THE DIPLOMATIC DIMENSION: AUSTRALIA AND THE *NUCLEAR TESTS* CASE

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'Diplomacy' is the form of international engagement that offers the best prospect of resolving differences and maintaining friendly relations between states. While the Nuclear Tests case — Australia's first encounter with the International Court of Justice as an applicant — demonstrates that diplomacy is not always successful when national and foreign policy interests are irreconcilable, diplomacy has to be the first course of action and must be allowed to 'run its course'. Only when that process has been exhausted should action be taken to resort to the Court (or engage in other international dispute settlement procedures) for a decision — based on a sound analysis of the legal issues, a rigorous assessment of the strength of Australia's legal case and when there is a compelling national or foreign policy imperative in doing so.

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I INTRODUCTION

Australia was 'present at the creation' of,[1] and has long been committed to, the international rules-based system for the peaceful settlement of disputes enshrined in the *Charter of the United Nations* ('*UN Charter*') and the *Statute of the International Court of Justice* ('*ICJ Statute*'). Australia played a significant role at the San Francisco Conference in 1945, especially through its delegates Herbert Vere Evatt and (Sir) Kenneth Bailey, in contributing to the drafting of the *UN Charter* and the *ICJ Statute*.[2]

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1 See Dean Acheson's memoir: Dean Acheson, *Present at the Creation: My Years in the State Department* (WW Norton & Company, 1969).

2 See Timothy LH McCormack, 'HV Evatt at San Francisco: A Lasting Contribution to International Law' (1992) 13 *Australian Year Book of International Law* 92.

In the 75 years since the establishment of the United Nations, Australia has consistently acted in accordance with the provisions of the *UN Charter* in its approach to settling disputes by peaceful means, through engaging in the suite of processes enumerated in art 33 in ch VI ('Pacific Settlement of Disputes'). This policy approach by successive Australian governments has encompassed 'judicial settlement', including through the International Court of Justice ('ICJ'), both as an applicant and a respondent. Australia's engagement with the Court in both capacities reflects a commitment to the international rules-based system and also to the Court as 'the principal judicial organ of the United Nations'.[3]

While Australia has been a party to five contentious ICJ cases, there have only been two matters, both of significant international concern, in relation to which Australia has initiated action in the Court as an applicant: the *Nuclear Tests* case of 1973[4] and the *Whaling in the Antarctic* case in 2010.[5] The decision by the Australian government to institute proceedings in both matters was taken after sustained and extensive diplomatic efforts had been exhausted and an impasse had been reached in pursuing the processes prescribed in art 33 of the *UN Charter*. Ideally, Australia would have preferred that both matters be resolved bilaterally without recourse to the Court. In this regard, both cases demonstrate that Australia has gone to the Court, as an applicant, as a 'last resort' when this became the only viable option remaining to attempt to resolve the dispute. The cases also illustrate the point made by His Excellency Judge James Crawford that 'since its inception Australia has both supported the Court and simultaneously relied upon it as a tool to defend or advance its foreign policy'.[6]

This article examines the diplomatic approach taken by Australia to dispute settlement, with reference to one of these matters, namely, seeking the cessation of atmospheric nuclear testing by France in the Pacific in the 1960s and 1970s. As a case study, it is intended to demonstrate Australia's commitment, in practice, to trying to resolve disputes amicably, principally through diplomatic action, notwithstanding the considerable challenges involved that derive from strongly held national policy positions and the intransigence of states (in this case, France) in relation to those policies. It will also illustrate the extent to which the consideration of maintaining friendly relations with states during a process of trying to resolve significant disagreements with them has been, and continues to be, an important element of Australia's strategic approach to dispute settlement, principally for broad-based bilateral relationship reasons.

The focus is on diplomatic strategy and practice. It is a practitioner's perspective.

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3 *Charter of the United Nations* art 92.

4 'Application Instituting Proceedings', *Nuclear Tests (Australia v France)* (International Court of Justice, General List No 58, 9 May 1973) ('Nuclear Tests Application').

5 'Application Instituting Proceedings', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 31 May 2010).

6 James Crawford, '"Dreamers of the Day": Australia and the International Court of Justice' (2013) 14(2) *Melbourne Journal of International Law* 520, 549.

II THE NUCLEAR TESTING CONTEXT

A *French Policy and Pacific Tests*

The key issue at the centre of the dispute between Australia and France that led to Australia instituting proceedings in the ICJ was France's absolute commitment to, and the carrying out of, atmospheric nuclear testing in the Pacific region.

For France, nuclear testing was a matter of the highest national importance, anchored in the Cold War. The nuclear testing programme over the period from 1960 to 1996, with atmospheric testing in the Pacific from 1966 to 1974, was based on a defence policy decision by the Pierre Mendès-France government in 1954 to arm France with nuclear weapons. When President Charles de Gaulle returned to power in 1958, he refined the initial vision into the well-defined concept of a fully independent *Force de frappe* (French for 'strike force') that would be capable of protecting France from a Soviet or other foreign attack and independent of the North Atlantic Treaty Organization, which de Gaulle considered to be too dominated by the United States. In particular, France was concerned that in the event of a Soviet invasion of Western Europe, the US, bogged down in the Vietnam War and afraid of Soviet retaliation against it, would not come to the aid of its allies in Western Europe. De Gaulle felt that France should never trust its defence, and therefore its very existence, to a foreign and thus unreliable protector.[7]

