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Cour internationale
de Justice
LA HAYE

International Court
of Justice
THE HAGUE

ANNEE 1995

Séance publique

tenue le lundi 11 septembre 1995, à 15 h 30, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

Demande pour un examen de la situation au titre du paragraphe 63 de l'arrêt rendu par la Cour en 1974 dans l'affaire des Essais nucléaires (Nouvelle-Zélande c. France)

COMPTE RENDU

YEAR 1995

Public sitting

held on Monday 11 September 1995, at 3.30 p.m., at the Peace Palace,

President Bedjaoui presiding

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

VERBATIM RECORD

Présents :

M. Bedjaoui, Président
M. Schwebel, Vice-Président
MM. Oda
Guillaume
Shahabuddeen
Weeramantry
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin
Mme Higgins, juges

Sir Geoffrey Palmer, juge *ad hoc*

M. Valencia-Ospina, Greffier

	Present:	President	Bedjaoui
Vice-President	Schwebel		
Judges	Oda		
	Guillaume		
	Shahabuddeen		
	Weeramantry		
	Ranjeva		
	Herczegh		
	Shi		
	Fleischhauer		
	Koroma		
	Vereshchetin		
	Higgins		
Judge *ad hoc*	Sir Geoffrey Palmer		
Registrar	Valencia-Ospina		

Le Gouvernement de Nouvelle-Zélande est représenté par :

L'honorable Paul East, QC, député, *Attorney-General* de la Nouvelle-Zélande,

comme agent et conseil,

M. Don MacKay, conseiller juridique du ministère des affaires étrangères et du commerce extérieur de la Nouvelle-Zélande,

comme coagent et conseil,

S. Exc. Mme Hilary A. Willberg, ambassadeur de Nouvelle-Zélande aux Pays-Bas,

comme coagent,

M. J. McGrath, QC, Solicitor general de la Nouvelle-Zélande,

Sir Kenneth Keith QC, membre du Barreau de la Nouvelle-Zélande, président de la Commission du droit de la Nouvelle-Zélande,

M. le Professeur Elihu Lauterpacht, CBE, QC, directeur du Centre de recherche en droit international et professeur honoraire de droit international à l'Université de Cambridge,

Mme Victoria Hallum, juriste, ministère des affaires étrangères et du commerce extérieur de la Nou

comme conseils.

The Government of New Zealand is represented by:

The Honourable Mr. Paul East QC, Attorney-General of New Zealand,

as Agent and Counsel,

Mr. Don MacKay, Legal Adviser of the New Zealand Ministry of Foreign Affairs and Trade,

as Co-Agent and Counsel,

Her Excellency Mrs. Hilary A. Willberg, Ambassador of New Zealand to the Netherlands

as Co-Agent

Mr. John McGrath QC, Solicitor-General of New Zealand,

Sir Kenneth Keith QC, of the New Zealand Law Bar, President, New Zealand Law Commission,

Professor Elihu Lauterpacht CBE, QC, Director of the Research Centre for International Law and Honorary Professor of International Law, University of Cambridge,

Ms Victoria Hallum, Legal Officer of the New Zealand Ministry of Foreign Affairs and Trade,

as Counsel.

Le Gouvernement de la République française est représenté par :

M. Marc Perrin de Brichambaut, conseiller d'Etat, directeur des affaires juridiques au ministère des affaires étrangères,

Sir Arthur Watts,

M. le professeur Pierre-Marie Dupuy,

M. le professeur Alain Pellet,

Mme Marie-Reine D'Haussy,

M. Christian Bernier,

M. Jean-Michel Favre,

M. Caristan,

M. Chevallier,

M. Corion,

M. Rochereau.

The Government of the Republic of France is represented by:

Mr. Marc Perrin de Brichambaut, Director of Legal Affairs at the French Ministry of Foreign Affairs,

Sir Arthur Watts,

Professor Pierre-Marie Dupuy,

Professor Alain Pellet,

Mrs. Marie-Reine D'Haussy,

Mr. Christian Bernier,

Mr. Jean-Michel Favre,

Mr. Caristan,

Mr. Chevallier,

Mr. Corion,

Mr. Rochereau.

Le PRÉSIDENT : Veuillez vous asseoir. La séance est ouverte. Comme je l'ai indiqué en ouvrant la séance précédente, la présente séance a pour objet de permettre à la Nouvelle-Zélande et à la France de faire connaître leurs vues sur certaines questions relatives aux «demandes» présentées par la Nouvelle-Zélande à la Cour le 21 août dernier.

