Pride, Prejudice and Persuasion?

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The purpose of this paper is to consider a number of situations where *pride*, *prejudice* or *persuasion* are relevant to matters concerning the jurisdiction of the International Court as well as to the decision by States whether to seek redress through the Court.

Pride

At the outset it can fairly be said that for some countries at least it is a matter of *pride* that they have accepted the jurisdiction of the International Court or have done so with a minimum of reservations. This is certainly true in the case of Australia. In answer to a question in Parliament, the then Prime Minister, Mr Whitlam, said on 9 July 1975:

> On 11 February of this year I made a statement in this House in which I referred to our warm support for the principles and objectives of the International Court and in which I said that Australia proposed to forgo its existing reservations to acceptance of the Court's jurisdiction. On 14 March 1975 I issued a statement announcing that I had taken action on 13 March to give effect to this earlier proposal to withdraw all of Australia's substantive reservations.[1]

Earlier in the same year, at a State Banquet in The Hague, Mr Whitlam, having described the Court as "one of the permanent instruments for world order and international law", went on to say:

> Australia has given her warm support to the principles and objectives of the International Court of Justice. We believe we must continue to promote the development of international law. We must promote its acceptance, not merely as a means of ending disputes, but as a standard for international conduct, as a positive embodiment of the principles of international justice and human brotherhood.[2]

Pride also has a role to play in being a willing party to a case before the Court, which is normally so where the case is brought under a Special Agreement between the participants.

Even when such an Agreement may have been the result of outside political pressure as in the "Framework Agreement" (Accord-Cadre) between Libya and Chad for the settlement of their *Territorial Dispute*,[3] there is reference to praiseworthy motives ("the fundamental principles of the United Nations"

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1 House or Representatives, *Debates*, vol 95, 9 July 1975, p 3680; text in (1978) 6 *Aust YBIL* 359 at 360.

2 This part of the speech of 4 January 1975 appears in (1978) 6 *Aust YBIL* 359.

3 *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment,* ICJ Rep 1994, p 6.

including "the peaceful settlement of international disputes" and the "non-use of force or threat of force in relations between States").

A sense of *pride* will often be expressed at the successful outcome of a case: the State concerned is able to congratulate itself on the way in which it was able to *persuade* the Court as to the correctness of its views and the arguments it used to support them.

How far such self-congratulation is justified by any objective standard may sometimes be open to doubt. In the *East Timor* case,[4] the International Court decided in Australia's favour on the narrow ground that:

> Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 [Timor Gap] Treaty, while Portugal allegedly could have done so; the very subject matter of the Court's decision would necessarily be a determination whether, having regard to circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia.[5]

In a News Release issued on 30 June 1995, the same day as the decision was handed down by the Court, the Foreign Minister, Senator Evans, observed that the Court had "accepted Australia's argument that the issues involved could not be determined in Indonesia's absence".[6] However, the Minister could not resist expressing his satisfaction with what he regarded as the successful outcome of the case:

> The Government welcomes the decision which now removes any possible uncertainty about Australia's rights in the Timor Gap. It confirms our view that the Timor Gap Treaty is a responsible and proper framework under which Australia can secure access to its own resources in an area which we have always claimed as Australia's.[7]

This assessment was more accurate in practical than in legal terms. The Court had left open the legal questions of the entitlement of the people of East Timor to permanent sovereignty over their natural resources and of the consequences of the application of that principle in the Timor Gap Zone of Cooperation. For all practical purposes, by declining jurisdiction in the *East Timor* case, the Court placed Australia's position under the Timor Gap Treaty beyond challenge. From this point of view, at least, the Minister was in a position to welcome the decision.

Pride can also be looked at from the perspective of the Court: the *pride* of the judges in being part of an institution which is the principal judicial organ of the international community.

Their status as members of the Court carries with it certain duties — of collegiality; of deference to, though not necessarily acceptance of, the arguments presented by the parties and the views of other members of the Court;

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4 *East Timor (Portugal v Australia),* ICJ Rep 1995, p 90.
5 *Ibid,* at 102.
6 See this volume, p 681.
7 *Ibid.*

and of awareness of the Court's role as part of the institutional framework of the international community.