France began its nuclear weapons program in French Algeria in the Sahara Desert with an atmospheric test in 1960. After Algeria gained independence in 1962, testing moved underground.[8]

Two years before the first Sahara test, France had begun, in 1958, searching for new testing sites due to the potential political problems with Algeria and the possibility of a ban on above-ground tests. By 1962, France hoped, in its negotiations with the Algerian independence movement, to retain the Sahara as a test site until 1968, but it decided that it needed to able to also perform above-ground tests of hydrogen bombs, which could not be done in Algeria. Mururoa and Fangataufa in French Polynesia were chosen as sites that year. President de Gaulle announced the new sites on 3 January 1963. The Polynesian people and leaders broadly supported the choice, although the tests became controversial after they began, especially among Polynesian separatists.[9]

In the period between July 1966 and September 1974, France conducted 46 atmospheric tests at Mururoa and Fangataufa atolls in the Tuamotu Archipelago. The Archipelago comprises almost 80 islands and atolls, forming the largest chain of atolls in the world. Mururoa and Fangataufa are 8,700 km from Australia and 1,200 km south-east of Papeete, the capital of French Polynesia, on the island of Tahiti. After 1974, France moved its testing underground (conducting, from 5 June 1975 until testing ended in 1996, a further 147 tests).

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7 Bill Gunston, *Bombers of the West* (Scribner, 1973) 103–4.

8 Jean-Marc Regnault, 'France's Search for Nuclear Tests Sites, 1957–63' (2003) 67(4) *Journal of Military History* 1223.

9 Ibid.

B *Australia's Policy Approach*

Australia's policy approach to nuclear testing since the end of the Second World War has been one of commitment to the goal of a world free of nuclear weapons and universal support for a comprehensive test ban treaty. Australia has long championed international nuclear non-proliferation and disarmament efforts, while supporting the right of all states to engage in the peaceful uses of nuclear energy.

During the 1950s and 1960s, the Australian Liberal–Country Coalition government, which was in power (led for most of that period by Sir Robert Menzies as Prime Minister), was tied 'by alliance and common ideological outlook to Britain and the United States' and had a disinclination 'to support any disarmament initiative not given their imprimatur'.[10]

Australia's policy had a strong Cold War dimension similar to France's; namely, a concern about the Soviet Union's nuclear capabilities. This led to the government making an 'exception' to Australia's general position on opposition to nuclear testing because the Soviet Union was conducting nuclear testing in the atmosphere. In 1962, the government stated that 'if the United States should decide it was necessary for the security of the free world to carry out nuclear tests in the atmosphere, then the United States must be free to do so'.[11] The Australian government had 'reluctantly accepted the necessity for the continuation of testing by the United States in the face of persistent Soviet Testing'.[12]

There was also an important Asian regional dimension to the policy during this period: the concern about the nuclear intentions of communist China. This concern is reflected in official documents of the time. One of these states that

> Australia has consistently advocated an international agreement on the suspension of nuclear weapons tests, and was one of the first countries to announce it would become a party to the *Nuclear Test Ban Treaty* which was signed in Moscow in August 1963. Australia has urged all States to accept the obligations laid down in the Treaty. Prior to the signature of the *Nuclear Test Ban Treaty*, Australian policy was, to some extent, inhibited by the fact that it was difficult consistently to object to testing when the three major nuclear powers themselves reserved the right to test. As these three powers have now at least partially surrendered their right we consider that others, and most notably Communist China and France, should follow suit.[13]

Key elements of Australia's policy, then as now, were to prevent the emergence of new nuclear powers and to ban nuclear testing, especially in the Pacific region. These fundamental objectives shaped and influenced Australia's

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[10] Trevor Findlay, 'The Making of a Moral Ornament: Australian Disarmament and Arms Control Policy 1921–1991' (Working Paper No 107, Peace Research Centre, Australian National University, May 1991).

[11] 'Nuclear Tests Application' (n 4) annex 3 ('Australian Government's Aide-Mémoire of 9 September 1963') 36.

[12] Ibid 38.

[13] Wayne Reynolds and David Lee (eds), *Australia and the Nuclear Non-Proliferation Treaty 1945–1974* (Australian Department of Foreign Affairs and Trade, 2013) 113 <https://www.dfat.gov.au/sites/default/files/australia-and-the-nuclear-non-proliferation-treaty.pdf>, archived at <https://perma.cc/RGW4-LY3G>.

approach to engaging diplomatically with France, both in the bilateral and international contexts, over its atmospheric testing in the Pacific.

In addition to the Australian government's policy imperatives, it is important to note the role that civil society played in opposing nuclear testing.[14]

An antinuclear movement emerged in Australia in the 1960s, in opposition to the global nuclear arms race, which was taking place in the context of the Cold War and the increasing public concerns about the risks of nuclear war and nuclear testing and the health effects of radioactive fallout from the tests.

Antinuclear campaigning over the period from 1960 to 1965 focused on a number of related issues: the need for general nuclear disarmament, and opposition to any nuclear testing in Australia (where the United Kingdom had conducted 12 major tests between 1952 and 1957) and the Pacific and to the newly established US nuclear-related bases in Australia. From 1962, however, for the next seven years, the peace and anti-war movement focused primarily on campaigns aimed at ending Australian participation in the Vietnam War and the associated conscription scheme.[15] In the early 1970s, particularly 1972, the movement became active again with respect to French nuclear testing. Together with other sectors of civil society, especially the unions, this movement was influential in the decision by the Whitlam government in 1972 to take a case against France to the ICJ.

