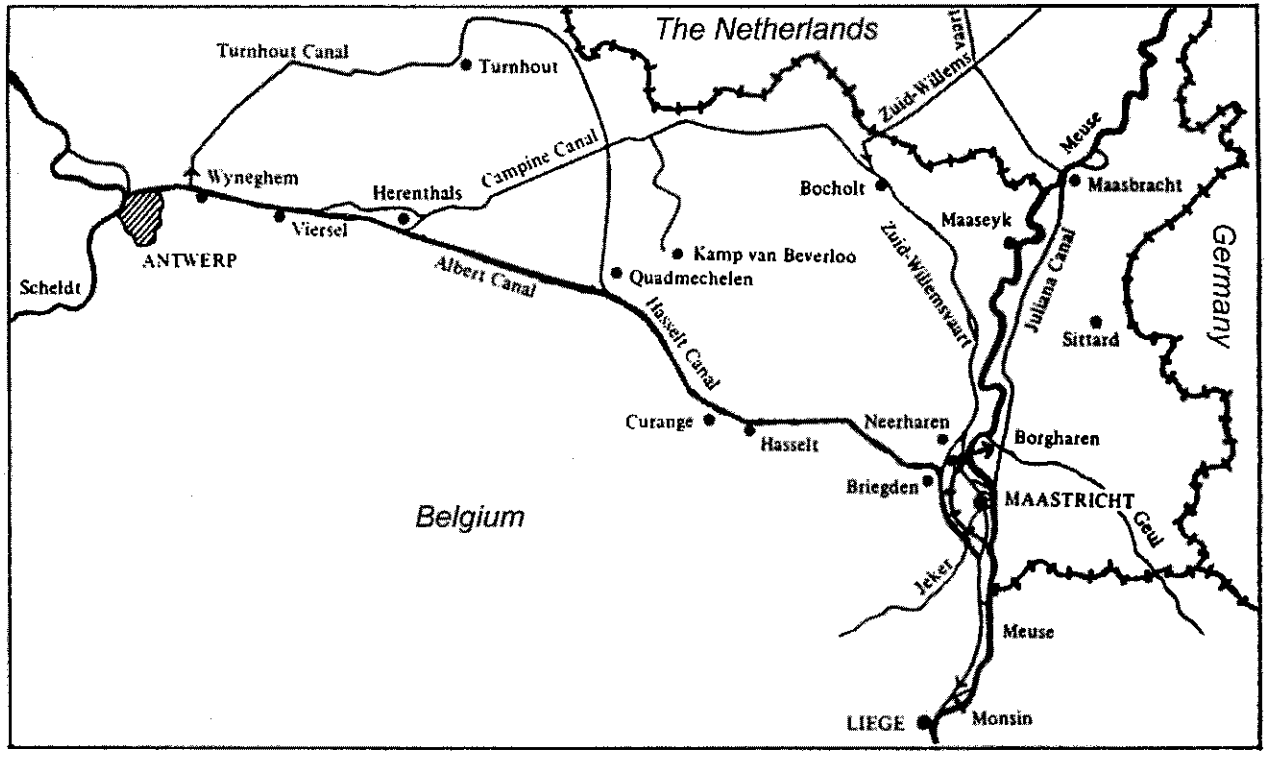

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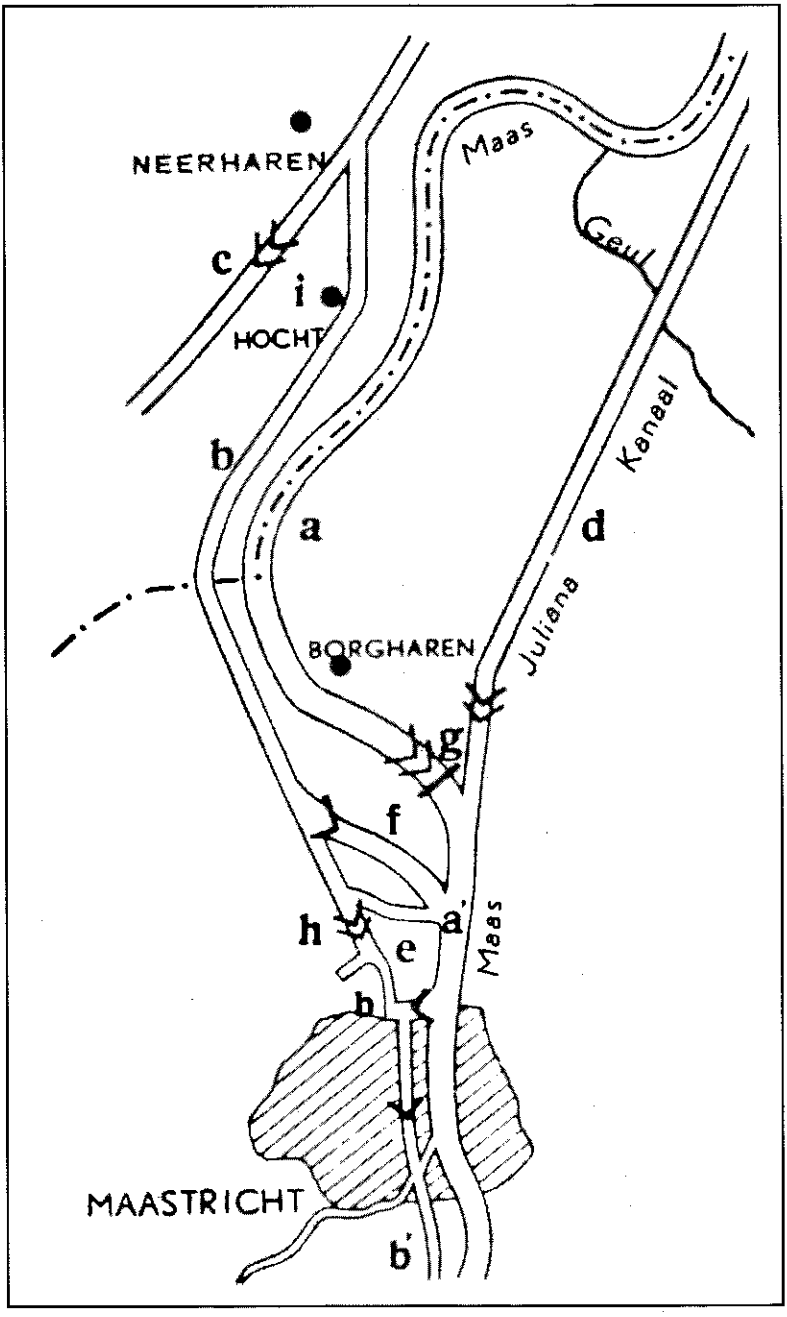