Ce jour-là, la Nouvelle-Zélande a déposé au Greffe deux documents, l'un intitulé «Demande d'examen de la situation» et l'autre «Nouvelle demande en indication de mesures conservatoires».

Le premier document se réfère à la déclaration faite par le Président de la République française aux médias le 13 juin dernier, selon laquelle «la France procéderait à une dernière série de huit essais d'armes nucléaires dans le Pacifique Sud commençant en septembre 1995». Le document néo-zélandais précise que, si le projet d'action annoncé par la France se réalise, celui-ci «remettra en cause le fondement de l'arrêt rendu par la Cour le 20 décembre 1974 dans l'affaire des *Essais nucléaires (Nouvelle-Zélande c. France)*». Le document rappelle qu'au terme de cet arrêt de 1974, la Cour avait décidé qu'il n'y avait pas lieu de statuer sur la demande qui lui avait été soumise par la Nouvelle-Zélande en 1973. La Cour avait en effet considéré que cette demande était devenue sans objet du fait des déclarations assorties d'effets juridiques contraignants par lesquelles la France s'était engagée à ne pas procéder à de nouveaux essais nucléaires dans l'atmosphère. Le document néo-zélandais rappelle toutefois aussi que la Cour avait inclus dans le même arrêt de 1974 un paragraphe 63 pour le cas, expose-t-il, où

> «la France cesserait éventuellement par la suite de se conformer à ses engagements relatifs aux essais dans l'atmosphère ou que l'un des fondements de l'arrêt vienne à cesser d'être applicable».

Le paragraphe 63 de l'arrêt du 20 décembre 1974 se lit comme suit :

> «Dès lors que la Cour a constaté qu'un Etat a pris un engagement quant à son comportement futur, il n'entre pas dans sa fonction d'envisager que cet Etat ne le respecte pas. La Cour fait observer que, si le fondement du présent arrêt était remis en cause, le requérant pourrait demander un examen de la situation conformément aux dispositions du Statut; la dénonciation par la France, dans une lettre du 2 janvier 1974, de l'Acte général pour le règlement pacifique des différends internationaux, qui est invoqué comme l'un des fondements de la compétence de la Cour en l'espèce, ne saurait en soi faire obstacle à la présentation d'une telle demande.»

Le Gouvernement néo-zélandais souligne dans son document que la «demande d'examen de la situation» qu'il contient est présentée au titre du «droit» que ce paragraphe accorde à la

Nouvelle-Zélande, dans le cas prévu, de solliciter la «reprise de l'affaire introduite par la requête du 9 mai 1973». Au terme dudit document, il est affirmé que les droits dont la Nouvelle-Zélande demande la protection «entrent tous dans le cadre des droits invoqués par la Nouvelle-Zélande au paragraphe 28 de sa requête de 1973» dans l'affaire des *Essais nucléaires*, mais que, pour le moment, «la Nouvelle-Zélande demande seulement la reconnaissance des droits qui seraient affectés de façon préjudiciable par la pénétration dans le milieu marin de substances radioactives en conséquence des nouveaux essais qui doivent être effectués aux atolls de Mururoa et de Fangataufa, et de son droit à une protection et à bénéficier d'une évaluation correctement réalisée de l'impact sur l'environnement». La Nouvelle-Zélande prie la Cour de dire et juger :

«i) que la réalisation des essais nucléaires envisagés constituera une violation des droits de la Nouvelle-Zélande, ainsi que d'autres Etats, au regard du droit international;

en outre et subsidiairement;

ii) que la France n'a pas le droit d'effectuer de tels essais nucléaires avant d'avoir procédé à une évaluation de l'impact sur l'environnement conformément à des normes internationales reconnues. Les droits de la Nouvelle-Zélande, ainsi que d'autres Etats, au regard du droit international, seront enfreints si cette évaluation ne démontre pas que les essais ne provoqueront, directement ou indirectement, aucune contamination radioactive du milieu marin.»

Ce premier document de la Nouvelle-Zélande était accompagné d'une lettre de l'ambassadeur de Nouvelle-Zélande aux Pays-Bas informant le Greffier, d'une part, de la désignation par la Nouvelle-Zélande d'un agent et de deux coagents et, d'autre part, de la démission du très honorable sir Garfield Barwick, juge *ad hoc* désigné par la Nouvelle-Zélande en 1973, et de la désignation, pour le remplacer, du très honorable sir Geoffrey Palmer.