III AUSTRALIAN DIPLOMATIC ACTION

A *Bilateral Representations*

The decision by the Australian government to institute proceedings against France in the ICJ was only taken after sustained efforts and bilateral representations by Australia at the diplomatic level for over a decade, from 1963 to 1973, had been exhausted. The assessment was eventually made by the Australian government that 'despite our efforts to reach a settlement of the dispute by discussion at all levels between our two Governments, these efforts have not succeeded and will not succeed'.[16] Accordingly, the Australian government advised the French government that 'in these circumstances the dispute between our two countries on this matter should be submitted to the International Court of Justice'.[17]

Australia's application instituting proceedings of 9 May 1973[18] records the timeline and a description of the factual situation regarding French testing; the representations made by Australia to France in the form of diplomatic notes; France's replies, such as they were, by note; and comments on Australia's

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[14] Henry Burmester, 'Civil Society and the Instigation of International Court Litigation: The Australian Experience' (2021) 21(3) *Melbourne Journal of International Law* 772 ('Civil Society and the Instigation of International Court Litigation').

[15] See Michael Hamel-Green, 'Nuclear Disarmament Campaigns in the 1960s', *Australian Living Peace Museum* (Web Page) <http://www.livingpeacemuseum.org.au/omeka/exhibits/show/nuclear-weapons-in-aus-pacific/nuclear-disarmament-aus-1960s>, archived at <https://perma.cc/4VPS-GRX7>.

[16] 'Nuclear Tests Application' (n 4) annex 14 ('Communication of 9 May 1973 by the Australian Prime Minister and Minister for Foreign Affairs') 72.

[17] Ibid.

[18] 'Nuclear Tests Application' (n 4).

approach aimed at reaching an agreed solution and to 'avoid legal proceedings'.[19] The descriptive part of the application and the formal documents annexed to it (notes, aide-mémoires, communications and public statements) illustrate the efforts by Australia to register concern about France's atmospheric nuclear testing in the Pacific, to seek the French government's agreement to discontinue testing and to resolve the matter through diplomatic means without recourse to legal action.

While the diplomatic approach, commencing in 1963,[20] conducted over a 10-year period, at times at a high level of political engagement, was not ultimately successful in itself, the actions taken by Australia in making sustained representations to and engaging with France exemplify a 'best practice approach' to seeking to resolve disputes amicably. These representations were mainly made through use of diplomatic notes: the well-established means of formal communication between states on any matter. Moreover, those representations ultimately formed a critical part of Australia's case before the ICJ. In this regard, it is instructive to consider the content, language and tone of the communications over that period. In particular, it is noteworthy, and not surprising, that the various communications are based on and reflect strongly held national policy objectives and decisions, both domestic and international.

In the case of Australia, the main themes in the notes (formal communications between states) and aide-mémoires (a written summary of key points made by a diplomat in an official conversation, which is left with the other party to the conversation, either at the time of the conversation or subsequently, as an aid to memory) were: the strength of the policy commitment to universal suspension of all nuclear testing (except for the US in light of continued testing by the Soviet Union in a Cold War context); support for the 1963 *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water*,[21] the 1968 *Treaty on the Non-Proliferation of Nuclear Weapons*[22] and for a *Comprehensive Nuclear Test-Ban Treaty*;[23] opposition to France conducting nuclear, and particularly atmospheric, testing, especially in the Pacific region; the danger that French testing might lead to other countries testing, leading, in turn, to a proliferation of nuclear weapons; concern about the health and environmental effects of radioactive fallout from testing; the strength of the community of interest in the Pacific and domestically in Australia against testing; recognition

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19 Ibid 10 [16].

20 In April 1963, Australia had conveyed, through the Minister for External Affairs, Sir Garfield Barwick, in a meeting with his French counterpart, Maurice Couve de Murville, 'deep regret at the decision which the French Government was then on the point of taking, namely, to move its nuclear testing to the Pacific area': ibid 6 [8].

21 *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water*, opened for signature 5 August 1963, 480 UNTS 43 (entered into force 10 October 1963). Australia signed the Treaty on 8 August 1963 and ratified it on 12 November 1963. France announced on 29 July 1963 that it would not join the Treaty and is not a party.

22 *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).

23 *Comprehensive Nuclear-Test-Ban Treaty*, GA Res 50/245, UN GAOR, 50th sess, 125th plen mtg, Agenda Item 65, Supp No 49, UN Doc A/RES/50/245 (17 September 1996), which adopted *Letter Dated 22 August 1996 from the Permanent Representative of Australia to the United Nations Addressed to the Secretary-General*, 50th sess, Agenda Items 8 and 65, UN Doc A/50/1027 (26 August 1996) annex ('*Draft Comprehensive Nuclear-Test-Ban Treaty*').

of France's responsibilities for its 'overseas territories' in the Pacific region; that the testing was contrary to international law; and the importance of the multifaceted bilateral relationship with France and the wish to maintain friendly relations.

The notes also expressed, progressively, in the pre-testing years, 'deep regret', and in the testing years, 'very great regret', 'deep concern', 'deep regret', 'considerable regret' and 'emphasises its concern' — strong terms in diplomatic language — at France's decision to conduct nuclear testing in the Pacific area.

