to require a cash contribution where the setting aside of land would be undesirable or unnecessary and the reasons why the setting aside of land is unnecessary or undesirable are pertinent to the proper exercise of that discretion. Here, as evidence was given that the respondent Council did not intend to acquire any further reserves in its area, and as there was no evidence to say that proposals for developing existing reserves could not be financed out of general revenue, the Appeal Board held that this was a proper case where a cash contribution should not be required.

C. A. Mallon.

PUBLIC INTERNATIONAL LAW

Nuclear Tests Case (New Zealand v. *France)*

Perhaps no other recent issue involving international law has so sensitised opinion within and outside New Zealand and attracted such international commentary as the atmospheric nuclear testing programme undertaken by France in the South Pacific since 1966.

In 1963, prompted by the fact that its former base for conducting atmospheric nuclear tests, the Reggane Firing Ground in the Sahara Desert, was available only until July 1, 1967, the French Government decided to move its test centre to Mururoa Atoll in the Tuamotu Archipelago; the first series of tests in the atmosphere of this area was conducted between July and October 1966. Opposition to the French programme has been expressed by successive New Zealand Governments since the 1963 decision became known and official protests have been lodged in a series of diplomatic notes communicated to the French Ministry of Foreign Affairs, before the United Nations, at the Stockholm Conference on the Environment in 1972, at meetings of the South Pacific Forum and conferences of Pacific leaders, and most recently, during discussions in Paris involving the Deputy Prime Minister of New Zealand and representatives of the French Government. Quite apart from this variety of official action, other forms of protest, neither endorsed nor encouraged by New Zealand Governments, have been preferred by non-governmental organisations intent on evincing their opposition to the French programme.

On May 9, 1973, New Zealand lodged with the Registry of the International Court of Justice an Application instituting proceedings against France in respect of that country's nuclear testing programme in the South Pacific; on the same day Australia also lodged a similar Application. It was contended by New Zealand that France had violated the rights of all members of the international community and particularly those of New Zealand and of the territories — the Cook Islands, Niue and the Tokelau Islands — associated with the Applicant. In support of its Application New Zealand alleged that its monitoring

system had shown that after each series of tests New Zealand and the South Pacific Islands for which it is administratively responsible have been subjected both to tropospheric and stratospheric fall-out; accordingly, the International Court was asked to adjudge and declare that the conduct by the French Governmeant of nuclear tests in the South Pacific region giving rise to radioactive fall-out, constitutes a violation of New Zealand's rights under international law, and that these rights will be violated by further such tests.

On May 14, 1973, a Request from New Zealand for interim measures of protection — that France refrain from conducting any further nuclear tests while the case was before the Court — was filed at the Hague, pending the final decision of the International Court; this Request was supported by subsequent oral pleadings before the Court.

By the narow majority of 8 to 6 an Order was issued by the Court on June 22, 1973, indicating certain interim measures of protection: both the Governments of New Zealand and France were enjoined to ensure that no action be taken which might aggravate or extend the dispute or prejudice the rights of the other party in respect of the execution of whatever decision the International Court might render in the case; and, in particular, the Court indicated that the French Government should avoid nuclear tests causing the deposit of radioactive fall-out on the territory of New Zealand, the Cook Island, Niue or the Tokelau Islands.

An important point raised by the *Nuclear Tests Case (New Zealand* v. *France*), I.C.J. Reports 1973, p. 135, is whether the International Court of Justice is competent to make an order for provisional measures of protection without first deciding upon whether it has jurisdiction. New Zealand claimed that the Court had jurisdiction by virtue of Article 17 of the General Act for the Pacific Settlement of International Disputes, concluded under the auspices of the League of Nations in 1928, read together with Articles 36 (1) and 37 of the Statute of the International Court of Justice, and by virtue of Article 36, paragraphs (2) and (5) of the same Statute. France, however, indicated that it considered the General Act no longer in force and that its acceptance of the compulsory jurisdiction of the International Court under Article 36 (2) was excepted in the present case because the French Government had made a reservation to this acceptance, excluding the jurisdiction of the Court in respect of "disputes concerning activities concerned with national defence."

The Court declined to finally conclude that the General Act is still in force and examined the request for the indication of interim measures only in the context of Article 41 of the Statute. The view was taken by the majority that it was not necessary for the Court, before indicating interim measures, to finally satisfy itself that it has jurisdiction on the merits of the case, it being sufficient to satisfy itself that the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded. In the result, it could

not be assumed a priori that New Zealand's claims fell outside the purview of the Court's jurisdiction.