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Source Verzijil, J.H.W., *The Jurisprudence of the World Court*, op. cit., at 465.

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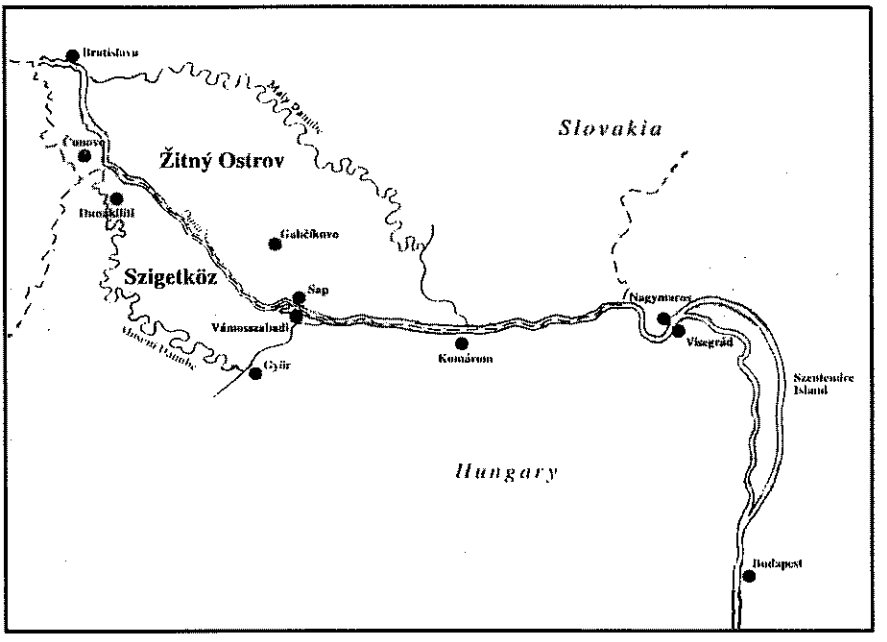

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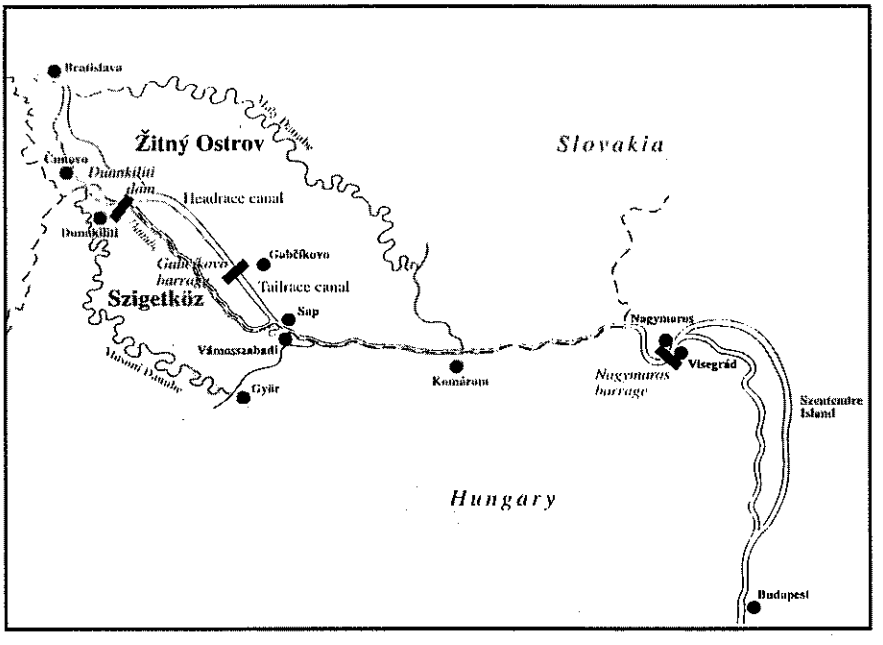
Source Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgement, ICJ Reports 1997, at 15