The French notes, few as they were, also referred to the importance of the bilateral relationship, which offered 'such promising prospects', including in the European and Asian contexts, and noted areas of mutual cooperation. However, the notes were categorical in emphasising France's defence policy and justification for acquiring nuclear weapons and conducting testing 'inspired by the purely defensive concern of deterring any possible aggressor', particularly in the Cold War context.[24]

B *The Value of Diplomatic Notes*

The question can be justifiably posed: what was the point of Australia continuing to make representations to France when it was unequivocally clear from 1963 that France's position was intransigent, that is, that there would not be a cessation of atmospheric nuclear testing in the Pacific until the French government decided to end the programme?

The response is that, in any matter, but particularly when there is a dispute between states, it is important to take a sustained approach, ensuring that the other state (or states) is fully aware of, as in this case, the Australian government's position. From a policy perspective, it was essential for Australia to register with France on a continuing basis its opposition to testing, particularly in the Pacific. The combination of diplomatic notes sent over a period of years demonstrates the commitment of the Australian government to its policy position. To not send a note each time that testing was likely to be undertaken would have been interpreted by France as Australia resiling from its policy. Moreover, the notes form an essential part of a state's application in any case initiated in the ICJ, as they illustrate, inter alia, the diplomatic efforts that have been made to settle the dispute amicably.

A particularly noteworthy aspect of the Australian diplomatic notes is their content and tone. They are comprehensive and to the point but elegant in the way in which they have been crafted as well as measured in expressing a strong policy difference. They are not just 'template texts' even if there is, necessarily, some repetition of key points and messages. A great deal of thought evidently went into preparing the notes. In this regard, they are probably 'products of their time' in terms of the sentiments expressed and the language used: such notes prepared today would most likely be more economical and not as 'rich' in those respects.

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[24] See 'Nuclear Tests Application' (n 4) annex 10 ('Note of 7 February 1973 of the French Ambassador, Canberra, to the Australian Prime Minister and Foreign Minister') 53.

Another noteworthy feature of both the Australian and French notes is their reference, consistently on Australia's part, to the importance of the bilateral relationship and of maintaining friendly relations despite the disagreement over testing. It is important in international relations, if it is at all possible, to 'carve out' any dispute from the overall relationship, which can be multifaceted. This approach is consistent with the *UN Charter* and the principles of promoting friendly relations between states. This is not to say, however, that damage to the bilateral relationship will not result from a dispute or even be used as leverage, or an implied threat, in such a dispute, as the final French note arguably illustrates.

C *Other Bilateral Diplomatic Action*

In addition to, and in between, the Australian diplomatic notes, Australia also engaged with French political figures and officials through the Australian Embassy in Paris, as well as with French Embassy staff in Canberra, and there were exchanges at the technical, scientific level relating to the evaluation of the dangers of radioactive fallout from the tests. There was also high-level political interaction by Australian Ministers with French equivalents, particularly in the period immediately prior to the initiation of ICJ action. This was all consistent with a strategy of using a variety of means to keep communicating and to encourage dialogue.

D *Multilateral and Regional Action*

In addition to the bilateral exchanges with France, Australia was very active in a range of fora in promoting and supporting a universal approach to the suspension of all forms of nuclear testing. In the UN, Australia regularly co-sponsored a resolution on the *Urgent Need for Suspension of Nuclear and Thermonuclear Tests* from 1963 to 1972.[25] At the first meeting of the South Pacific Forum in 1971, Australia joined with other Pacific nations in appealing to France to make the then-current test series the last in the Pacific area. In subsequent Forum meetings, Australia supported communiqués expressing 'unanimous concern at the French Government's continuation of nuclear testing in the South Pacific' (1972) and 'urging the French Government to bring about an immediate halt to all testing in the area' (1973).[26] In the Australia, New Zealand and US ('ANZUS') context, the 1968 ANZUS Council communiqué contained a reference:

> Noting the continued atmospheric testing of nuclear weapons by Communist China and France, the Ministers reaffirmed their opposition to all atmospheric

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[25] GA Res 1910 (XVIII), UN GAOR, 18th sess, 1265th plen mtg, Supp No 15, UN Doc A/RES/1910(XVIII) (27 November 1963); GA Res 2604 (XXIV), UN GAOR, 24th sess, 1836th plen mtg, Supp No 30, UN Doc A/RES/2604(XXIV) (16 December 1969); GA Res 2663 (XXV), UN GAOR, 25th sess, 1919th plen mtg, Supp No 28, UN Doc A/RES/2663(XXV) (7 December 1970); GA Res 2828 (XXVI), UN GAOR, 26th sess, 2022nd plen mtg, Supp No 29, UN Doc A/RES/2828(XXVI) (16 December 1971); GA Res 2934 (XXVII), UN GAOR, 27th sess, 2093rd plen mtg, Supp No 30, UN Doc A/RES/2934(XXVII) (29 November 1972).

[26] 'Application for Permission to Intervene Submitted by the Government of Fiji', *Nuclear Tests (New Zealand v France)* [1973] II ICJ Pleadings 89, 91 ('Application for Permission to Intervene (Fiji) in Nuclear Tests (New Zealand v France)').

> testing of nuclear weapons in disregard of world opinion as expressed in the *Nuclear Test Ban Treaty*.[27]

At the United Nations Conference on the Human Environment held in Stockholm in June 1972, Australia supported a resolution condemning nuclear weapons tests, especially those carried out in the atmosphere, and calling on 'those States intending to carry out nuclear weapons tests to abandon their plans to carry out such tests since they may lead to further contamination of the environment'.[28]

All these actions were important in building broad-based and like-minded support for an end to nuclear testing by France in the Pacific; they demonstrated the strength of international condemnation of that testing.