Interim measures of protection have been indicated by the Court in previous instances; in the *Anglo-Iranian Oil Co. Case (United Kingdom* v. *Iran),* I.C.J. Reports 1951, p. 89, the Court made an order for provisional measures in spite of an objection to its jurisdiction, as it did in both the *Fisheries Jurisdiction Case (United Kingdom* v. *Iceland),* I.C.J. Reports 1972, p. 12, and the *Fisheries Jurisdiction Case (Federal Republic of Germany* v. *Iceland,* I.C.J. Reports 1972, p. 30. Most recently, the question has come before the International Court in a decision given since the *Nuclear Tests Case (New Zealand* v. *France)* (supra) when Pakistan instituted proceedings before the Court in respect of India's alleged intention to hand over to Bangladesh for trial for genocide Pakistani nationals taken prisoner of war by India in 1971, and requested interim measures of protection. As Pakistan had asked the Court to postpone consideration of its request for interim measures, the Court adopted the view that it could no longer treat the request as a matter of urgency and was accordingly not called on to pronounce upon it: *Prisoners of War Case (Pakistan* v. *India),* I.C.J. Reports 1973, p. 328. Similarly, in the only other instance where a request for the indication of interim measures has been refused, the Court appears to have emphasised the element of urgency as a prerequisite for the granting of an order: *Interhandel Case (Switzerland* v. *United States of America),* I.C.J. Reports 1957, p. 105.

Judge Petren, one of the four dissenting judges who set forth their opinions, considered that the International Court of Justice, like any other court, must ensure as far as possible that it possesses jurisdiction before undertaking the examination of the merits of the case, and he was unable to accept the interpretation that it is only when the absence of jurisdiction is manifest that the Court ought not to indicate provisional measures. Judge Gros also disagreed with the majority, being of the view that both parties have a right to a proper and serious examination of the jurisdiction of the Court, and that the Court, in cases where jurisdiction is not evident, should proceed without undue delay to such an examination. Jurisdiction also appeared to Judge Forster to be a matter of absolute priority and he thus declined to adopt the majority opinion on the ground that the Court should have satisfied itself that it really had jurisdiction and should not have contented itself with a mere probability. The remaining judge who appended a dissenting opinion to the Order of the Court, Judge Ignacio-Pinto, based his opposition to the indication of interim measures on the same considerations he expounded in the *Nuclear Tests Case (Australia* v. *France),* I.C.J. Reports 1973, p. 99; the Court should have rejected New Zealand's Request, and, in making the Order, it had exceeded its competence; he also added that his conviction that the *Nuclear Tests Case (Australia* v. *France)* (supra) was political in character was confirmed in the present case.

Although the Government of France was informed that the International Court would hold public hearings to afford it

the opportunity to present observations on the New Zealand Request, the French Government stated that it considered that the Court was manifestly not competent in the case, refused to appoint an agent and requested the Court to remove the case from its list. But failure to appear and present formal submissions on the part of France did not constitute a bar to the issuance of provisional measures, since Article 53 of the Statute of the International Court of Justice provides that, in the case of the non-appearance of one of the parties before the Court or failure to defend the case, the other party is entitled to call upon the Court to decide in favour of its claim provided that the Court, before doing so, satisfies itself not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well-founded in fact and in law. In the *Fisheries Jurisdiction Cases* (supra) the Court observed that the non-appearance of one of the states concerned cannot, by itself, constitute an obstacle to the granting of interim measures of protection provided that the parties have been afforded the opportunity of presenting their observations on the subject.

It is with great interest that the decision of the Court on the merits of the case is awaited.

R. Ah Keni.

TAXATION AND ESTATE PLANNING

Assignments of income

Two recent decisions, one in the Supreme Court and one in the Court of Appeal, will have an important effect on tax considerations. For practical purposes the more important decision was that of Cooke J. in *James* v. *Commissioner of Inland Revenue* [1973] 2 N.Z.L.R. 119. Because of its fact situation the case is of special importance: it concerned particularly an interest-free loan, repayable on demand, and the effect of this as a settlement which came within s. 105 (2) Land and Income Tax Act 1954. This section provides in effect that where, by the terms of any settlement (which includes any disposition, trust, covenant, agreement, arrangement or transfer of assets — s. 105 (4)) the income of the settled property is payable to, or applied or accumulated for, the benefit of any person for less than the prescribed period and the settlor remains the beneficial owner of the corpus, or the settlement provides that the corpus shall revert to or remain under the control of the settlor, the income from the settled property shall be deemed to be derived by the settlor. The prescribed period for most cases is seven years, or where infants are involved, the duration of their minority.

The facts, briefly, were these: James, the taxpayer, sold his farm to a company, of which he, his wife and the trustees of a family trust were directors; the family trust was created at the same time as the company. The money from the sale