Although the preservation of collegiality sounds like a matter of minor importance, it can have significant implications. Collegiality and deference would surely have avoided the disaster for the Court, as well as for Judges Spender and Fitzmaurice personally, in the outcome of the *South-West Africa* cases.[8]

Prejudice

The role of the Court is a source of debate and disagreement. The *pride* that some States express in their acceptance of the Court's jurisdiction is more than offset by the *prejudice* which many States are said to feel towards the Court. This is manifested by the relatively small number of acceptances of the Court's "compulsory" jurisdiction by declarations made under Article 36(2) of the Statute. Of the 185 UN members at the end of 1994, 53 on that date had made such declarations, and there were 7 declarations listed as having been made under Article 36(2) of the previous Statute, but as remaining in force by virtue of Article 36(5) of the present Statute.

This may not be an accurate basis of assessment of the attitude of States towards the Court. There is an increasing number of treaties which bestow jurisdiction on the Court. As the United States asserted in its Press Statement accompanying its announced termination of its acceptance of the Court's compulsory jurisdiction:

> This action does not signify any diminution of our traditional commitment to international law or to the International Court of Justice in performing its proper functions. U.S. acceptance of the World Court's jurisdiction under Article 36.1 of its Statute remains strong (i.e. in relation to matters pursuant to "treaties and conventions in force"). [9]

It is also true that a significant percentage of cases heard by the Court are submitted by Special Agreement between the parties (for example, Tunisia/Libya;[10] Libya/Malta;[11] Libya/Chad[12]).

There are, of course, examples where the withdrawal or absence of a declaration does signify *prejudice* against the Court.

French hostility towards the granting of interim measures of protection in the *Nuclear Tests* cases[13] led, in January 1974, to its withdrawal of its acceptance of

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8 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa), Second Phase, Judgment,* ICJ Rep 1966, p 6.

9 (1985) 24 ILM 1742 at 1744–45.

10 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment,* ICJ Rep 1982, p 18.

11 *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment,* ICJ Rep 1985, p 13.

12 *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment,* ICJ Rep 1994, p 6.

13 *Nuclear Tests (Australia v France), Interim Protection, Order of 22 June 1973,* ICJ Rep 1973, p 99.

the Court's compulsory jurisdiction,[14] though it had already shown its displeasure with the proceedings by refusing to enter a formal appearance, simply referring to its national defence reservation to its acceptance and demanding the dismissal of the case.

More dramatically, in response to the Court's decision that it had jurisdiction in the *Nicaragua* case,[15] the United States announced that it would not participate further in the proceedings, and launched an unprecedented attack on the Court.[16]

The attitude of Communist countries was opposed to the Court, partly because of an objection to the concept of third party adjudication, but also because of the attitude, inherited from the Soviet Union, that the Court was a bourgeois capitalist institution. As Friedmann wrote in 1970:

> The Communist theory is still that the Court essentially reflects a bourgeois and capitalist system of international law – an attitude developed in the early 20s before the U.S.S.R. joined the Court, but little modified since, despite its participation.[17]

Many of the reservations to the Genocide Convention 1948 were by States of Eastern Europe excluding the jurisdiction of the International Court under Article IX of the Convention.[18] In February 1989, however, the Soviet Union notified the UN Secretary-General that "due to the major importance it attaches to upholding at present the role played in world affairs by the United Nations International Court of Justice", it was recognising the Court's jurisdiction under a number of international human rights' treaties, including the Genocide Convention.[19]

Persuasion

Persuasion is at the heart of the judicial process. The theory is that the decision will be based upon the persuasiveness of the arguments submitted to the tribunal by the parties.

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14 (1974) 907 UNTS 129.

15 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Jurisdiction and Admissibility, Judgment,* ICJ Rep 1984, p 392.

16 See US Statement of January 1985 (1985) 24 ILM 246 and the Observations on the Court's Judgment, *ibid,* at 249. The text of the Department of State's letter terminating the US acceptance of the Court's jurisdiction is given in *ibid,* at 1742.

17 Friedmann W, "The International Court of Justice and the Evolution of International Law" (1970) 14 *Archiv für Völkesrecht* 305 at 313.

18 See the reservations of Albania, *Multilateral Treaties Deposited with the Security-General, Status as at 31 December 1995* (ST/LEG/SER.E/14), p 88; Bulgaria, (1951) 78 UNTS 318; Byelorussian SSR, (1954) 190 UNTS 381; Hungary, (1954) 188 UNTS 306; Poland, *Multilateral Treaties*, p 85; Soviet Union, (1954) 190 UNTS 381; Ukranian SSR, (1954) 201 UNTS 368.