Australia's diplomatic strategy had many 'tracks' — and, of course, France was very robustly engaged in its own diplomatic defensive campaigning throughout.

IV THE ICJ: THE LEGAL OPTION

A *The Shape and Dimension of the Dispute*

In its application instituting proceedings to the ICJ, the Australian government noted that, '[o]ver the last decade', it had been 'at pains to convey to the French Government its apprehension and concern at the conducting of these tests'.[29]

At the beginning of 1973, when it was learned that France intended to carry out further tests, the Australian government sent a note dated 3 January 1973,[30] which indicated, for the first time, that Australia was considering a legal course of action. The note recorded that despite repeated formal requests, France had continued testing. In making 'quite clear' its position on testing and that Australia had 'hitherto adopted a position of considerable restraint in this matter', the note referred to 'the opinion' of the Australian government that the conducting of such tests 'would not only be undesirable but would be unlawful' (and mentions some of the reasons as a basis in law for that assertion).[31] France's formal assurance was sought that no more tests would be held in the Pacific area either in 1973 or in the future.

Significantly, the note states that

> [i]n making this request, the Australian Government is mindful of the amicable relations that have for so long existed between France and Australia and is anxious that those relations should continue and not be put under strain. The Australian Government is bound to say, however, that in the absence of full assurances on this matter, which affects the welfare and peace of mind not only of

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27 'Nuclear Tests Application' (n 4) annex 5 ('Note of 17 May 1968 of the Australian Government') 42.

28 *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1973) 32.

29 'Nuclear Tests Application' (n 4) 6 [8].

30 Ibid annex 9 ('Note of 3 January 1973 of the Australian Ambassador, Paris, to the French Foreign Minister') 50.

31 Ibid.

> Australia but of the whole Pacific community, *the only course open to it will be the pursuit of appropriate international legal remedies*.[32]

The Australian note sent on 3 January 1973 did result, for the first time in nearly 10 years, in a formal reply from France, dated 7 February 1973, which set out, at considerable length, France's defence policy and justification for acquiring nuclear weapons and conducting nuclear testing (to 'imperatively endow itself with the means of ensuring its security and preserving its vital interest … inspired by the purely defensive concern of deterring any possible aggressor').[33] The French Ambassador asserted 'the conviction that [French] nuclear experiments have not violated any rule of international law'.[34] He expressed 'the ardent hope' that Australia would find 'the whole of the considerations' that France had put forward 'convincing', and that they addressed, comprehensively, the bilateral relationship 'which … traditionally friendly, [has] never been so intensive and promising as today'.[35]

The note concludes by stating:

> The French Government would profoundly regret it if relations between France and Australia, which at the present moment offer such promising prospects, were to run the risk of being compromised. For its part, it will spare no effort, in the framework of its traditional policy of friendship with Australia, to develop mutually advantageous relations with that country. It ventures to hope the Australian Government, moved by the same considerations, will abstain from any act likely to injure the fundamental rights and interests of France, and declares itself, for its part, ready to exchange views with the Australian Government on any point that may seem relevant.[36]

As is mentioned in the Australian application instituting proceedings, it is in these two notes, dated 3 January and 7 February 1973, 'that the shape and dimensions of the dispute … appear so clearly'.[37]

B *Legal Action: Ramping Up*

The sharper approach and threat of legal action taken in the Australian note of 3 January 1973 reflected the policy position of the Whitlam Labor government, which was elected to office on 2 December 1972. Labor's election platform included a statement that 'Labor opposes the development, proliferation, possession and use of nuclear, chemical and bacteriological weapons'.[38] In his 'It's Time' election speech on 13 November 1972, Mr Gough Whitlam had pledged: 'We will take the question of French nuclear tests to the International Court of Justice to get an injunction against further tests.'[39] He also said:

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32 Ibid (emphasis added).

33 'Nuclear Tests Application' (n 4) annex 10 ('Note of 7 February 1973 of the French Ambassador, Canberra, to the Australian Prime Minister and Foreign Minister') 53.

34 Ibid 57.

35 Ibid.

36 Ibid 59.

37 'Nuclear Tests Application' (n 4) 10 [15].

38 Ibid 10 [14].

39 Gough Whitlam (Speech, Blacktown, New South Wales, 13 November 1972) <https://electionspeeches.moadoph.gov.au/speeches/1972-gough-whitlam>, archived at <https://perma.cc/WQV9-LUY7>.

'We shall act in this matter on the same high legal advice which Mr McMahon [then Prime Minister] has received — but failed to act upon. We will ratify the *Treaty on the Non-Proliferation of Nuclear Weapons*.'[40]

The Whitlam government's policy position was strongly influenced by action taken within Australia by three state Labor governments (Tasmania, South Australia and Western Australia) and by civil society in reaction to the three nuclear tests conducted by France in 1972. The three state governments commissioned legal opinions (one on jurisdictional issues, the others on substantive issues) from Professor DP O'Connell, then Professor of International Law at Adelaide University, which were provided in late 1972 to the Liberal Prime Minister, William McMahon, and to the Labor Opposition leader, Gough Whitlam.[41] The McMahon government did not take any action on them, but Whitlam was persuaded by the legal advice contained in them. The opinions rejected the idea of the Australian states having any *locus standi* before the ICJ.

