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## International Court of Justice

### **New Zealand's Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's 1974 Judgment in the *Nuclear Tests Case (New Zealand v France)***

On 22 September 1995 the International Court of Justice (ICJ) delivered its Order dismissing the case brought by New Zealand against France over French proposals to conduct a series of eight underground nuclear weapons tests at Mururoa and Fangataufa Atolls in the South Pacific starting in September 1995. The action raised by New Zealand, stemming as it did from concerns that the proposed tests would adversely affect the marine environment by way of radioactive pollution, was an attempt to have the ICJ re-open the *Nuclear Tests Case* involving the parties, instigated by New Zealand in 1973.<sup>1</sup>

In bringing the 1995 action, New Zealand argued that para. 63 of the ICJ's Judgment rendered on 20 December 1974 provided for the continuation of the action at a later date if the basis of the 1974 decision was affected by subsequent French actions. On 13 June 1995, President Chirac announced to the media that France intended to undertake a programme of nuclear weapons tests in the region. This, New Zealand submitted, affected the basis of the ICJ's decision of 1974 thereby permitting that case to be re-opened. Some explanation of the Nuclear Tests Case is required as background to the new Request.

The Judgment of the ICJ in the case of *New Zealand v France* given on 20 December 1974<sup>2</sup>

The action raised by the New Zealand Government on 9 May 1973 sought a determination from the ICJ to the effect that the conduct by the French

<sup>1</sup> *Nuclear Tests Case (New Zealand v France)* ICJ Rep. [1974] 457. New Zealand's concern was based, to a large extent, on the use of atolls for the tests, given the possible threat to the marine environment. New Zealand states in its Request to the ICJ: "the South Pacific sites used by France are quite unlike any of the other sites that have been used for the conduct of underground nuclear explosions. Unlike a continental land mass or other oceanic islands which have been used for underground testing, coral atolls such as Mururoa and Fangataufa are an integral part of their surrounding marine environment. Water passes from the ocean into the atoll, including its central core, and from the atoll into the ocean." New Zealand Request, n. 3 below, p. 24, para. 51.

<sup>2</sup> *Ibid.*

Government of nuclear tests in the South Pacific region which gave rise to radioactive fall-out constituted a violation of New Zealand's rights under international law and that these rights would be violated by any further tests.<sup>3</sup> No final decision was reached by the ICJ. In the course of 1974 the French authorities made a number of undertakings which the ICJ interpreted as being tantamount to legally binding commitments not to carry out further *atmospheric*<sup>4</sup> nuclear tests.

The ICJ concluded that "the objective of the Applicant has in effect been accomplished, in as much as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific".<sup>5</sup> Accordingly, as New Zealand no longer had an object in the case the ICJ declared, by nine votes to six, that it was not called upon to give a decision.<sup>6</sup>

The Court did, however, make a proviso in para. 63 of its Judgment and it is on the basis of this paragraph that New Zealand raised the recent action. Paragraph 63 runs as follows:

"63. 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."<sup>7</sup>

The ICJ left open the possibility that New Zealand might successfully request a resumption of the case in the event that France subsequently failed to comply with its undertakings regarding atmospheric testing thereby "affecting" the "basis" of the Judgment.

### The Basis of New Zealand's Request of 21 August 1995

New Zealand's Request was based upon its interpretation of para. 63 of the earlier Judgment. It stated that the rights for which it sought protection all fell

<sup>3</sup> *Ibid.* See also ICJ Pleadings, Nuclear Tests, vol. 2, p. 3. This is referred to in New Zealand's Request for an Examination of the Situation, submitted to the International Court of Justice, 21 August 1995, p. 5.

<sup>4</sup> Emphasis added. See *Nuclear Tests Case, op. cit.*, n. 1, pp. 474-475, paras. 53 and 54. The restriction of France's commitment to atmospheric testing proved crucial to the Court's Order in the present case as will be illustrated below.

<sup>5</sup> *Nuclear Tests Case, op. cit.*, n. 1, pp. 475, para. 55.

<sup>6</sup> *Ibid.* pp. 475-477. For a discussion of this see also New Zealand's Request, *op. cit.*, n. 3, pp. 10-11.