19 Text in (1989) 83 *American Journal of International Law* 457. Among other East European States which withdrew their reservations to the Genocide Convention were Bulgaria, *Multilateral Treaties Treaties Deposited with the Security-General, Status as at 31 December 1995*, p 94 at n 13; Byelorussian SSR, *ibid*, p 90 at n 12; Hungary, *ibid*, p 90 at n 14; Ukranian SSR, *ibid*, p 90 at n 12.

In international litigation one can probably discount the possibility of a relatively strong case being undermined by poor presentation because, almost invariably, the teams representing litigating States will have the assistance of one or more of the experienced band of advisers who appear regularly before the Court. However, even with advice, it may not always be possible to strike the right balance between conciseness and detail. The problem can be illustrated by the remarks of El Maghur opening Libya's oral presentation to the Court in the *Tunisia/Libya Continental Shelf* case:

> I must confess that I and my colleagues are a little hesitant about being brief. Having been so in the Libyan Memorial, we stood accused in the Tunisian Counter-Memorial of failing to inform the Court properly and of oversimplification. But when we sought to reply adequately to the Tunisian Memorial in the Libyan Counter-Memorial we were accused of attempting to swamp the Court with details to confuse and overcomplicate the issues. [20]

He then referred to Jenning's rebuke on Tunisia's behalf that Libya's proceedings comprised "a mass of scientific material so voluminous and wide-ranging that it must have raised acutely ... the question of the legal criteria of relevance or irrelevance", before stating that Libya "would not be thrown off the track by this sort of statement".[21] Libya was comforted that "the legal process will be applied here with firmness and objectivity ... within the walls of a great hall of law ... [from which] the noise of propaganda and strife is shut out".[22]

The trouble with disputes of the type being dealt with the Court in that case, in which equity is a recognised factor in their resolution, is that it is far from obvious to a litigant what evidence can be employed. Certainly the Court has not provided much guidance. Its comment in the *Tunisia/Libya* case that equity "as a legal concept is a direct emanation of the idea of justice"[23] was an inducement to States to employ social, economic and even moral factors in an attempt to persuade the judges of the justice/equity of their arguments. Although denying that it could indulge in "distributive justice", the Court seemed otherwise to leave open the matters which it could take into account. It was "bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result", there being "no rigid rules ... as to the exact weight to be attributed to each element in the case".[24]

It is possible, and can be advantageous, to build a moral element into a case in making a legitimate legal point. For example, in the *East Timor* case,[25] a history of Portugal's alleged shortcomings as a colonial and administering power of the territory fitted in neatly with Australia's contention that Portugal lacked the necessary standing to bring the case to the Court.

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20 *ICJ Pleadings, Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, vol V, p 3.
21 *Ibid.*
22 *Ibid*, p 4.
23 ICJ Rep 1982, p 18 at 60; referred to as a "guiding concept" in the *Frontier Dispute, Judgment,* ICJ Rep 1986, p 554 at 633.
24 ICJ Rep 1982, p 18 at 60.
25 ICJ Rep 1995, p 90.

Similarly, Australia could point to the fact that Portugal had gained access for its fishing vessels to the waters of Western Sahara by agreement with the Moroccan authorities as supporting its contention that entering into the Timor Gap Treaty with Indonesia was a necessary step for Australia to ensure its rights in the area covered by the Treaty. Of course, this evidence had the added advantage of showing that, while Portugal could respond, in line with the case it was making, that two wrongs do not make a right, Portugal's conduct revealed a degree of hypocrisy in its new found fervour as the champion of a colonial people.

It seems highly doubtful whether a "moral card" has any value if it has no relevance to the case before the Court. This would certainly have been so in the *East Timor* case when, in response to Australia's references to Portugal's maladministration of East Timor, Portugal raised the issue of Australia's treatment of its own Aboriginal inhabitants.

Persuasion also has a role to play in prognosis and in subsequent analysis of a decision. At times, the outcome of a particular case will be forecast, or later criticised, without the forecaster, or critic, taking adequate account of the various aspects of the dispute as presented to the Court which, at the time, convinced the Court as to what conclusion it should reach.

Where the criticism arises from a lack of appreciation as to the factors involved in the decision after the Court's judgment has been scrutinised, a second issue of *persuasion* is involved: the need for the Court, and the apparent failure on the occasion in question, to persuade the losing party and the wider international community of the correctness and wisdom of its decision.

In the *East Timor* case, the present writer[26] was as confident that Australia would succeed on the "indispensable third party" issue (as it is sometimes called) as he was certain that Australia would fail on that ground in the *Nauru* case.[27] Those who saw a sufficient parallel between the two cases to regard as likely a rejection of the indispensable third party contention in the *East Timor* case appeared to ignore the fact that Australia's position in that case was not solely dependent upon the third party issue.