Dans le second document déposé par la Nouvelle-Zélande le 21 août 1995, il est notamment fait référence à la «Demande d'examen de la situation» dont il vient d'être question, ainsi qu'à l'ordonnance en indication de mesures conservatoires rendue par la Cour le 22 juin 1973. Les «nouvelles mesures conservatoires» énoncées ci-après y sont demandées «à titre prioritaire et vu l'urgence», en application des articles 33 de l'Acte général du 26 septembre 1928 que j'ai cité tout à l'heure et 41 du Statut de la Cour :

«1) que la France s'abstienne de procéder à de nouveaux essais nucléaires aux atolls de Mururoa et de Fangataufa;

2) que la France procède, à l'égard des essais nucléaires auxquels elle se propose de procéder, à une évaluation de l'impact sur l'environnement conforme aux normes internationales reconnues et que la France s'abstienne de procéder à ces essais, si cette évaluation ne démontre pas que ces essais ne provoqueront aucune contamination radioactive du milieu marin;

3) que la France et la Nouvelle-Zélande veillent à ce qu'aucune mesure ne soit prise qui soit susceptible d'aggraver ou d'étendre le différend soumis à la Cour, ou de porter atteinte aux droits de l'autre Partie pour ce qui est de mettre en œuvreles décisions que la Cour pourra prendre en l'espèce».

Au terme de ce document, la Nouvelle-Zélande «prie par ailleurs le Président de la Cour d'exercer les pouvoirs qu'il tient du Règlement, en attendant que la Cour exerce ses propres pouvoirs».

Ce second document était accompagné de deux lettres, l'une du ministre des affaires étrangères de Nouvelle-Zélande, et l'autre de l'ambassadeur de Nouvelle-Zélande aux Pays-Bas, dans lesquelles l'urgence de la situation était invoquée et la même demande était adressée au Président d'exercer les pouvoirs prévus au paragraphe 3 de l'article 66 du Règlement de 1972, qui était alors en vigueur à l'époque de l'introduction de l'instance en 1973.

Le Greffe a fait tenir le jour même une copie de l'ensemble de ces lettres et documents au Gouvernement français.

Le 23 août 1995, le Gouvernement australien a déposé au Greffe un document intitulé «Requête à fin d'intervention présentée par le Gouvernement australien au titre de l'article 62 du Statut». Le 24 août 1995, les Gouvernements du Samoa et des Iles Salomon ont déposé l'un et l'autre un document intitulé «Requête à fin d'intervention fondée sur l'article 62 du Statut — Déclaration d'intervention fondée sur l'article 63 du Statut» dont les termes étaient analogues; et, le 25 août 1995, des documents similaires portant le même titre ont été déposés, respectivement, par les Gouvernements des Iles Marshall et des Etats fédérés de Micronésie. Cinq documents par conséquent qui se réfèrent tant à la «Demande d'examen de la situation» qu'à la «Nouvelle demande en indication de mesures conservatoires» présentées par la Nouvelle-Zélande.

Par une lettre en date du 28 août 1995, reçue au Greffe le même jour, l'ambassadeur de France aux Pays-Bas, se référant aux demandes de la Nouvelle-Zélande, a notamment fait savoir à la Cour que son gouvernement considérait : qu'aucune base ne pouvait fonder, ne fût-ce que

prima facie, la compétence de la Cour pour connaître de ces demandes; que la démarche de la Nouvelle-Zélande ne s'inscrivait pas dans le cadre de l'arrêt du 20 décembre 1974, qui portait exclusivement sur les essais «atmosphériques»; que la Cour ayant jugé la demande la Nouvelle-Zélande de 1973 comme étant sans objet, ladite demande n'existait plus et qu'ainsi la démarche du 21 août 1995 ne pouvait pas s'y rattacher; que, la Cour n'ayant manifestement pas compétence, ni la question de la désignation d'un juge *ad hoc*, ni celle de l'indication de mesures conservatoires ne pouvaient se poser; et qu'enfin la démarche de la Nouvelle-Zélande ne pouvait faire l'objet d'une quelconque inscription au rôle général de la Cour.

Copie de cette lettre a immédiatement été transmise par le Greffe au Gouvernement néo-zélandais.