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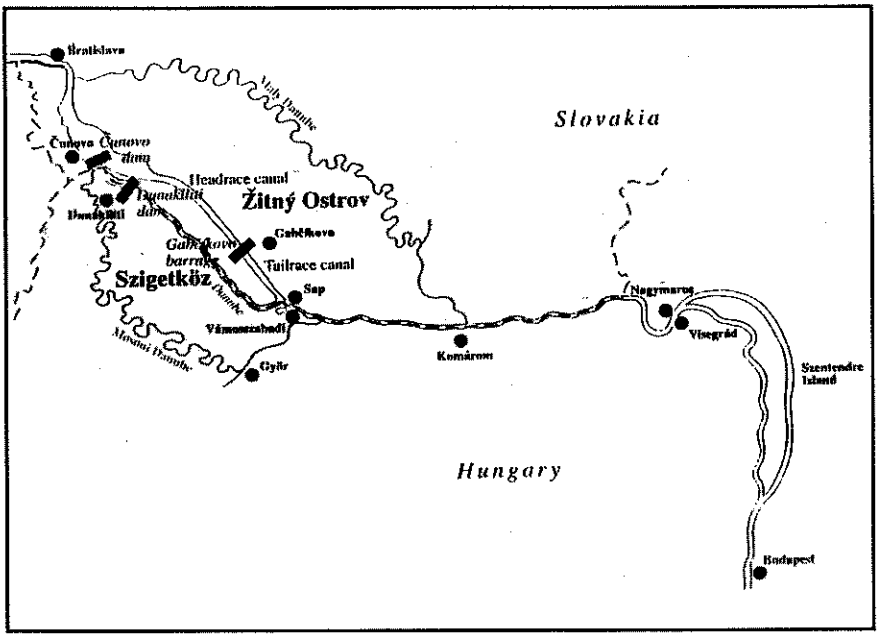

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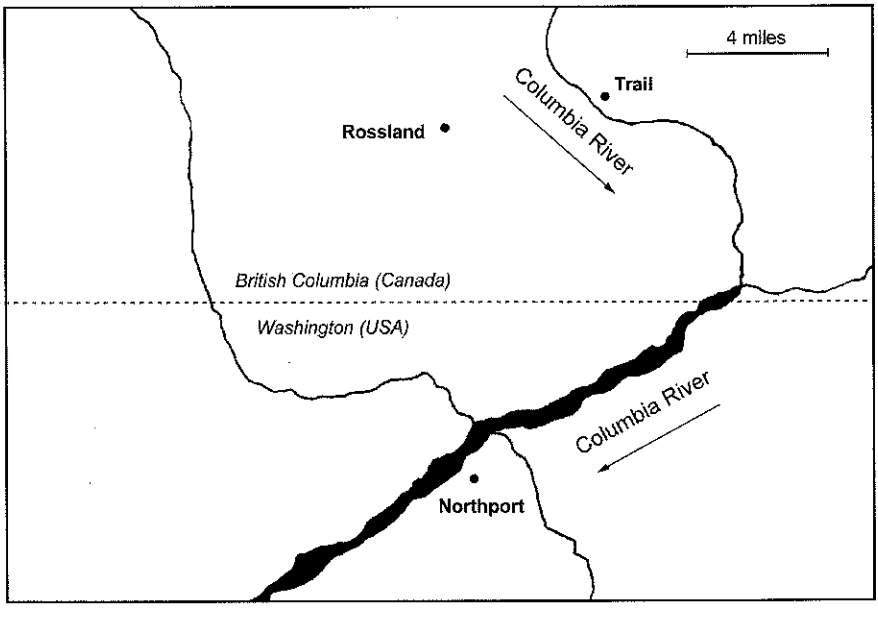

