

5-1-1976

Nuclear Tests Case: Australia v. France; New Zealand v. France

L. L. Herman

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [International Law Commons](#)



This work is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 4.0 License](#).

Recommended Citation

L. L. Herman, "Nuclear Tests Case: Australia v. France; New Zealand v. France", Comment, (1976-1977) 3:1 DLJ 288.

This Commentary is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

In two separate judgments of December 20, 1974, the majority of the International Court of Justice³ held that the objectives of both Australia and New Zealand in ending French nuclear testing in the South Pacific had been accomplished by virtue of various public announcements made on behalf of the French government that, following the conclusion of the 1974 series of tests, France would revert to underground testing. Since the objectives of both applicants had been accomplished, and consequently the issues had been resolved, the Court was of the view that it was no longer called upon to give a decision thereon. As noted by the Court in the Australia case,

The Court finds that no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached that 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 judgement.⁴

The reason for this finding was that France had, by virtue of a statement made by the President of the Republic at a Press Conference and by his office through a communiqué, stated it was reverting to underground testing. The Court referred to further statements by the French Foreign Minister and Minister of Defence that following the conclusions of the 1974 series of tests, France would cease atmospheric nuclear testing. This, the majority opinion holds, was the prime aim of Australia and, on the basis of these

*L. L. Herman, Legal Advisory Division, Department of External Affairs Ottawa. The views expressed in this comment are those of the author and do not necessarily represent the views of his Department.

1. [1974] I.C.J. 253

2. *Id.* at 547.

3. President Lachs, and Judges Forster, Gros, Petrán, Ignacio-Pinto, Bengzon, Morozov, Nagendra Singh, Ruda concurred in the majority judgement. Judges Onyeama, Dillard, Jiménez de Aréchaga, deCastro, Waldock and Judge ad hoc Barwick dissented.

4. *Id.* at 271. The judgements in both the Australia and New Zealand cases parallel one another, and while there are some significant differences between the two cases, this comment will centre on the reasons of the Court in the Australia case.

assurances, the objective of Australia had been accomplished. Therefore, the Court was faced with the situation in which the objective of the applicant had in effect been accomplished, inasmuch as the Court found that France had undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific.⁵

The treatment by the majority of the application and submission of Australia is noteworthy. It is interesting that, without any express request or argument so directed, they interpreted the submission of Australia on the basis of diplomatic correspondence from Australia to France and of statements made by the Australian Attorney General during the course of oral arguments before the Court to the effect that Australia would only be satisfied in its claim if France assured it that it would discontinue further nuclear testing.⁶ In view of the clear intent reflected in the wording of the Application, which on its face asks the Court to decide that the carrying out of *further* atmospheric tests in the South Pacific Ocean is not consistent with applicable rules of international law, is this not a somewhat unusual procedure for the Court to follow? The same holds true with even more force in the New Zealand case, since here the application, more specific in its formulation, asks for a declaration that nuclear tests were “a violation of New Zealand’s rights under international law, and that these rights will be violated by any such further tests”. In asserting its capacity to so treat the Application, the majority state that it is the Court’s duty to isolate the real issue in the case and to identify the object of the claim⁷ and in doing so, not to confine itself to the ordinary meaning of the words used. Further, the majority holds, the Court must take into account the Application as a whole, the arguments of the Applicant before the Court, the diplomatic exchanges brought to the Court’s attention and public statements made on behalf of the applicant Government.⁸

5. *Id.* at 270.

6. Referring to a communiqué dated June 8, 1974, issued from the Office of the President of France advising that France was reverting to underground testing after its current series of atmospheric tests were completed, the Attorney-General had stated, during oral submissions that “The concern of the Australian Government is to exclude completely atmospheric testing. It has repeatedly sought assurances that atmospheric tests will end. It has not received those assurances. The recent French Presidential statement cannot be read as a firm, explicit and binding undertaking to refrain from further atmospheric tests.” *Id.* at 261.