Le 30 août 1995, j'ai reçu les représentants de la Nouvelle-Zélande et de la France, qui, après avoir exposé leurs positions respectives, ont été invités, s'ils le souhaitaient, à assister la Cour en lui exposant brièvement, dans un aide-mémoire informel, leur point de vue sur ce qui paraissait les opposer *in limine*, à savoir la nature juridique des demandes néo-zélandaises.

Les deux gouvernements ont eu l'obligeance — et je les en remercie au nom de la Cour — de répondre positivement à l'invitation qui leur avait été faite. La Nouvelle-Zélande a déposé son «aide-mémoire» le 5 septembre 1995 et la France le 6 septembre 1995. Chacun des deux Etats a d'emblée souligné le caractère officieux du document qu'il présentait : d'abord la Nouvelle-Zélande pour préciser qu'il ne constituait pas un nouvel exposé complet de sa position et ne pouvait être considéré comme épuisant son droit d'exposer officiellement et publiquement ses vues en ce qui concerne les questions soulevées par le Président et par la lettre de l'ambassadeur de France en date du 28 août 1995; et ensuite la France pour préciser à son tour que la présentation de son «aide-mémoire» ne s'inscrivait nullement dans le cadre d'une procédure régie par le Statut et le Règlement de la Cour, «s'agissant d'une instance qui n'a pas lieu d'être», ne constituait en aucune manière l'acceptation de la part du Gouvernement français de la juridiction de la Cour, et ne préjugeait en rien de son attitude ultérieure.

Ces deux «aide-mémoire» se sont avérés fort utiles à la Cour en ce qu'ils ont confirmé que la

Nouvelle-Zélande et la France avaient des vues radicalement opposées sur la question préliminaire et fondamentale de savoir si, en l'absence d'un acte formellement reconnu par le Statut comme apte à introduire une instance, la Cour se trouvait ou non, en l'espèce, saisie d'une telle instance. Selon la Nouvelle-Zélande, ses demandes du 21 août 1995 ne s'inscrivent nullement dans le cadre d'une nouvelle affaire, mais dans celui d'une affaire en cours — celle introduite le 9 mai 1973 —, qui n'a jamais été formellement terminée et au sujet de laquelle la Cour a expressément réservé, au paragraphe 63 de son arrêt de 1974, le droit pour le Gouvernement néo-zélandais de «reprendre l'instance»; d'après la Nouvelle-Zélande, ses demandes entrent dans les prévisions dudit paragraphe 63 : dès lors, l'affaire doit être reprise au stade de la procédure qu'elle avait atteint à la date de l'arrêt de 1974 et la Cour doit statuer en priorité sur la «nouvelle demande en indication de mesures conservatoires». Selon la France au contraire, l'affaire introduite par la requête néo-zélandaise du 9 mai 1973 a été définitivement close par l'arrêt du 20 décembre 1974 et la «demande d'examen de la situation» de la Nouvelle-Zélande n'entre pas dans les prévisions dudit paragraphe 63; cette «demande», toujours selon la France, ne peut être rattachée à aucune disposition du Statut et ne porte sur aucune «affaire» dont la Cour pourrait connaître; et, en conséquence, aucun acte de procédure ne peut être effectué, ce qui entraîne l'exclusion de toute audience publique, de toute procédure incidente et de toute désignation d'agent ou de juge *ad hoc*. Le Gouvernement français insiste à cet égard sur le fait qu'il ne soulève aucune sorte d'exceptions préliminaires au sens de l'article 79 du Statut de la Cour, le problème posé en l'espèce à la Cour se situant «en amont» et la solution à ce problème constituant un «préalable catégorique» qui ne relève d'aucune procédure incidente.

La Cour se trouve ainsi confrontée à une situation particulièrement complexe qui paraît sans précédent. Profondément soucieuse de respecter les principes les plus fondamentaux qui sous-tendent toute bonne administration de la justice, la Cour a convenu des arrangements que je vais indiquer. Ces arrangements ne doivent en rien préjuger de la décision qu'elle prendra ultérieurement quant à l'existence ou non d'une affaire devant elle. La Nouvelle-Zélande et la France en ont été dûment avisées. Les séances publiques qui se tiendront aujourd'hui et demain auront pour

objet de permettre à chacun des deux Etats de faire connaître ses vues sur la question suivante :

> «les demandes présentées à la Cour par le Gouvernement néo-zélandais le 21 août 1995 entrent-elles dans les prévisions du paragraphe 63 de l'arrêt de la Cour du 20 décembre 1974 en l'affaire des *Essais nucléaires (Nouvelle-Zélande c. France)* ?»