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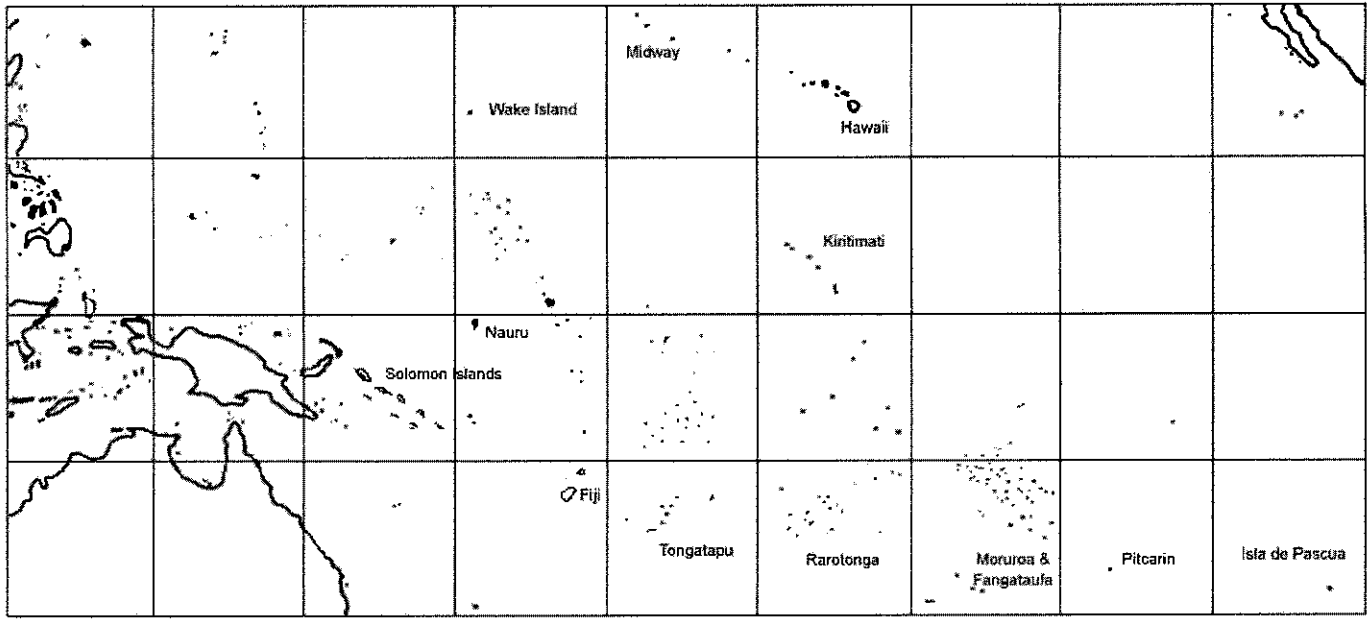

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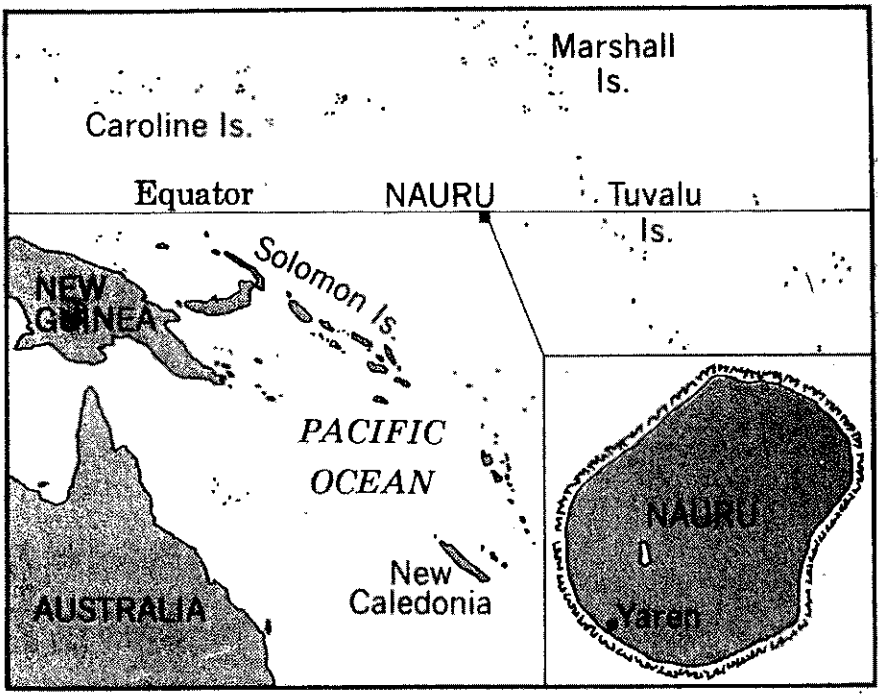

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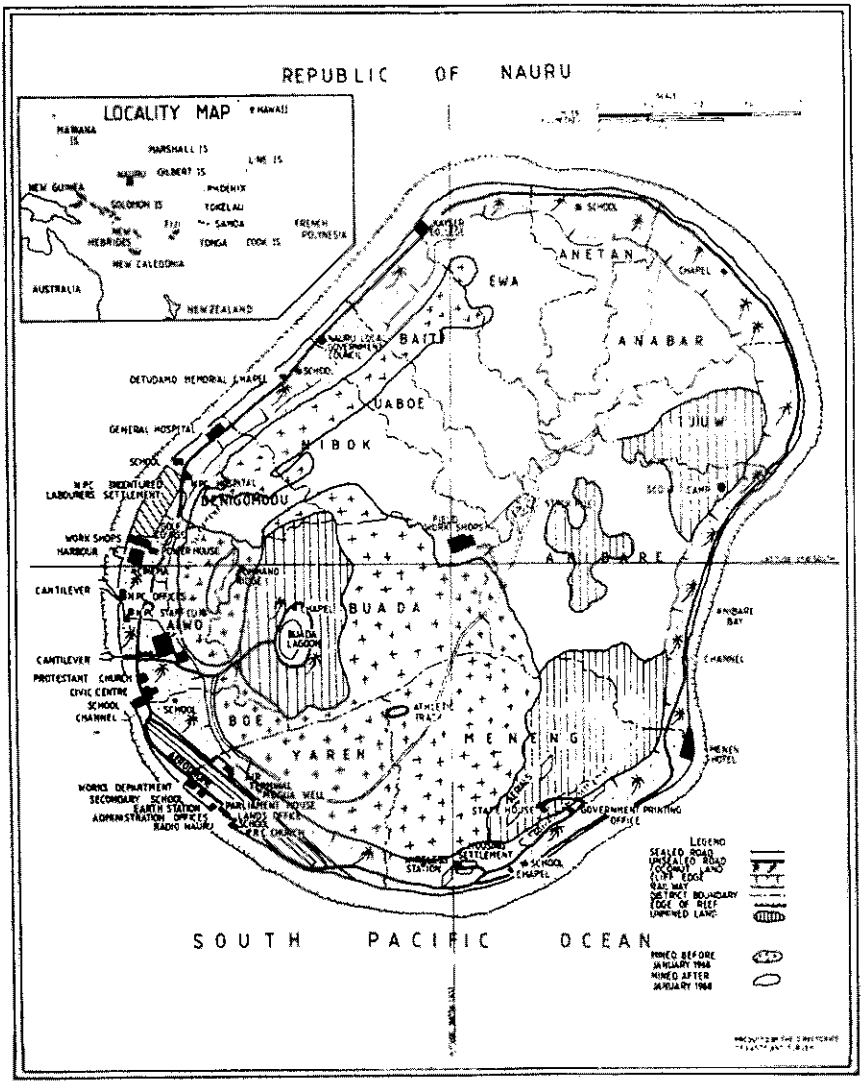