There were and must remain genuine doubts as to Portugal's standing, as very much a "lame duck" administering power, to bring a claim either on its own behalf[28] or on behalf of the East Timorese.[29]

Australia also raised the question: if it could not deal with Indonesia over the Timor Gap, what steps could it take to secure its interests? To have negotiated a deal with Portugal would have been an exercise in futility. In Judge Oda's view, this aspect of the case was in reality a dispute between Portugal and Indonesia as to which was the coastal State with regard to East Timor, and not therefore a matter which could be litigated by Portugal against Australia.[30]

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26 See Greig DW, "Third Party Rights and Intervention before the International Court" (1992) 32 *Virginia Journal of International Law* 285 at 346–47, 369–70.

27 *Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections, Judgment,* ICJ Rep 1992, p 240.

28 See Judge Oda, ICJ Rep 1995, p 90 at 118.

29 See Judge Vereshchetin, *ibid,* at 135–38.

30 *Ibid,* at 112.

Moreover, even if the arguments on the merits had gone substantially against Australia, the Court would ultimately have been faced with the insoluble problem of devising a substantive remedy that would not have directly affected Indonesia's rights under the Timor Gap treaty.[31] It was at this point that the Portuguese argument came full circle because, in Judge Ranjeva's Opinion,[32] the *de facto* nullification of the Treaty sought by Portugal could not be justified without there being a need to decide upon the lawfulness of Indonesia's entry into and continued presence in East Timor.

The element of *persuasion* of its audience by the Court is a matter of major importance. This is a factor which it is necessary for members of the Court, both individually and collectively, to keep in mind at each stage of a proceeding.

The most striking example from the Court's first quarter century was the decision in the *South-West Africa* cases.[33]

1. It was alleged that the majority was wrong in refusing to accept the opposite conclusion reached in 1962 in the case,[34] and in distinguishing it on a ground which Lester Pearson described "would have baffled the intellectual ingenuity of the Medieval Schoolmen skilled in arguing, as in the legendry debate between St Thomas Aquinas and Duns Scotus, as to how many angels could sit on the point of a needle".[35]
2. In particular, there had been, it was alleged, an abuse of the Presidential position by Judge Spender:
   (a) in persuading Judge Zafrullah Khan to stand aside because of his earlier involvement as a representative of Pakistan to the General Assembly in debates on South-West Africa;[36]
   (b) in his use of the Presidential casting vote to overturn the 1962 majority;[37] and
   (c) in his attempt to muzzle dissent by proclaiming a restrictive role for separate opinions,[38] by asserting that, if a separate or dissenting opinion went outside the matters considered by the Court in its judgment, "it ceases to have any relationship" with the judgment and therefore "ceases to be an expression properly in the nature of a judicial expression of opinion" because "it is only through their relationship to the judgment that a judicial character is imparted to individual opinions".[39] This may have been directed at Judge Van Wyk's tendentious Opinion, but Judge Spender's own Separate Opinion in the *Interhandel* case[40] was open to the same objection as it dealt with the validity of the United States' automatic reservation and of the Declaration

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31 See Judge Shahabuddeen, *ibid,* at 124.
32 *Ibid,* at 132.
33 ICJ Rep 1966, p 6.
34 *South West Africa, Preliminary Objections, Judgment,* ICJ Rep 1962, p 319.
35 McWhinney E, *Judicial Settlement of International Disputes* (1991), p 19.
36 *Ibid,* p 18.
37 ICJ Rep 1966, p 6 at 51.
38 *Ibid,* at 51–57.
39 *Ibid,* at 57.
40 *Interhandel, Judgment,* ICJ Rep 1959, p 6.

containing it,[41] notwithstanding the fact that the issue was avoided by the Court in that case.

More recently may be cited the Court's inept handling of El Salvador's Application to Intervene in the *Nicaragua* case.[42] While the Application was open to criticism in not clearly identifying the link between its substance and the jurisdictional stage of the proceedings then pending, it was the height of folly not to allow El Salvador the opportunity of an oral hearing to clarify its position, particularly in light of the further written submissions it had made to the Court.[43] The outcome figured in the criticism of the Court made by the United States on its withdrawal from further participation in the case.[44]

This is not to suggest for one moment that there was anything underhand or which could remotely be regarded as improper about the decision in the *East Timor* case. All that can be asked is whether the Court might not have done more to explain that its invocation of the third party rule was not just a technical device to avoid considering the merits of the case, but was a cardinal principle in the exercise of jurisdiction by an international tribunal, and that there were other reasons why Australia was not answerable to Portugal before the Court.