Aux fins de ces séances, et compte tenu de la composition qui était celle de la Cour au moment du prononcé de l'arrêt de 1974, le très honorable sir Geoffrey Palmer, désigné pour siéger en qualité de juge *ad hoc* par la Nouvelle-Zélande, vient compléter la Cour et va prendre l'engagement solennel requis.

Sir Geoffrey Palmer est actuellement professeur de droit à l'université Victoria de Wellington et à l'université d'Iowa; il est aussi procureur et avoué auprès de la Haute Cour de Nouvelle-Zélande et membre du Conseil privé de sa Majesté. Sir Geoffrey a accompli une prestigieuse carrière non seulement dans le domaine universitaire, mais également politique : il a en effet successivement exercé, parmi d'autres, les éminentes fonctions de procureur général, de ministre de la justice, de ministre de l'environnement et de premier ministre de Nouvelle-Zélande. J'invite maintenant sir Geoffrey Palmer à prendre l'engagement solennel requis et je prierai l'assistance de bien vouloir se lever.

Sir Geoffrey PALMER: I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.

Le PRÉSIDENT : Je vous remercie. Veuillez vous asseoir. Je prends acte de l'engagement solennel de sir Geoffrey Palmer.

Je note avec une grande satisfaction la présence dans la salle de représentants de la Nouvelle-Zélande et de la France. Avant de leur donner la parole, je souhaiterais encore indiquer que j'ai reçu le 6 septembre dernier une lettre du premier ministre de Nouvelle-Zélande, dans laquelle, se référant à l'essai nucléaire effectué le même jour par le Gouvernement français, il m'a réitéré les demandes que m'avaient déjà adressées précédemment le ministre des affaires étrangères et l'ambassadeur de Nouvelle-Zélande et qui tendaient à ce que j'use des pouvoirs qui sont reconnus au Président de la Cour par l'article 66, paragraphe 3, du Règlement de 1972. Je voudrais ici assurer le

premier ministre de Nouvelle-Zélande et son gouvernement que j'ai été extrêmement sensible à ces demandes et que celles-ci ont retenu toute mon attention. Il convient cependant de rappeler que les pouvoirs reconnus au Président par la disposition susmentionnée du Règlement de 1972, comme également par le paragraphe 4 de l'article 74 du Règlement en vigueur, s'inscrivent expressément dans le cadre d'une procédure incidente en indication de mesures conservatoires. Je suis convaincu qu'au vu de la situation juridiquement très complexe que j'ai décrite tout à l'heure, le Gouvernement néo-zélandais comprendra qu'il était difficile de donner suite auxdites demandes sans nécessairement préjuger des questions à présent devant la Cour.

Je donne maintenant la parole à M. Paul East, *Attorney-General* de Nouvelle-Zélande, désigné comme agent par le Gouvernement néo-zélandais.

Mr. EAST:

Introduction

1. Mr. President and Members of the Court, as the Attorney-General for New Zealand I am honoured and privileged to appear before you on this occasion to represent New Zealand in a matter which is of the greatest importance to it.

2. In 1973 one of my predecessors stood here in this highest Court in support of an application made by New Zealand. The proceedings concerned French nuclear testing in the South Pacific. The Government of New Zealand is here now, as it was then, in the spirit of the rule of law amongst nations.

3. Today New Zealand seeks to continue those same proceedings.

4. I recognize that last Friday the Court decided that the purpose of this public sitting is to enable New Zealand and France to inform the Court of their views on the following question:

> "Do the Requests submitted to the Court by the Government of New Zealand on 21 August 1995 fall within the provisions of paragraph 63 of the Judgment of the Court of 20 December 1974 in the case concerning *Nuclear Tests (New Zealand* v. *France*)?"

I will confine my speech, as will those who follow me for New Zealand, to that matter. It is necessary, however, to put that question asked by the Court into its factual and legal context and its regional context.

5. There are currently two documents before the Court - one is the Request for an Examination of the Situation (the Main Request), the other is the Further Request for the Indication of Provisional Measures (the Interim Measures Request).