7. *Id.* at 262.

8. *Id.* at 263.

As much strength as there may appear to be in these justifications, it must however, be seriously questioned whether, in the absence of specific argument directed to the point, the Court could boldly assert that the "ultimate objective" of Australia was a termination of atmospheric testing and that therefore its claim cannot be regarded as a claim for a declaratory judgment.⁹ This, in light of the Australian Application which "asks the Court to *adjudge and declare*" (emphasis added) that the carrying out of further tests by France is not consistent with applicable rules of international law, would appear to be a reformulation of a specific request by a litigant for a declaration as to the legal relationship between the parties. Can it therefore be conclusively stated that Australia's claim had been satisfied? Counsel for Australia had never said as much, although the majority seems to so think. Was not Australia requesting a declaration as to the nature of France's actions in international law were it to carry out further atmospheric testing?

A further ground upon which the judgment of the majority may also be the subject of interest is its conclusion that there was a legal obligation undertaken by the Government of France as a result of the public statements made by the President and other Ministers. It was on the basis of these statements that the Court was able to reason that the totality of Australia's claim had been satisfied. The Court held that,

in announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the applicant, its intention effectively to terminate these tests. It was bound to assume that other states might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general frame of the security of international intercourse, and the confidence and trust which are so essential in relations among states. It is from the actual substance of these statements and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, *and the Court holds that they constitute an undertaking possessing legal effect.* (Emphasis added)¹⁰

This is certainly an interesting proposition. While largely obiter dicta, it is an attempt to enunciate a significant principle in

9. *Id.* at 263.

10. *Id.* at 269.

international law. It can be expected that its application in other areas may run into difficulty. When and at what point do statements by Government leaders on national policy constitute legal obligations? Cannot a Government change its policy? Are not legal obligations among states primarily based upon intention to enter into legal obligations, an intention that was evidenced in the *Eastern Greenland* case but not evidenced here?¹¹ In the latter case, the statement made by the Norwegian foreign Minister was “definitive and conclusive” regarding the intention of Norway not to make any difficulties over the claim by Denmark to sovereignty over Greenland. In the present case, are there compelling grounds for concluding that, in reply to Australian requests, (which were contained in a series of communications and statements) there was a “definitive and conclusive” statement made on behalf of the Government of France? It should be recalled that none of the relevant statements were directed to the Australian Government, but were made to the public at large.

In spite of the foregoing, it may be helpful to consider the practical significance of the case in a different light. It is obvious that even the most steadfast believer in international settlement of disputes would be aware that an undertaking by the court to examine on its merits an issue of this magnitude, with the attendant risks of politics influencing the weight of any decision they may arrive at concerning the legality of these tests, was a task of uncertain success. The Court in declining to consider the merits of the case, in effect has stated that France was to be bound by their decision, in much the same way as if the Court had decided on the merits of the case in Australia’s favor. Declaring resultant legal obligations consequent on the French promise to suspend nuclear testing, the Court has attempted to meet the long-term objectives of Australia and New Zealand while at the same time, indicating that policy

11. *Legal Status of Eastern Greenland* (Perm. Ct. Int. Just.) (1933), Series A B No.53 The case, involving a dispute over the sovereignty of Eastern Greenland between Denmark & Norway, was resolved by the Permanent Court in favor of Denmark. Denmark argued firstly that its sovereignty had historic foundations and secondly that Norway had expressly recognized this sovereignty by, among other acts, a statement made by the Norwegian foreign minister Mr. Ihlen “that the Norwegian Government would not make any difficulties in the settlement of this question”. The Court held that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

decisions taken by one state in an issue of this scope, where each of the parties were aware of its significance to the other, cannot be without lasting force and effect. Indeed, some considerable judicial pressure appears to have been directed to the French where the Court declares,

Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested states may take cognizance of unilateral declarations and place confidence in them, and are entitled to require the obligations thus created be respected.¹²