Persuasion as an Indirect Consequence

There may be situations in which the purpose of initiating international litigation is not directly related to the prospect of *persuading* the tribunal of the correctness or validity of the claims of the State concerned.

It is arguable that Portugal's application to the Court in the *East Timor* case could not have been made on the basis of a cost/benefit analysis in which the chance of success was a significant element. The motives were more likely to have been linked to internal political considerations and to a wish to raise Portugal's profile internationally and in a more favourable light.

This is not to imply that there was any abuse of process involved in that case, any more than there was in New Zealand's attempt to reopen the *Nuclear Tests* case.[45] In the context of the times, the Court's decision of 20 December 1974[46] may have been the most successful outcome for which New Zealand could have hoped. By holding that France was bound by various unilateral assurances that it had given to conduct further tests underground, the Court secured an end to French atmospheric nuclear tests in the region.

There were a number of unusual features about the Court's judgment:

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41 *Ibid,* at 54–59.

42 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Declaration of Intervention, Order of 4 October 1984,* ICJ Rep 1984, p 215.

43 See Judge Schwebel, *ibid,* at 223 *et seq.*

44 See (1985) 24 ILM 246 at 247–48.

45 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case, Order of 22 September 1995,* ICJ Rep 1995, p 288.

46 *Nuclear Tests (New Zealand v France), Judgment,* ICJ Rep 1974, p 457.

1. The Court imposed its own limited interpretation on the substance of the claim as relating solely to French atmospheric tests,[47] even though the New Zealand case (unlike that of Australia) was framed in terms of nuclear tests in general.[48]
2. In addition, the New Zealand application,[49] even more clearly than that of Australia,[50] requested a determination as to the illegality of the tests that had already occurred.[51]
3. The decision was based upon the principle that the French undertakings were binding, but the Court did not canvass the existence or scope of the right of a declarant State to withdraw from such undertakings.

It was this last issue which the Court seemed to have in mind in paragraph 63 of its Judgment in which it left open the possibility of the Applicant States reopening the proceedings:

> Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for 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 a request.[52]

The attempt by New Zealand to reopen the case was not based upon a failure by France to honour the commitment about atmospheric testing, but upon the fact, dealt with in 1 above, that New Zealand's case in 1973–74 had been directed against all nuclear testing and not just against tests conducted in the atmosphere. What New Zealand had to do to stand any chance of success was to demonstrate that what had occurred by 1995 affected the basis of the 1974 Judgment, in light of the fact that the announced round of underground tests was but the latest in a series which had been conducted over a twenty years' period. According to Sir Geoffrey Palmer, sitting as an *ad hoc* judge in the case, New Zealand attempted to do so in two ways, by showing that:

> (a) the pertinent facts have changed increasing the risk of nuclear contamination;
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> [and]
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> (b) the state of international law had rapidly developed and progressed from the point it was at in 1974 so clarifying the standards to be applied to the dispute. [53]

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47 ICJ Rep 1974, p 457 at 467.
48 *Ibid,* at 460; and see also ICJ Rep 1995, p 288 at 325–26.
49 ICJ Rep 1974, p 457 at 460.
50 *Nuclear Tests (Australia v France), Judgment,* ICJ Rep 1974, p 253 at 256.
51 See the Joint Dissenting Opinion of Judges Onyeama, Dillard, de Arechaga and Waldock, at 312–21, 494–514.
52 ICJ Rep 1974, p 457 at 477.
53 ICJ Rep 1995, p 288 at 400.

With regard to (a) New Zealand was in a position of some difficulty in that it had, during those twenty years, failed to challenge the Court's limitation of the case to atmospheric tests and consequent acceptance of the French undertaking to test underground in the future as resolving the dispute. However, New Zealand could argue with some force that, in 1974, the Court would not have endorsed the continuation even of underground tests in that environment if it had been made aware of what is now known as to the dangers of contamination. Furthermore, the atolls (Mururoa and Fangutunfa) are "marine features"[54] which are unsuitable for the containment of the nuclear debris from the explosions for the half-life of the isotopes in question. Indeed, there is the strong likelihood that, on current theories with regard to global warming, the atolls will no longer be either French or territory at all in the course of the next century. Finally, even by 1974 it could be contended that the French activities in a marine environment were contrary to customary international law.[55]

It was in relation to (b), the rapid development of international environmental law since 1974, that the New Zealand submissions courted disaster. There was no reason why New Zealand could not have made the point about the current illegality of French actions as follows:

(i) It could have explained how international law has developed in order to establish the present illegality of France's activities. Even if the Court would have been most unlikely to have ruled on the conduct measured by the current law, New Zealand's political interests would have been served by demonstrating the wrongfulness of that conduct.