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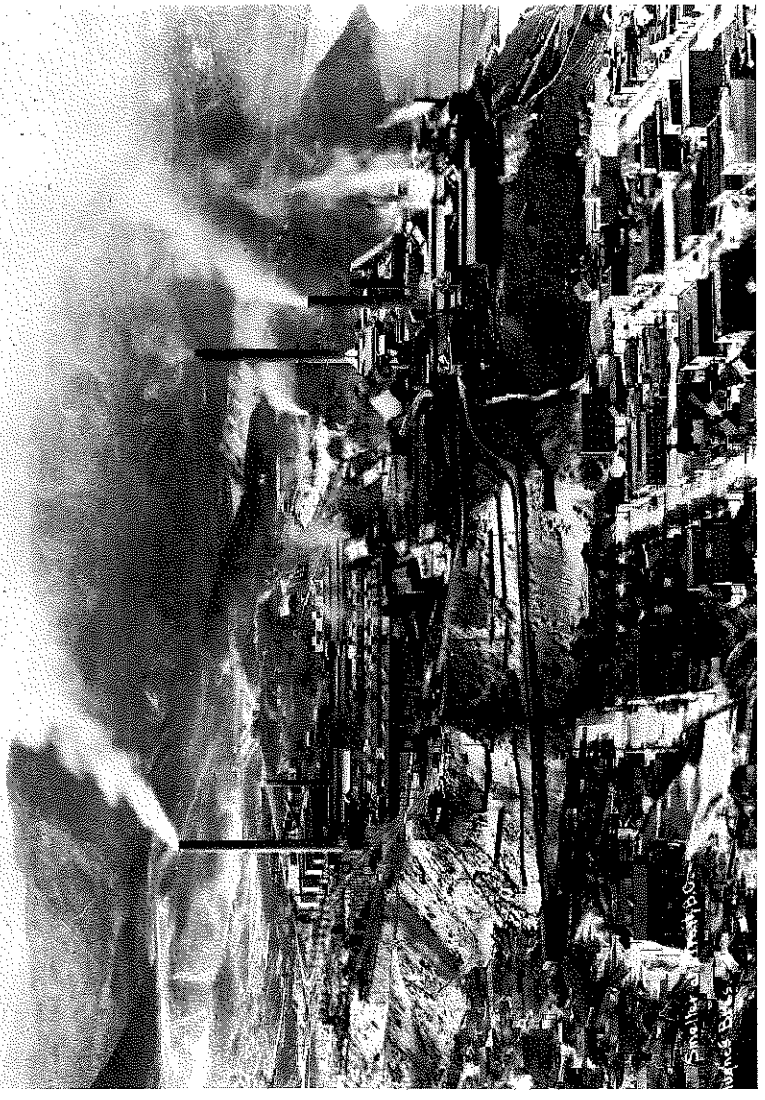

Figure 1 1930 aerial photo of the Trail Smelter
Photo reprinted with permission of Cominco Ltd.

Figure 2 The sinking of the *Rainbow Warrior One*

Figure 3 The Global State of Waveland

Figure 4 Merry sealers. The St. Paul Band, Pribilof Islands, at the time of the Bering Sea Fur Seals Dispute

Reprinted from: *Fur Seal Arbitration: Proceedings of the Tribunal of Arbitration convened at Paris under the Treaty between the United States of America and Great Britain, concluded at Washington, February 29, 1892, for the determination of Questions between the Two Governments concerning the Jurisdictional Rights of the United States in the Waters of the Bering Sea*, Washington D.C., Government Printing Office, 1895

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Reprinted from: *Fur Seal Arbitration: Proceedings of the Tribunal of Arbitration convened at Paris under the Treaty between the United States of America and Great Britain, concluded at Washington, February 29, 1892, for the determination of Questions between the Two Governments concerning the Jurisdictional Rights of the United States in the Waters of the Bering Sea*, Washington D.C., Government Printing Office, 1895