The arguments advanced by Judge Gros of France in his separate opinion and in support of the majority cannot escape comment. Judge Gros goes farther than the majority by asserting that there was no justifiable dispute, *ad initio*, for the Court to determine. He reviews the position of Australia during the 20 year history prior to the dispute, and notes that by its conduct before 1972 Australia had disqualified itself from claiming that its rights in international law had been violated. Indeed, during the 1950's and early 1960's, he notes, Australia had acquiesced in tests in the South Pacific by the British and United States Governments. With the signing of the Test Ban Treaty in 1963, the Australian attitude changed somewhat but fell short of total and outright opposition, based on an assertion of legal rights, to these tests. "The Applicant", he says, "has endeavoured to present to the Court, as the object of a legal dispute, a request for the prohibition of acts in which the Applicant has itself engaged, or with which it has associated itself . . ."¹³ and, he does not feel that, based on consistent state practice, Australia can now not come before the Court claiming its rights have been violated. He says,

The Applicant has disqualified itself by its conduct and may not submit a claim based on a double standard of conduct and of law.

What was good for Australia along with the United Kingdom and the United States, cannot be unlawful for other states.¹⁴

State practice and evidence of consistent conduct, Judge Gros says, transcend changes of government, and while governmental policy may have been altered, the facts show a long history of acquiescence and even cooperation as a matter of state conduct. In

12. [1974]I.C.J. 268

13. *Id.* at 284

14. *Id.* at 285

effect, he seems to be postulating a “clean hands doctrine”, so long familiar in courts of Equity.

The strong dissenting opinion of four of the Court’s judges should be noted. Taking exception with the Court’s re-interpretation of the Australian submission, the four justices state that the true nature of Australia’s claims ought to be determined on the basis of the clear and natural meaning of the text of its formal submission, which was an unequivocal request of the Court for a judicial declaration on the legality of the tests conducted by France. This was a case of a dual submission — comprising both a request for a declaration of illegality and a prayer for an order or injunction — and the fact that the submission asks for some consequential relief should not be used to set aside the basic submission.¹⁵ The dissent rejects the majority’s approach of bringing other materials such as diplomatic communications and statements made in the course of hearings and governmental press statements into the proceedings as means of interpreting the submission, which amounts to a revision of the text. Moreover, they point out that if Australia’s claim was satisfied by the French assurances, then satisfaction ascribed to Australia could only be shown by precise withdrawal or amendment of their submission before the Court.¹⁶

Moreover, Australia’s claim was not satisfied by assurances by France that it was going underground after 1974. What Australia sought was a declaration as to the legality of French atmospheric tests conducted as from the date of the Application, May 2, 1973. A judicial declaration of illegality would therefore embrace those tests which took place in 1973 and 1974, and, although not raised in the submission, may be used as the basis for a claim to compensation. The object, therefore, remained.¹⁷ The most significant comment of all by the minority, is their refutation of the “inherent” jurisdiction of the Court as articulated by the majority claiming that it has the discretionary power to take such action as may be required under the circumstances and to ensure the best means by which justice should be done to the parties. The court has not, the minority opinion states,

. . . the discretionary power of choosing those contentious cases it will decide and those it will not . . . In our view, for the Court to discharge itself from carrying out that primary obligation must

15. *Id.* at 315

16. *Id.* at 317

17. *Id.* at 318-19.

be considered as highly exceptional and a step to be taken only when the most cogent considerations of judicial propriety so require. In the present case we are very far from thinking any such considerations exist.¹⁸

The two cases will be the subject of considerable comment for a time to come, and on the basis of many of the broad statements by the Court as well as the strong dissent, it is difficult to anticipate what weight the decision will have in international law. The implications of the judgment as far as unilateral declarations which amount to legal obligations is an important one for states to consider. If the majority viewpoint is given credence, governmental declarations should be carefully studied in light of the judgement, in the hope that statement of intention reflecting government policy do not amount to assumptions of irrevocable legal obligation on the part of unsuspecting states.

18. *Id.* at 322.