<sup>7</sup> *Nuclear Tests Case, op. cit.*, n. 1, p. 477.

within the scope of the rights invoked in its Application of 1973 and that, even within this context, it only sought recognition of those rights which would be adversely affected by entry into the marine environment of radioactive material as a result of further tests to be carried out at Mururoa or Fangataufa Atolls together with recognition that it was entitled to protection and to the benefit of a properly conducted Environmental Impact Assessment.<sup>8</sup>

New Zealand requested the ICJ to adjudge and declare:

“(i) that the conduct of the proposed nuclear tests will constitute a violation of the rights under international law of New Zealand, as well as of other States; further or in the alternative;

(ii) that it is unlawful for France to conduct such nuclear tests before it has undertaken an Environmental Impact Assessment according to accepted international standards. Unless such an assessment establishes that the tests will not give rise, directly or indirectly, to radioactive contamination of the marine environment the rights under international law of New Zealand, as well as the rights of other States, will be violated.”<sup>9</sup>

In addition to the foregoing New Zealand also requested provisional measures, as follows:

“(1) that France refrain from conducting any further nuclear tests at Mururoa and Fangataufa Atolls;

(2) that France undertake an Environmental Impact Assessment of the proposed nuclear tests according to accepted international standards and that, unless the assessment establishes that the tests will not give rise to radioactive contamination of the marine environment, France refrain from conducting these tests;

(3) that France and New Zealand ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decisions the Court may give in this case.”<sup>10</sup>

### ICJ Decision of 22 September 1995

The ICJ, in reaching its decision, confined itself to the question *in limine*: “Do the Requests submitted to the Court by the Government of New Zealand on 21 August 1995 fall within the provisions of para. 63 of the Judgment of the Court of 20 December 1974 in the case concerning Nuclear Tests (*New Zealand v France*)?”<sup>11</sup> Referring to the wording of para. 63<sup>12</sup> the ICJ considered that within

<sup>8</sup> New Zealand's Request, *op. cit.*, n. 3, p. 57.

<sup>9</sup> *Ibid.*, p. 58. See the discussion of the precautionary principle below, esp. ff. 26–28.

<sup>10</sup> International Court of Justice Communiqué No. 95/29 bis of 22 September 1995, p. 2.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Nuclear Tests Case*, *op. cit.*, n. 1, p. 477.

this question there were two separate queries to be answered. The first was: what procedure was foreseen by the ICJ in para. 63 when it stated that “the Applicant could request an examination of the situation in accordance with the provisions of the Statute”? The second was: had the “basis” of the 1974 Judgment been “affected” by the French proposals to undergo a course of nuclear tests?<sup>13</sup>

*The ICJ Decision of 1974: Scope for “Special Procedure”?*

With regard to the first question the ICJ was required to decide whether or not para. 63 permitted a “special procedure” which could in effect lead to the re-opening of the 1973 action. France argued before the ICJ that New Zealand’s Request was subject to compliance with the “provisions of the Statute” as stated in para. 63 itself. Accordingly, New Zealand could only make either, (a) a request for interpretation or revision of the earlier decision, or (b) a new Application which, in the French view, would be “out of the question”.<sup>14</sup>

New Zealand, on the other hand, argued that para. 63 “is a mechanism enabling the continuation or the resumption of the proceedings of 1973 and 1974 . . . The Court foresaw that the course of future events might in justice require that New Zealand should have that opportunity to continue its case, the progress of which was stopped in 1974. And to this end the Court authorized these derivative proceedings . . . the presentation of a Request for such an examination is to be part of the same case and not of a new one.”<sup>15</sup> Contrary to the French view, therefore, New Zealand was not seeking either an interpretation of the 1974 Judgment under Article 60 of the Statute, nor a revision of that Judgment under Article 61.

The ICJ agreed with New Zealand that the term “in accordance with the provisions of the Statute” in para. 63 could not have been intended to limit New Zealand’s procedural entitlements to legal procedures expressly provided for under the Statute, such as the filing of a new application, a request for an interpretation or a request for revision. The ICJ had not excluded a “special procedure” in the event that the circumstances set out in para. 63 had occurred, i.e. circumstances which “affected” the “basis” of the Judgment.

*Was the basis of the 1974 Judgment affected?*

The ICJ made it clear that the “special procedure” enabling the 1973 action to be continued depended entirely upon whether circumstances affecting the basis of the Judgment of 20 December 1974 had arisen. This proved to be the crux of the matter. The logical process was to define what the “basis” of the 1974 decision was. In making its decision in 1974 the ICJ had found that “for purposes of the Application, the New Zealand claim is to be interpreted as applying only to atmospheric tests, not to any other form of testing, and as applying only to

<sup>13</sup> International Court of Justice Communiqué, *op. cit.*, n. 10, p. 3.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

atmospheric tests so conducted as to give rise to radioactive fall-out on New Zealand territory."<sup>16</sup>

The reference in the earlier Judgment to *atmospheric* tests proved crucial. The ICJ in 1995 concluded that in 1974 it had addressed the question of whether New Zealand, in its application, might have had broader objectives than the cessation of atmospheric nuclear tests.<sup>17</sup> This possibility, however, had not formed part of the Judgment and so the ICJ in 1995 could not re-address this question since its sole task was an analysis of the basis of the 1974 Judgment. This had dealt exclusively with France's undertaking not to conduct any further atmospheric nuclear tests. Only if France had resumed nuclear testing in the atmosphere would the basis of the Judgment have been affected and as this was not the case New Zealand's Request did not fall within the provisions of para. 63. The Request was consequently dismissed by twelve votes to three.