The opinions led to the commitment regarding ICJ action made in Whitlam's 'It's Time' election speech. That commitment was also strongly influenced by civil society's, and particularly the union movement's, reaction and protests to the testing in 1972 — a public reaction that was 'unprecedented for its intensity, scale and speed with which it developed'.[42] In deciding to initiate ICJ proceedings, the Whitlam government knew it was responding to a groundswell of domestic opposition to atmospheric testing.[43]

Also, on 23 January 1973, it was reported in the media that Prime Minister Whitlam had said, following a meeting with New Zealand Prime Minister Norman Kirk, that both had agreed that they would take measures, including possibly a break in diplomatic relations if necessary, against French nuclear tests in the Pacific. Whitlam had also said that the suspension of diplomatic relations was 'one of the contingencies' if France resumed testing that year, and announced that Australia would seek an injunction against the tests in the ICJ. New Zealand Prime Minister Kirk was reported to have said that he had sent President Georges Pompidou of France a personal appeal to call off future testing.[44]

C *Last Ditch Diplomatic Action*

The ramping up of Australia's approach in its note of 3 January 1973, with the reference to seeking legal remedies, reflected the fact that over the preceding nine years, the French government had not made any move, despite the sustained formal representations, to change its policy on conducting nuclear testing in the Pacific. Moreover, it had not replied formally to any of the notes that Australia

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40 Ibid.

41 For the genesis of the legal opinions, see 'Obituary: Professor DP O'Connell' (1981) 7 *Australian Year Book of International Law* xxiii, xxvi.

42 *Legality of French Nuclear Tests in the Pacific* (National Archives of Australia, A432, 1972/3396 PART 1) 259, quoted in Burmester, 'Civil Society and the Instigation of International Court Litigation' (n 14) 777.

43 Henry Burmester, 'Sir Elihu Lauterpacht QC and the *Nuclear Tests* Case' (2018) 35 *Australian Year Book of International Law* 41; Burmester, 'Civil Society and the Instigation of International Court Litigation' (n 14).

44 'Australia and New Zealand Set Moves against French A-Tests', *The New York Times* (New York, 24 January 1973) 3.

had conveyed prior to that time — it had been, as is noted in Australia's application instituting proceedings, a 'one-sided correspondence'.[45]

Nonetheless, the Australian government persisted in its efforts to try to reach an agreed outcome by responding to what turned out to be the last French note (of 7 February 1973) with its own note, dated 13 February 1973 (from Gough Whitlam, who held both offices of Prime Minister and Minister for Foreign Affairs, to the French Foreign Minister, Maurice Shumann).[46] In addition to the points referred to above, this note responded to the French points regarding the bilateral relationship:

> [T]he Australian Government is most mindful of the close friendship between Australia and France, based on a commitment to the principles of freedom and democracy, as well as the common western intellectual and cultural heritage … [and] therefore attaches great importance to the maintenance of friendly relations with France, and to the development of an even more fruitful relationship in the future.[47]

It was also, however, more emphatic than hitherto in countering France's assertion that its nuclear tests had not violated any rule of international law: the Australian government 'cannot agree … being on the contrary convinced that the conducting of the tests violates rules of international law. It is clear that in this regard there exists between our two Governments a substantial legal dispute.'[48]

In what might be regarded as 'a last ditch' attempt to avoid taking the matter to the ICJ, the Australian note went on to say:

> However, the existence of legal disputes between friendly countries need never prejudice or impede the development of their good relations if a resolution of them is sought in a spirit of objectivity and reciprocal understanding — whether by bilateral negotiations or ultimately by recourse to objective legal judgment.[49]

Australia indicated that it would be 'very happy' to have discussions with France but on 'the condition' that France would not proceed with nuclear testing during the discussions 'until either government informs the other that such discussions are unlikely to succeed'.[50] In support of the 'condition', the note referred to the strength of public opinion in Australia about the effects of French tests in the Pacific, which was such that whichever political party was in office, it would be under great pressure to take action. Moreover, '[t]he Australian public would consider it intolerable if the nuclear tests proceeded during discussions to which the Australian government had agreed'.[51]

France responded positively to the Australian request, giving an assurance that testing would not proceed during the discussions. Australia also agreed to France's request that 'this assurance' not be made public while the discussions were being held.

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45 See 'Nuclear Tests Application' (n 4) 8 [14].

46 Ibid annex 11 ('Note of 13 February 1973 of the Australian Prime Minister and Minister for Foreign Affairs to the French Foreign Minister') 60.