6. The Main Request seeks a declaration from the Court that the conduct of the proposed nuclear tests will constitute a violation of international law, or alternatively a declaration that it is unlawful for France to conduct the proposed nuclear tests unless an Environmental Impact Assessment is conducted according to accepted international standards. Unless such an Environmental Impact Assessment shows that the tests will not give rise to any radioactive contamination of the marine environment the tests should not proceed.

7. In view of the fact that the French Government has shown no willingness to reconsider its decision to break the moratorium on nuclear testing which it and other nuclear weapons states agreed on in 1992 or even to postpone the proposed series of nuclear weapons tests until the Court has had an opportunity to consider the matter, New Zealand is also requesting interim measures of protection from the Court. The need for interim measures has been sharply demonstrated by the nuclear detonation which took place at Mururoa on 5 September 1995.

8. New Zealand seeks an order from the Court to direct France to refrain from carrying out any further nuclear tests in the South Pacific region.

9. The Court will be aware of both the urgency and the gravity of the case before it. The nuclear weapons tests which were looming when New Zealand filed its Request for an Examination of the Situation and its Further Request for Provisional Measures have now, regrettably, become a reality with the news that France exploded the first of its series of nuclear weapons tests at Mururoa on 5 September 1995.

10. New Zealand wishes to express its deep sense of regret and frustration at France's decision to proceed with its first nuclear weapons tests since 1991 despite the clearly expressed views of the international community that it should not do so. It is particularly regrettable that France should begin its nuclear tests before the Court has been able to consider the New Zealand Requests, and New Zealand sincerely hopes that France will not again act in a way that prejudges the outcome of this case.

11. It should not be thought that the fact that the nuclear tests have commenced in any way removes the need for the Court to consider the matter. On the contrary, France's actions in carrying

out a nuclear weapons explosion on 5 September and the continuing determination of France to proceed with further tests, scheduled to take place between now and May 1996, highlights the urgency of this case and the need for immediate provisional measures.

12. For New Zealand and other South Pacific countries this is a matter of vital importance. Members of the Court will be aware of the rioting and destruction which has occurred in Tahiti following the recent nuclear detonation. The countries of the South Pacific are gravely concerned at these developments. New Zealand approaches this Court as an appropriate and responsible forum which can respond to the legal aspects of the concerns of our region. By having such matters heard in a considered and judicial manner, it is hoped that much of the tension and anger which has led to the rioting can be dissipated. It is far better that the opposition to nuclear testing is presented in this way rather than by civil disobedience.

13. In just a few days the leaders of the South Pacific countries will gather in Papua New Guinea for the annual meeting of the South Pacific Forum. Their attention will be focused on French nuclear testing, which is of grave concern to the countries and peoples of the region. Their attention will also focus on these proceedings in the expectation that the due process of international law can provide early resolution.

14. My Government is therefore grateful to the Court for the steps it has taken to give New Zealand an early hearing.

15. The New Zealand Government is most gratified by the appearance of France before the Court today. This enables the serious issues at stake to be dealt with in accordance with international law and with the procedures envisaged by the founders of the United Nations and this Court.

16. When France announced the resumption of nuclear testing on 13 June of this year the New Zealand Prime Minister immediately made a public statement in the New Zealand Parliament deploring the French decision and urging the French Government to reconsider its decision. The New Zealand Parliament then considered a resolution condemning the resumption of French nuclear testing in the South Pacific. The resolution was supported by all seven political parties represented

in the New Zealand Parliament and was passed unanimously. Bringing the matter to the Court is not an attempt of the party in Government to seek any political advantage. It is rather a measured and responsible action taken with the full participation and support of all political parties in the Parliament including the Government's political opponents.

17. On 15 June, the New Zealand Permanent Representative at the United Nations Conference on Disarmament made an announcement similar to that of the Prime Minister's, stating in particular that New Zealand rejected the argument that further tests are necessary to ensure the safety of France's nuclear arsenal before the Comprehensive Test Ban Treaty comes into force. He also observed that there was no justification that France could advance that would be consistent with the commitment that it had undertaken that, pending the entry into force of the Comprehensive Test Ban Treaty, "the nuclear weapon States should exercise utmost restraint".

18. On 4 July 1995 the New Zealand Prime Minister addressed a letter to the French President, referring to the statement made by the Prime Minister in Parliament, calling attention to the strong public reaction in New Zealand and indicating that the French decision had cast a cloud over the relationship between New Zealand and France that would last so long as the nuclear tests continue. A further letter was sent by the New Zealand Prime Minister to President Chirac on 13 July 1995 stating among other things that

> "Small island nations dependent for their livelihood on the sea find the risk associated with testing unacceptable. Aside from the possibility of accidents there are concerns about the long-term consequences for the marine environment. Countries of the South Pacific are unanimous in their opposition to nuclear testing in the region."