Finally the ICJ also dismissed New Zealand's request for provisional measures. Also refused were applications for permission to intervene submitted by Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia together with declarations of intervention made by the last four states, all of which proceedings were incidental to New Zealand's main request.

### Dissenting Opinions

Three judges dissented from the majority decision<sup>18</sup> and, although they issued separate judgments, a common argument runs through their opinions, namely that the ICJ's perspective on the "basis" of the 1974 Judgment was unduly restrictive considering that the proposal by France to conduct underground nuclear tests would result in nuclear contamination or radioactive fall-out. Further, New Zealand's action of 1973 was based on the dangers of nuclear testing of whatever kind and similar dangers would result from either underground or atmospheric testing. Accordingly, the "basis" of the 1974 Judgment had been affected.<sup>19</sup>

This line of argument mirrored the submission made by New Zealand in its

<sup>16</sup> *Ibid.*, pp. 3–4. See also *Nuclear Tests Case*, *op. cit.*, n. 1, p. 466, para. 29.

<sup>17</sup> The ICJ also took into account the Communiqué issued by the office of the French President on 8 June 1974 intimating that France now proposed to move to a programme of underground testing. The important section reads: "in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed." *Nuclear Tests Case*, *op. cit.*, n. 1, p. 469. New Zealand referred to this in its 1995 submission to support its case. The ICJ in giving Judgment in 1974, New Zealand argued, had been aware of this French statement of intent and yet "it did not specifically state that underground testing would end the dispute absolutely." *New Zealand Request*, *op. cit.*, n. 3, p. 34.

<sup>18</sup> Judge Weeramantry, Judge Koroma and Judge *ad hoc* Sir Geoffrey Palmer.

<sup>19</sup> See the three dissenting opinions generally as summarized in the International Court of Justice Communiqué, *op. cit.*, n. 10, Annex pp. 2–3.

Request. New Zealand argued that the only type of testing carried out by France in the South Pacific prior to the 1973 action was atmospheric. New Zealand's statements at the time evidenced a primary concern with fall-out. Therefore, the ICJ had "matched" the French undertaking with New Zealand's primary concern, namely fall-out from atmospheric testing. In its submission of 1995 New Zealand called for recognition that times had changed: "Had the Court realised in 1974 that a shift to underground testing would raise the same concerns, then, doubtless, the 'matching' would not have been made."<sup>20</sup> The ICJ had no evidence of the detrimental effects of underground testing in 1974 and so thought the match to be adequate. Now evidence of that kind was to hand and, accordingly, the basis of the earlier judgment had been affected.<sup>21</sup>

New Zealand presented a wide range of scientific evidence to illustrate the dangers of underground testing and, in particular, the possible ramifications for the atmosphere.<sup>22</sup> In addition it pointed to French admissions of radioactive releases resulting from previous tests<sup>23</sup> as well as French recognition that in 1979 a nuclear device, being tested in the South Pacific and having become stuck in the detonation shaft, had to be detonated at less than the intended depth.<sup>24</sup> This evidence was in the end not considered by the ICJ which did not address any arguments beyond the procedural basis of New Zealand's Request.

### The Precautionary Principle

In his dissenting Opinion, Judge Weeramantry expressed regret that the ICJ had not availed itself of the opportunity to consider the precautionary principle.<sup>25</sup> This statement was presumably in response to New Zealand's Request which called upon the ICJ to apply the principle.

The status of the precautionary principle in international law is not precisely defined.<sup>26</sup> New Zealand, in an attempt to explain its effect, argued in its

<sup>20</sup> New Zealand Request, *op. cit.*, n. 3, p. 11. See also p. 35.

<sup>21</sup> In support of its contention that the type of tests was not the issue in the earlier case, New Zealand cited its submission to the ICJ in 1973 which reads: "New Zealand asks the Court to adjudge and declare: that the conduct by the French Government of nuclear tests in the South Pacific . . . constitutes a violation of New Zealand's rights under international law", *Nuclear Tests Case op. cit.*, n. 1, p. 460 (also cited in New Zealand's Request, *op. cit.*, n. 3, p. 32). In other words there was no specific reference to *atmospheric* nuclear tests.

<sup>22</sup> New Zealand Request, *op. cit.*, n. 3, pp. 12-33. See also N. Grief, "Nuclear Tests and International Law", in I. Pogany (ed.), *Nuclear Weapons and International Law* (1987), pp. 236-237.