(ii) To avoid the impression that it was attempting to argue a new case, New Zealand could have employed the evidence of how the law has developed since 1974 as helping to clarify the stage which it had reached in 1973-74.

(iii) The final step would have been to show how the new scientific evidence led to the conclusion that underground testing was legally unacceptable even at that time.

Choosing to argue that the new evidence in (iii) demonstrated the present illegality of French conduct in (i) seemed almost inevitably to support the French contention that New Zealand was attempting to commence a new case and not simply to reopen the pre-existing one.

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54 The term "marine feature" was employed by Pakistan to describe the Rann of Kutch, an inland sea caused by salt water for more than half the year: see *Rann of Kutch* arbitration (1968) 50 ILR 2 at 31. The atolls could be regarded as "marine" both because of the extent to which sea water penetrated their substrata, but also because of their likely future submergence.

55 For example, see the General Assembly's Declaration of Principles Governing the Sea-Bed and Ocean Floor, and the Sub-Soil Thereof, beyond the Limits of National Jurisdiction 1970, GA Res 2749 (xxv), para 8, text in (1971) 10 ILM 220 at 221; Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof 1970, in (1971) 10 ILM 145 at 146; and the Provisional Draft Articles of a Treaty on the Use of the Sea-bed for Peaceful Purposes proposed by the Soviet Union in July 1971, Art 6(1), in (1971) 10 ILM 994 at 995.

Nevertheless, as already suggested, international litigation may have wider purposes than success in the particular case. Even in the absence of a favourable outcome, Court proceedings may help dissuade the adversary from continuing with allegedly wrongful conduct. The *persuasion* in such circumstances is of course less direct. *Persuasion* of the Court is not (necessarily) a major factor in the decision to bring the case.

In the *Nuclear Tests* cases of 1974, Australia and New Zealand succeeded in achieving a desired outcome, and this may have been a bonus to the pressure the proceedings helped generate against atmospheric nuclear pollution: even on an optimistic assessment, their chances of obtaining a determination of the illegality of atmospheric testing may, at that time, have seemed slim.

With regard to the *East Timor* case, it is hardly for Australia to calculate what benefits, if any, accrued to Portugal. The proceedings may, incidentally, have had the benefit for Australia that it deemed it expedient to declare its support for the right of the East Timorese people to self-determination, a step which may have seemed inconsistent with its earlier recognition of Indonesia's sovereignty over the territory *de jure*.[56]

For New Zealand, the attempt to reopen the *Nuclear Tests* case was designed, by giving the issue of French testing, even underground, of nuclear weapons in the Pacific an airing in a different forum, to support and publicise the widespread opposition in New Zealand and elsewhere to such tests. In so far as this contributed to the curtailing of the French testing programme, it must be regarded as a successful venture.

Conclusion

This paper has provided a survey of a number of factors which may affect the attitude of States towards the International Court and its jurisdiction. It has not, by any means, attempted to be exhaustive. For example, it has not considered the concern of many States that, by accepting the jurisdiction of the Court, they are relinquishing to the Court control over the determination of the legal principles to be applied to particular disputes. When a matter is settled by negotiation, the outcome could well involve a compromise as to the relevant law as well as to disputed facts, or even as to appropriate redress. A loss of control over what law is to be applied in a particular case has been a factor in the selection of a forum to decide disputes. Thus, while the International Court has obvious financial advantages to litigating States which, if they wished to submit a matter to arbitration, would have to defray the costs of establishing the tribunal, it might appear to have the disadvantage of comprising a proportion of judges with perceptions of international law which the States concerned might imagine are different from their own. However, in the *Gulf of Maine* case,[57] the

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56 The statement concerning Australia's recognition *de facto* of Indonesian control over East Timor on 20 January 1978 is given in "Australian Practice in International Law 1978–1980" (1983) 8 *Aust YBIL* 252 at 279; for those acknowledging Australia's recognition *de jure* of the situation on 15 December 1978 and 8 March 1979, see *ibid*, at 281–82.