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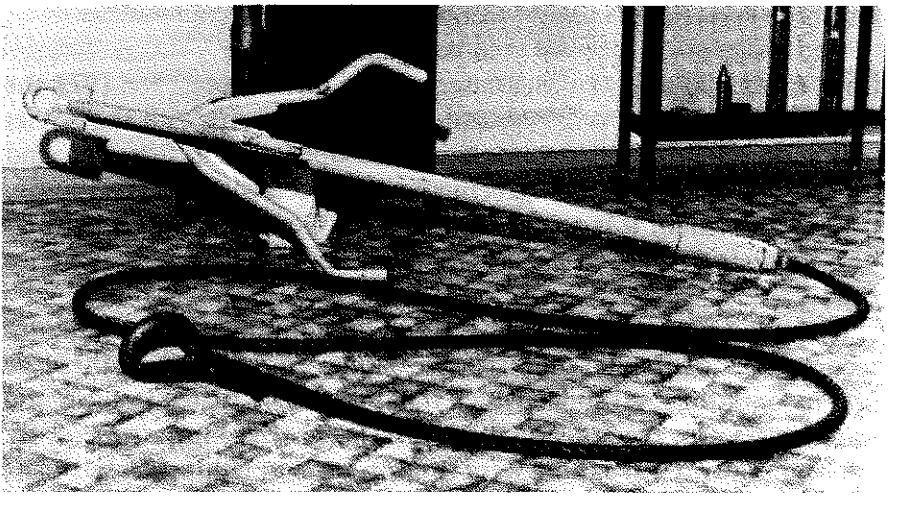

Figure 7 Iceland's secret weapon: the trawl-wire cutter
Photo reprinted with permission of C. Hurst & Co. Publishers Ltd. from Jónsson, H., *Friends in Conflict*, London, Hurst, 1982

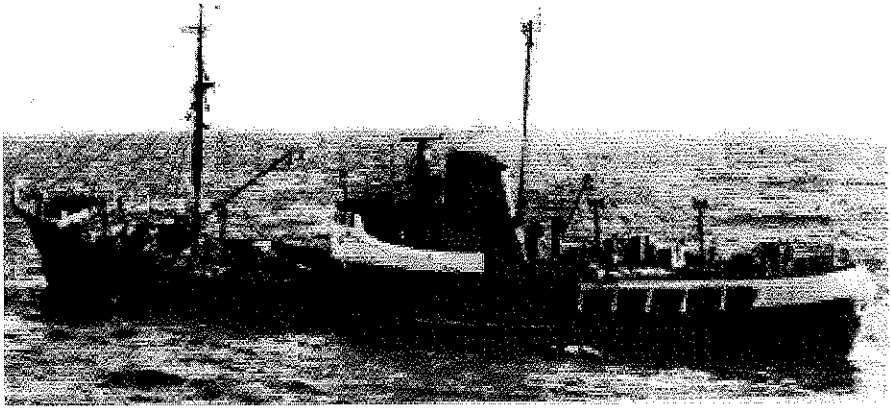

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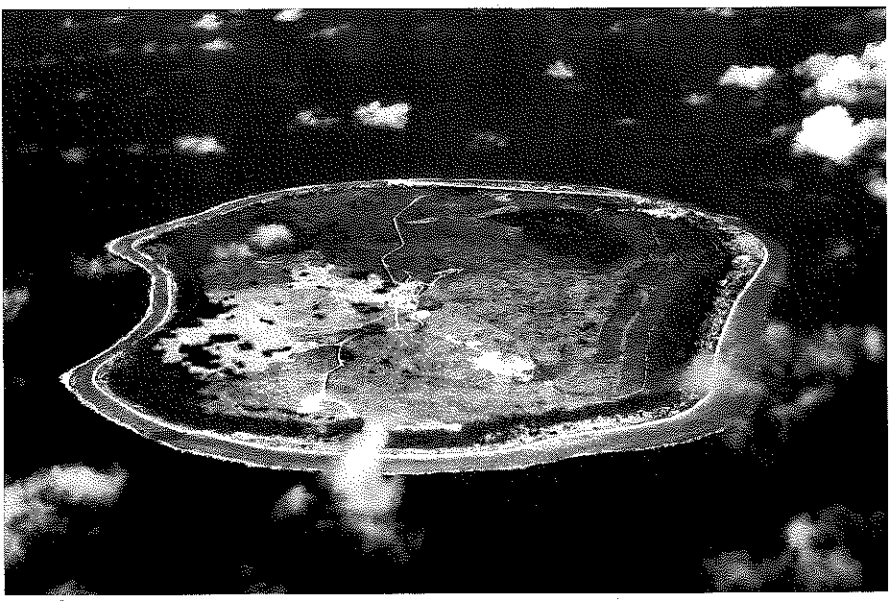
Photo reprinted with permission of C. Hurst and Co. Publishers Ltd. from Jónsson, H., *Friends in Conflict*, London, Hurst, 1982