<sup>23</sup> New Zealand Request, *op. cit.*, n. 3, p. 17.

<sup>24</sup> *Ibid.*, p. 26 citing *Les Atolls de Mururoa et de Fangataufa (Polynésie Française)*, Vol. 2: *Les expérimentations nucléaires effets mécaniques, lumino-thermiques, électromagnétiques*, J. Bouchez and R. Lecomte (May 1995), p. 93.

<sup>25</sup> International Court of Justice Communiqué, *op. cit.*, n. 10, Annex p. 2-3. Similarly he regretted that the ICJ had not examined the intergenerational principle relating to the rights of future generations.

<sup>26</sup> A full discussion of the emergence of the precautionary principle in international law is outwith the scope of this note. For an explanation of it see generally, D. Freestone, "The Precautionary

submission that, "in situations that may possibly be significantly environmentally threatening, the burden is placed upon the party seeking to carry out the conduct that could give rise to environmental damage to prove that that conduct will not lead to such a result."<sup>27</sup> This assertion that the precautionary principle in effect reverses the normal burden of proof has been described as its strongest formulation and is not necessarily the accepted interpretation of the principle in international law.<sup>28</sup>

New Zealand, advancing the precautionary principle, argued that before France could carry out underground nuclear tests leading to deposit and storage of radioactive wastes near the marine environment "it must provide evidence that the tests will not result in the introduction of any radioactive material to that environment". An obligation which would require the carrying out of a full Environmental Impact Assessment in accordance with international standards.<sup>29</sup>

Contrary to the opinion of Judge Weeramantry, however, the majority interpretation of para. 63 of the 1974 Judgment led the ICJ to the conclusion that a *prima facie* case had not been established by New Zealand, thus precluding examination of this and other moot points.

### Conclusion

This case breaks new ground in the acceptance by the ICJ that it had created, in its 1974 Judgment, scope for a special procedure not necessarily provided for expressly in the Statute.<sup>30</sup> By including para. 63 in its earlier Judgment, the ICJ had, New Zealand submitted "exercised inherent powers to preserve its jurisdiction in appropriate circumstances".<sup>31</sup> The ICJ appears to accept that this is the case despite deciding that in this instance the procedure does not apply. The case also highlights the increasing demands in international environmental law for both the application of the precautionary principle and for Environmental Impact Assessments to be carried out where activities are planned which

*cont.*

Principle", in R. Churchill and D. Freestone (ed.), *International Law and Global Climate Change* (1991) and Sands, *Principles of International Environmental Law*, vol. 1, 1995.

<sup>27</sup> New Zealand Request, *op. cit.*, n. 3, p. 53-54.

<sup>28</sup> David Freestone is of the view that the burden imposed by the principle is not quite as onerous as this: "It appears . . . that existing international law requires alertness, precaution and effort going beyond simple prevention where there is a 'significant risk' of extraterritorial harm." This is not a reversal of the burden of proof. None the less, it seems that, in a situation where environmental harm is reasonably foreseeable, investigations as to whether or not harm is likely are required: "This must include investigation within the context of the principle of sustainable development of possible environmental impacts, prior notification of planned activities to states concerned and exchange of environmental information": *op. cit.*, n. 26, p. 31.

<sup>29</sup> New Zealand Request, *op. cit.*, n. 3, p. 55. The need for this "investigation" was highlighted, New Zealand contended, by environmental dangers such as those referred to at n. 23 and n. 24 above. See also New Zealand Request, *op. cit.*, n. 3, p. 36.

<sup>30</sup> International Court of Justice Communiqué No. 95/29 of 22 September 1995.

<sup>31</sup> New Zealand's pleadings before the ICJ, Public Sitting, 11 September 1995, No. CR 95/19, p. 47.



may be environmentally dangerous.<sup>32</sup> The common theme in these demands is for *prior* assessment where these risks arise. Again, however, in spite of the emphasis given in New Zealand's pleadings to the legal requirement of prior assessment, the procedural basis of the ICJ's decision precluded a full analysis of this argument.

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<sup>32</sup> See generally New Zealand's pleadings before the ICJ, Public Sitting, 12 September 1995, No. CR 95/20, esp. pp. 24–38. In particular, on the growing requirement for Environmental Impact Assessments in international law, New Zealand referred to the United Nations Convention on the Law of the Sea 1982, Art. 205; the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986 (“the Noumea Convention”), Art. 16 and the Rio Declaration of 1992, Principle 17. The precautionary principle is referred to throughout New Zealand's pleadings but see esp. CR 95/20, pp. 8–24. Again there is a reference to the Rio Declaration, Principle 15 at p. 21.