57 *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Constitution of Chamber, Order of 20 January 1982*, ICJ Rep 1982, p 3.

United States and Canada avoided this potential problem by persuading the Court to accede to their own choice of judges to form a chamber of the Court.

Although this stratagem might well suit the States concerned, and this was especially so for the United States in view of its continuing prejudice towards the Court, it does raise questions as to the status of a decision handed down in these circumstances. The Statute of the Court is deficient in that, with respect to a chamber formed to adjudicate in a particular case, there is no provision dealing with the selection of judges, Article 26(2) simply requiring that the "number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties". While this provision does not preclude States from insisting upon their own choice of judges, it is arguable that the Court has certain responsibilities with regard to their selection. For instance, as a judgment given by a chamber of the Court is, by Article 27 of the Statute, to be "considered as rendered by the Court", one would have supposed that the Court should be in a position to insist that a chamber should, as far as possible, comply with the requirement imposed by Article 9 of the Statute on electors of members of the Court that the latter should be representative "of the main forms of civilisation and of the principal legal systems of the world".

The chamber in the *Gulf of Maine* case, as selected by the parties,[58] may to some extent have satisfied the latter criticism in that it included judges from both a civil law and common law background. However, it was established in disregard of the former requirement in that it comprised solely judges from a western legal tradition. It is therefore difficult not to sympathise with the sentiments expressed by Judge El-Khani in voting against the chamber's membership:

> I find that the imposition of a particular composition renders the Court no longer master of its own acts, deprives it of its freedom of choice and is an obstacle to the proper administration of justice. Furthermore it diminishes the prestige of the Court and is harmful to its dignity as the principal judicial organ of the United Nations. It results in its regionalisation by depriving it of its basic and essential characteristic of universality. [59]

As to the future of compulsory jurisdiction under Article 36(2) of the Court's Statute, most speakers at this Colloquium have adopted a positive and optimistic approach. This may perhaps be to misread the signs. There is an increasing trend towards the regulation by treaty of various areas of international activity and the institution in connection therewith of legal dispute settlement mechanisms. Thus, as one observer has written of international economic relations:

> In international trade organisations ... there is a continuing trend towards "legalisation" and "judicialisation" of dispute settlement procedures. As international relations are increasingly determined by economic relations, this change from power-oriented "diplomatic" to rule-oriented "legal" methods of

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58 The judges were (at *ibid*, 8–9) Gros, Ruda (to be replaced by the Judge *ad hoc* to be selected by Canada), Mosler, Ago and Schwebel. The chamber had an added peculiarity in that, by the time it sat, Judge Gros had been replaced by another French judge on the Court.

59 *Ibid*, at 12.

dispute settlement can be seen as a new stage in the development of international law. [60]

Where a compulsory form of binding adjudication is established among all the parties to a treaty, this has the great advantage of enabling a determination of contested legal issues to be made which is effective throughout the treaty regime. For example, if reservations to the treaty in question are allowed, but a particular reservation is challenged on the ground that it is incompatible with the object and purpose of the treaty, a decision by a tribunal, created to determine matters arising out of the interpretation or application of the treaty, that the reservation is or is not invalid will be equally binding on other parties to the treaty not directly involved in the dispute.[61] On the other hand, if there is no such mechanism, but the States involved in a dispute over the validity of a reservation are subject to the jurisdiction of the International Court with regard thereto, a determination of that issue by the Court would be of no legal effect as far as other parties to the treaty are concerned. The reason of course is that, by Article 59 of the Statute, a "decision of the Court has no binding force except between the parties and in respect of that particular case."

In terms of *persuasion*, there is little doubt that the expansion of international jurisdiction is more attractive to States through special mechanisms in regimes designed to promote co-operation in particular areas of activity than it is through the avenue of declarations bestowing competence on the Court under Article 36(2) of its Statute with regard to disputes in general. As far as the Court is concerned, States have, for the most part, not been persuaded by regular exhortations to have recourse to that body to resolve their disputes, nor have they been prevailed upon to accept in advance its jurisdiction for that purpose.[62] Possible *pride* in accepting the Court's compulsory jurisdiction in response to such exhortations is outweighed in part by *prejudice* towards the Court which is still prevalent. Where the need for definitive settlement procedures is sufficiently great, the preference may well be for some specialist tribunal.

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60 Petersmann E-U, "The Dispute Settlement System of the World Trade Organisation and the Evolution of the GATT Dispute Settlement System Since 1948" (1994) 31 *Common Market Law Review* 1157 at 1169.