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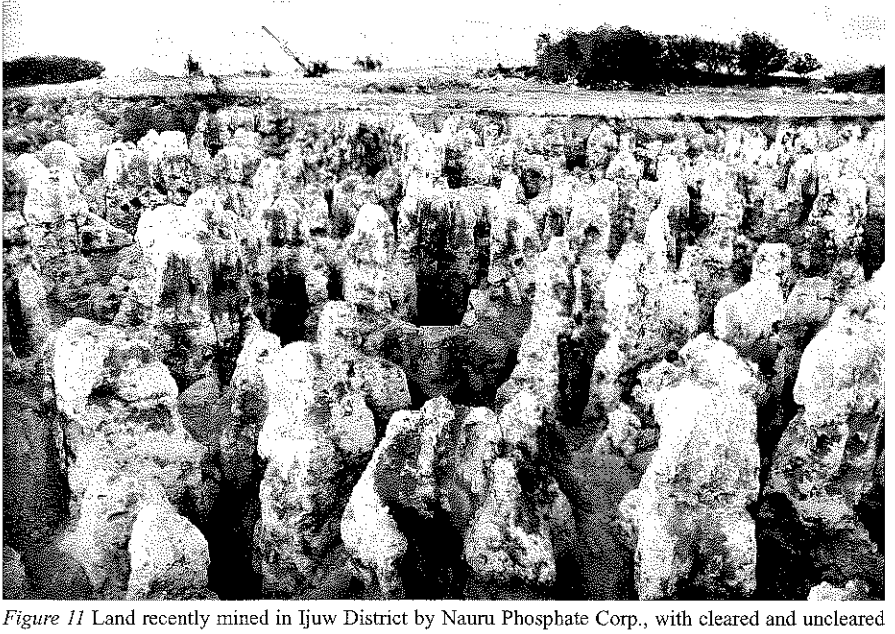

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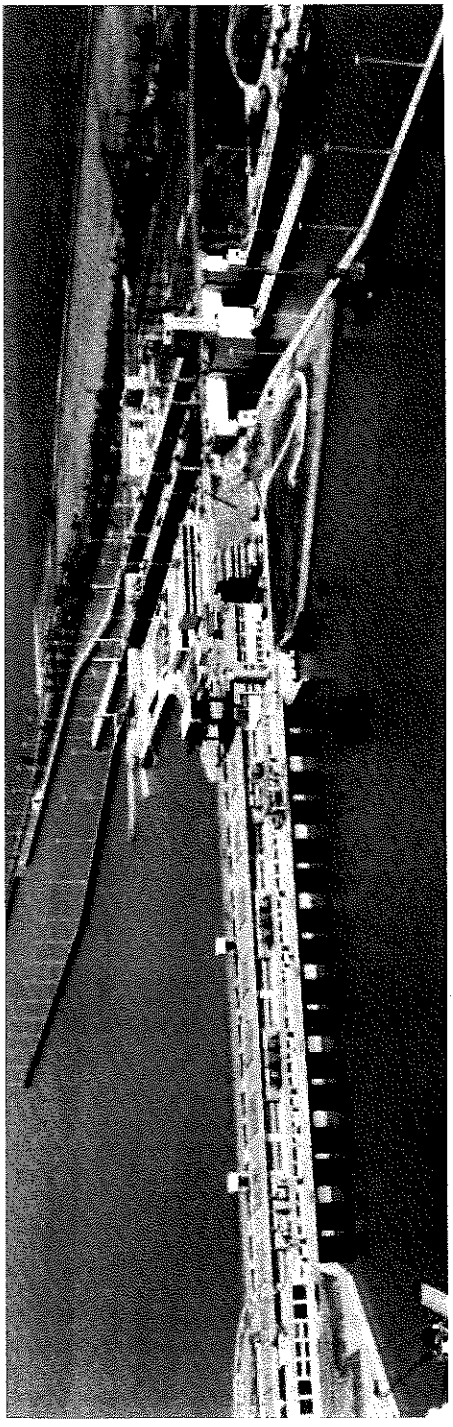

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Post Scriptum

As this book went to press, on August 4, 2000, the Arbitral Tribunal established under Annex VII of the UNCLOS rendered the award on the *Southern Bluefin Tuna* dispute[1]. Surprisingly, the Tribunal decided, four judges to one, that it lacked jurisdiction to hear the case on the merits[2].

Less than twelve months before, twenty-two judges of the ITLOS (including one from Japan) had found unanimously that the Arbitral Tribunal had *prima facie* jurisdiction[3]. Those judges came to this conclusion on the grounds that the conduct of the parties within the 1993 Convention regime, as well as their relations with nonparties, was relevant to the evaluation of States' compliance with the UNCLOS[4]; in other words, lack of cooperation under the 1993 regime would be a violation of the UNCLOS. According to the ITLOS, the fact that the 1993 Convention applies to the parties did not preclude their right to invoke the provisions of the UNCLOS[5]. The dispute settlement mechanism contained in the 1993 Convention would override the one contained in the UNCLOS only in the event Australia, New Zealand and Japan agreed to submit the dispute to arbitration under Article 16 of the 1993 Convention[6].

Starting from the same observations as the ITLOS, the Arbitral Tribunal made a surprising about-face that will provide legal scholars with endless material for discussion. In line with the findings of the ITLOS, the Arbitral Tribunal observed that the dispute, while centered on the 1993 Convention, had also arisen under the UNCLOS[7]. In particular, it was not a case of two disputes but of a single dispute arising under both conventions[8]. To find that the dispute arising under the Law of the Sea Convention was distinct from the dispute that arose under the 1993 Convention would be artificial[9].