47 Ibid.

48 Ibid 62.

49 Ibid.

50 Ibid.

51 Ibid.

As the Australian application instituting proceedings notes, '[t]he French undertaking thus recognized the incompatibility of continued testing with the pursuit of a settlement by negotiation or, it may be suggested, by judicial means'.[52]

Discussions were held in Paris, from 18 to 20 April 1973, between the Australian Attorney-General (Senator Lionel Murphy) and Solicitor-General (Bob Ellicott QC) and the French Ministers for Foreign Affairs (Michel Jobert) and the Armed Services (Robert Galley). At the conclusion of the main discussions on 19 April, no agreed communiqué was issued, but the Attorney-General issued a public statement, which stated that

> [t]hroughout the discussions were cordial and frank and every effort was made to find an amicable resolution to this dispute. However, the clear position was reached that the French Government would not agree to cease testing in the atmosphere of the Pacific. They would not supply us with any information as to the dates of their proposed tests or expected size and yield of their explosions. They were not prepared to join with us in an application to the International Court of Justice on any basis.[53]

The statement records that the Attorney-General offered to have Australian scientists meet with French counterparts to discuss and attempt to resolve problems of scientific evaluation of the dangers of radioactive fallout from the tests

> on the understanding between the two Governments that France would not resume atmospheric testing without reasonable notice, such as one month, to Australia, and that Australia would not initiate proceedings in the International Court of Justice before receipt of such notice.[54]

This understanding was, as the statement notes, 'an endeavour' to resolve the dispute without prejudice to the positions of both France and Australia. This understanding was, however, unacceptable to France. Nevertheless, 'without prejudice to the right of the Australian Government to initiate legal proceedings or to take other action in the meantime', the Attorney-General agreed to a meeting 'in the course of the coming weeks' between French and Australian scientists to continue to exchange views on the measurements of radioactivity resulting from the tests and their interpretation.[55]

The statement concludes: 'It was clear on termination of these talks that it was not possible to find a solution to the dispute between France and Australia despite the attempts to do so.'[56]

Fourteen days later, on 2 May 1973, in a parliamentary statement, the French government indicated that, regardless of the protests made by Australia and other countries, it did not envisage any cancellation or modification of its programme of nuclear testing as originally planned.

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52 'Nuclear Tests Application' (n 4) 10 [18].

53 Ibid annex 13 ('Text of Public Statement Issued by the Australian Attorney-General in Paris on 19 April 1973') 70.

54 Ibid.

55 Ibid.

56 Ibid.

The final diplomatic action by Australia was the sending of a communication dated 9 May 1973,[57] from the Australian Prime Minister and Minister for Foreign Affairs (Whitlam) to the President of the French Republic (Pompidou), which referred to the bilateral discussions that had been held in Paris in April, the fact that by 20 April it was clear that it was not possible to find a solution to the dispute, the statement in the French Parliament and the fact that, at the scientific talks held in Canberra (from 7 to 9 May), there had been no intimation that the French position would change.

The communication stated:

> It is therefore clear that, despite our efforts to reach a settlement of the dispute by discussion at all levels between our two Governments, these efforts have not succeeded and will not succeed.
>
> The Australian Government believes that in these circumstances the dispute between our two countries on this matter should be submitted to the International Court of Justice. At the Paris talks it was made clear by the French representatives that France would not agree to make a joint application to the Court. Accordingly, I have instructed that an application instituting proceeding against France in this matter be filed.
>
> The Australian Government is also seeking through the procedures of the Court, protection against further tests pending the Court's decision.[58]

While acknowledging that the diplomatic process had been exhausted, the communication concluded, significantly, with the assertion:

> I am confident that this course of action, which is in accordance with the *Charter of the United Nations*, will not affect the development between our two countries of the close relations which are of great importance and benefit to both of us.[59]

That is to say that even if states might be in dispute on a particular matter, it is imperative to maintain and sustain the essence of the bilateral relationship, particularly when, as was the case with Australia and France, that relationship is already well established.

V THE CASE

On 9 May 1973, Australia and New Zealand each instituted proceedings against France concerning tests of nuclear weapons that France proposed to carry out in the atmosphere in the South Pacific region. France stated that it considered the ICJ manifestly to lack jurisdiction and refrained from appearing at the public hearings or filing any pleadings. By two orders of 22 June 1973, the Court, at the request of Australia and New Zealand, awarded provisional measures to the effect, inter alia, that, pending judgment (consideration of the case on the merits), France should avoid nuclear tests causing radioactive fallout on Australian or New Zealand territory.[60] By two judgments delivered on 20 December 1974,

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57 'Nuclear Tests Application' (n 4) annex 14 ('Communication of 9 May 1973 by the Australian Prime Minister and Minister for Foreign Affairs') 72.

58 Ibid.

59 Ibid.

60 *Nuclear Tests (Australia v France) (Order on 22 June 1973)* [1973] ICJ Rep 99; *Nuclear Tests (New Zealand v France) (Order on 22 June 1973)* [1973] ICJ Rep 135.

the Court found that the applications of Australia and New Zealand no longer had any object (were 'moot') and that it was therefore not called upon to give any decision thereon. In so doing, the Court based itself on the conclusion that the objective of Australia and New Zealand had been achieved in as much as France, in various public statements, including one by President Valéry Giscard d'Estaing, had announced its intention of carrying out no further atmospheric nuclear tests on the completion of the 1974 series.[61]

The awarding of provisional measures represented a significant diplomatic outcome for Australia, as well as for New Zealand and those states, particularly in the Pacific region, that were also opposed to testing.[62] The sustained diplomacy outlined in Australia's application, including the evidence of international opposition to atmospheric testing, was undoubtedly integral to achieving that important result, representing a first but nonetheless critical step to bring an end to the testing.

VI DIPLOMACY AND NATIONAL INTERESTS

The various communications conveyed by Australia to the French government over a decade demonstrate the commitment by Australia to seek an agreed outcome to what was a significant international policy difference between the two states. The diplomatic approach was the appropriate course of action to pursue, as an attempt to register clearly Australia's policy position of opposition to nuclear testing, especially in the Pacific region, and to appeal to the French government to change their own policy. It was an approach conducted in the knowledge that it was most unlikely that France would change its position of conducting testing because of the importance that it attached to its nuclear defence policy. The fact that France ignored and did not respond to any of Australia's communications until the threat of legal action was made was indicative of their resolve to proceed with that policy regardless of widespread international opposition to it. When France finally did respond, it did not resile in any way from its position.