61 For a consideration of what might constitute such a dispute settlement procedure within a treaty regime, see Greig DW, "Reservations: Equity as a Balancing Factor?" (1995) 16 *Aust YBIL* 21 at 90–107.

62 See the Report of the Secretary-General pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992. Boutros-Ghali B, *An Agenda for Peace: Preventative Diplomacy, Peacemaking and Peace-Keeping* of June 1992, A/47/277–S/24111, in which he proposed steps to reinforce the role of the Court that included a recommendation that all member States of the UN accept the jurisdiction of the Court without reservation before the end of the Decade of International Law in 1999 (UN Department of Public Information, *Yearbook of the United Nations* 1992, vol 46, p 986). Acting on this basis, the General Assembly, in Resolution 47/120B of 20 September 1993, encouraged States to make greater use of the Court and recommended that they accept the Court's jurisdiction, including by means of dispute settlement procedures in multilateral treaties (UN Department of Public Information, *Yearbook of the United Nations 1993*, vol 47, pp 1139–40).

For a mixture of reasons, the idea has been canvassed that the election of judges to the International Court should be limited to those having the nationality of States which have accepted the compulsory jurisdiction of the Court. Apart from the impossibility of gaining acceptance for such an amendment to the Statute which, by Article 69 of that instrument is subject to the requirements of Article 108 of the Charter,[63] the proposal seems misconceived for two principal reasons. In the first place, it can hardly be denied that all members of an organisation which requests an advisory opinion have an interest in the proceedings which makes an exclusion of persons from selection as judges on the ground that their State has not made a declaration under Article 36(2) totally inappropriate. Secondly, even with regard to the Court's contentious jurisdiction such an exclusion is inapposite as the majority of cases are submitted to the Court on the basis of the parties' agreement under Article 36(1) of the Statute, whether by special agreement or by some prior treaty arrangement.

Even if the Statute were to be amended along the lines suggested, the results might not be satisfactory. It would be an even more remote possibility that States would agree to unconditional acceptance of the Court's compulsory jurisdiction as a precondition to the eligibility of one of their nationals for election to membership of the Court. If the qualification for election was no more than that the State of nationality should have made a declaration under Article 36(2), the outcome would be predictable. In order not to preclude their nationals for selection, many States would accept the Court's jurisdiction in the narrowest terms. In other words, the practical effect of such an amendment to the Statute might be rather limited.[64]

As to Australia's attitude towards the Court, occasional rumblings of discontent have been expressed within the country at the unconditional acceptance of the Court's compulsory jurisdiction. This occurred in the period leading up to the Court's decision in the *East Timor* case from industry groups which saw no reason why access to "Australia's" continental shelf should be delayed by international litigation or even prevented by an adverse decision of

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63 According to Art 108:

> Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

64 Another fanciful idea could be proposed that would deter such a possibility and avoid limiting the eligibility of candidates for election. This would involve instead restricting the privilege of judges sitting in contentious cases to those from States the declarations of which would encompass the dispute before the Court. This might operate as some deterrent to the failure to make a declaration or to the making of a very limited one. There is more than a degree of unreality about such an idea, not least because it could well involve disputes about whether particular judges were entitled to sit on a particular case. All that can be said is that it is an unreality which permeates the very thought of limiting the eligibility of selection by reference to acceptance of the Court's compulsory jurisdiction.

the Court. In comparison with the outcome on the jurisdictional issues in the *Nauru* case, a judgment against Australia in *East Timor* would have been regarded as much more serious and would have resulted in some soul-searching over the advisability of rethinking the present declaration under Article 36(2) of the Statute. As it is, a record of won one, lost one, at least protects Australia from being relegated to the level of those States which have withdrawn their acceptances of the Court's compulsory jurisdiction.

In the final analysis, the attitude within Australia is probably reflective of views within the international community, though the balance may well be different. Within political circles in Australia, acceptance of the Court's jurisdiction is still presented as a matter of *pride*. There are occasional expressions of a feeling of *prejudice* against the acceptance of any international jurisdiction and therefore control over Australian policy in disputed areas. For the most part, that *prejudice* has been allayed by Australia's interest, as a medium sized power in economic and military terms, in the peaceful and non-confrontational settlement of its international disputes.

In the case of public opinion, as with some policy makers, it is all a matter of *persuasion*. Thus, a setback before the Court over an issue of importance could well shift the balance from *pride* to *prejudice*. At least one might hope that the decision in the *East Timor* case has ensured that such a shift will not occur in the immediate future.