Be that as it may, the Arbitral Tribunal reached an antithetical conclusion regarding the existence of its jurisdiction by relying on article 281.1 of the UNCLOS. Article 281.1 specifies that the dispute settlement procedures of Part XV of the UNCLOS (i.e. compulsory procedures entailing binding decisions) apply only where no settlement has been reached by recourse to peaceful means, and if agreement between the parties does not exclude any further procedures. The fact that settlement has not been reached was self-evident[10]. However, because, in the Arbitral Tribunal's view, Article 16 of the 1993 Convention makes recourse to judicial settlement condi-

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1 *Southern Bluefin Tuna Case – Australia and New Zealand v. Japan*, Arbitral Award of August 4, 2000. The text of the award, together with the written pleadings and the transcripts of the hearings, can be found at the ICSID website <http://www.worldbank.org/icsid/bluefintuna/main.htm> (Site last visited August 15, 2000).

2 Sir Kenneth Keith was unable to concur with the conclusions of the majority. He attached a Separate Opinion. *Ibid.*

3 *Supra*, Ch.III.4.4.1 and III.4.4.2, at 209-211. See note 82.

4 *Southern Bluefin Tuna* cases, Order of August 27, 1999, para. 50.

5 *Ibid.*, para. 55.

6 *Supra*, Ch.III.4, note 91.

7 *Southern Bluefin Tuna Case* Award, *supra* note 1, para. 52 (towards the end).

8 *Ibid.*, para. 54.

9 *Ibid.*, para. 52.

10 *Ibid.*, para. 55.

tional upon the consent of all parties[11], the meaning and intent of that article is to exclude the procedures for compulsory settlement contained in the Law of the Sea Convention[12]. For that reason, Article 16 of the 1993 Convention does exclude further procedures, and therefore, jurisdiction had to be declined[13].

Such teleological analysis was not confined to Article 16 of the 1993 Convention but also extended to the overall UNCLOS structure. Indeed, the Arbitral Tribunal went to some length to explain the general considerations that led it to such an unexpected conclusion[14]. In particular, it postulated that the negotiators of the UNCLOS did not intend to create an imbalance between the rights and obligations of coastal and non-coastal States in respect to settlement of disputes arising from events occurring within their respective EEZs and on the high seas[15].

Moreover, it noted that the "...UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions"[16]. Although the UNCLOS established a general system of dispute settlement entailing binding decisions (Section 2 of Part XV), it also introduced important limitations and exceptions (Section 3 of the same part). Article 281.1 allows parties to confine the applicability of compulsory procedures to cases where all parties to the dispute have agreed to submit their dispute to compulsory procedures. A large number of international agreements regarding maritime issues (postdating as well as antedating the conclusion of the UNCLOS) exclude, with varying degree of explicitness, unilateral reference of a dispute to compulsory adjudicative or arbitral procedures. Article 16 of the 1993 Convention purported to do just that and the Arbitral Tribunal upheld it[17].

Accordingly, the Arbitral Tribunal unanimously revoked the provisional measures prescribed by the ITLOS, which enjoined Japan from conducting an experimental fishing program for southern bluefin tuna[18]. At the same time, the Arbitral Tribunal declared that the revocation did not mean that the parties may disregard the effects of those measures. The prospects for a successful settlement of the dispute will be promoted by the parties' abstaining from any unilateral act that may aggravate it[19].

In brief, the *Southern Bluefin Tuna* dispute has not been settled and there might well be subsequent litigation. Ongoing negotiations seem to have narrowed the gap between the parties, and Japan has offered mediation or arbitration under the 1993 Convention. As with the *Icelandic Fisheries*, *Turbot*, *River Meuse*, and *Nuclear Tests* disputes, unilateral submission to adjudication has not resulted in a substantial improvement of the environmental problem, and has left the parties with an unresolved dispute and litigation costs to pay[20].

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11 *Supra*, Ch.III.4, note 41.

12 *Southern Bluefin Tuna Case* Award, *supra* note 1, para. 57.

13 *Ibid.*, para. 59.

14 For a description of some of the general concerns that might have inspired the Arbitral Tribunal, see *supra* Ch.III.4, at 210-211 and 215.

15 "...a balance the Tribunal must assume was deliberately established by the States Parties to UNCLOS". Award, para. 62 (last sentence).

16 *Ibid.*, para. 62.

17 However, partially to limit the reach of its reasoning, the Tribunal stressed that "...there might be instances in which the conduct of a State Party to UNCLOS and to a fisheries treaty implementing it would be so egregious, and risk consequence of such gravity, that a Tribunal might find that the obligations of UNCLOS provide basis for jurisdiction, having particular regard to the provisions of article 300 [i.e. good faith and abuse of rights]". *Ibid.*, para. 64.

18 *Ibid.*, para. 66. On this point Sir Kenneth Keith voted with the majority. Revocation of interim measures is just the corollary of the decision to decline jurisdiction.

19 *Ibid.*, para. 67–68.

20 *Supra*, Ch.III.2, 3, 6, 9.

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