French intransigence, reflected by this 'silence' over many years in terms of formal diplomatic communication and then their confirmation to continue with their policy — even when the legal option was 'elevated' following the change of government in Australia — was an important reason why the Australian government decided to institute proceedings in the ICJ. The Australian notes demonstrated a good faith attempt to resolve the matter amicably without recourse to legal action. The ultimate decision by the Australian government to institute proceedings in court was taken to be not only consistent with a policy

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61 *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253; *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457. Sir Garfield Barwick was appointed judge ad hoc for Australia.

62 Fiji filed an application to intervene under the terms of art 62 of the *Statute of the International Court of Justice* in the case: 'Application for Permission to Intervene Submitted by the Government of Fiji', *Nuclear Tests (Australia v France)* [1973] ICJ Pleadings 149; 'Application for Permission to Intervene (Fiji) in Nuclear Tests (New Zealand v France)' (n 26). The Court decided to defer consideration of the application until it had pronounced on the jurisdictional question and the admissibility of New Zealand's application: *Nuclear Tests (Australia v France) (Order)* [1973] ICJ Rep 320; *Nuclear Tests (New Zealand v France) (Order)* [1973] ICJ Rep 324.

commitment of the incoming Labor government but also in recognition that continuation of diplomatic representations — given the French response to the 'last ditch' communication from Australia in the first half of 1973 — would not bring about a change in French policy.

The emphasis in the Australian communications and also in those of the French government on the importance of the bilateral relationship is noteworthy and reflects an aspiration on both sides to carve out their differences over nuclear testing from the broader relationship.[63] However, the 'friendly' French references were accompanied by a scarcely veiled 'threat' of bilateral relations running 'the risk of being compromised' by Australia's position.[64] Moreover, while Australia meticulously and persistently made its views known to France, the French adopted an aloof, almost dismissive, attitude during the long period when they were engaged in testing, by ignoring and not replying to most of those representations.

Behind the veneer of the 'bilateral relations' that the diplomatic language employed, nuclear testing did have a direct impact on relations between Australia and France, which were tense throughout the entire period, coming to a head in 1972, when Australian civil society and the unions engaged actively in protest action and boycotts, more so than they had done in the pre-Whitlam government period. France was fully aware of the opposition in Australia to testing, politically as well as within Australian civil society, dating from 1963. France probably calculated that the Australian government could not really do anything to thwart their defence-related policy, other than to register its views through diplomatic channels and engage with other like-minded states in expressing opposition to testing through resolutions adopted at the UN and in communiqués issued following the annual meetings of the South Pacific Forum — actions that France, for most of the period, ignored.

Could the Liberal–Country Coalition government, in power in Australia during the period of French testing from 1966 until Labor won election in 1972, have taken more steps or other actions to register its opposition to that testing? The options of recalling the Australian Ambassador in Paris 'for consultations' or even, more extreme, breaking off diplomatic relations were available. However, it appears that neither of those two options were seriously contemplated by the government of the day, nor does it seem that there was any appetite in that government to exercise the ICJ option. The policy approach was focused exclusively on diplomacy: bilateral and multilateral.

It took a change of government in Australia to move to a more robust stage of taking the matter to the ICJ for decision, even though France made it clear that it would not join in the case. Interestingly, while Prime Minister Whitlam (who was also Minister for Foreign Affairs from 5 December 1972 to 6 November 1973) carried through with his election promise, he also had a very positive view of France, despite his opposition to testing, and was conscious of the importance of the bilateral relationship in many spheres.[65] After the case, he made an official

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63 Similar to Australia and Japan in the *Whaling in the Antarctic* case.

64 'Nuclear Tests Application' (n 4) annex 10 ('Note of 7 February 1973 of the French Ambassador, Canberra, to the Australian Prime Minister and Foreign Minister') 58–9.

65 Stephen Henningham, 'Whitlam and Australia's Relations with France, 1972–75: Conflict and Cordiality' (2017) 14(3) *History Australia* 414.

visit to France in January 1975, which was reported as 'marking the end of strained relations' between the two countries.[66]

VII CONCLUSION

Engaging in diplomacy will remain critical in Australia's approach to dispute settlement, in whatever context, consistent with its support for the rules-based system of international relations, and its commitment to the purposes and principles of the *UN Charter* and to the ICJ as 'the principal judicial organ of the United Nations'.[67]

'Diplomacy' is the form of international engagement that offers the best prospect of resolving differences and maintaining friendly relations between states. While, as the *Nuclear Tests* case demonstrates, diplomacy is not always successful when national and foreign policy interests are irreconcilable, it has to be the first course of action and to 'run its course': only when that multi-track process has been exhausted should action be taken to resort to the ICJ (or other international dispute settlement procedures) for a decision — based on a sound analysis of the legal issues and rigorous preparation of Australia's case and when there is a compelling national or foreign policy imperative in doing so.

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66 Flora Lewis, 'Australian Chief's Paris Visit Ends Rift over Nuclear Tests', *The New York Times* (New York, 7 January 1975) 3.

67 *Charter of the United Nations* art 92.