19. New Zealand hoped greatly that the diplomatic representations and realization by France of the strength of public opposition in the world including, it may be said, 60 per cent of its own people, would lead to the abandonment of French plans to resume testing.

20. In this hope New Zealand was encouraged by its recollection of the fact that President Chirac's predecessor, President Mitterrand, had on no fewer than three occasions expressly linked the continuance of French restraint in nuclear testing to the exercise of similar restraint by the United States and Russia.

21. It was, therefore, a considerable change of position that the clearly stated and firmly held

policy of one President should now be repudiated by his successor. That change in position had to be carefully considered by the New Zealand Government, the more so given the warm nature of New Zealand's relationship with France and the ties which the two countries had in common.

22. Eventually the Prime Minister of New Zealand, on 17 August 1995, had to write to the President of France in the following terms:

> "We have earnestly sought to appraise all the avenues of action that are open to the New Zealand Government in order to further our view-point and to protect the national and international interests that we consider important. Needless to say, in this process we seek to act moderately in a manner consistent with the bilateral relationship between our ... countries which, I agree with you, is both cordial and permanently based."

The letter then went on to inform the French President that New Zealand had decided to have urgent recourse to the opportunity afforded by the Judgment of 20 December 1974 in the *Nuclear Tests* case.

23. In short, Mr. President and Members of the Court, New Zealand's response to the French announcement of 13 June, as it finally emerged in legal form when we lodged our Request for an Examination of the Situation of 21 August, is one which New Zealand deferred until New Zealand had thoroughly explored with France the possibility that France would change its mind.

Background

24. Mr. President, as the Court will be aware, New Zealand's concerns about the legality and safety of nuclear testing in the South Pacific are long-standing.

25. New Zealand is not returning to this Court on a sudden impulse. There has been continuous opposition, on New Zealand's part, to nuclear testing in the region. This was not broken by France's decision, in 1974, to stop testing in the atmosphere in the South Pacific.

26. As stated, our opposition is of long standing. Amongst other things, it reflects concern for the South Pacific environment. It has also reflected the strong attachment of New Zealand, and other South Pacific countries, and most of the international community, to nuclear non-proliferation and the goal of nuclear disarmament.

27. Since 1972 New Zealand has taken a lead in tabling a resolution each year at the United Nations General Assembly calling for a comprehensive test ban treaty to be negotiated. In 1993, for the first time, and again in 1994, the resolution was adopted by consensus. The negotiations on a

comprehensive test ban treaty underway in the Conference on Disarmament have been very much welcomed by New Zealand. The potential impact of resumed nuclear testing in the South Pacific, on the progress towards that ban has of course heightened alarm over the French decision. There is considerable concern that renewed French nuclear testing may jeopardize these negotiations.

28. Mr President, New Zealand's opposition to nuclear testing, and nuclear weapons, has also been expressed in domestic legislation, the New Zealand Nuclear Free Zone, Disarmament and Arms Control Act, which was enacted by the Parliament of New Zealand in 1987. Amongst other things that Act creates a nuclear free zone within New Zealand and gives effect at the national level to our related international obligations.

29. The New Zealand Act therefore complements the South Pacific Nuclear Free Zone which was established in 1986 by the entry into force of the Treaty of Rarotonga. That treaty reflects the collective will of South Pacific nations.

30. The 1973 case, under which New Zealand now seeks to return to the Court, related not just to New Zealand itself but also to the Cook Islands, Niue and the Tokelau Islands (now called "Tokelau"). The same applies to the Requests presently before the Court. This is because New Zealand's acceptance of the Statute of the Court embraces these areas of the Pacific.

31. The Cook Islands and Niue are self-governing states in free association with New Zealand - having carried out acts of self determination under United Nations supervision.

32. Both Governments have given their full support to New Zealand's action in bringing the matter before the Court.

33. New Zealand continues to have responsibility for the administration of Tokelau under Committee of 24 supervision. Tokelau has indicated its support for New Zealand's stance on France's decision to resume nuclear testing in the South Pacific in a letter from the Council of the Faipule to the Administrator of Tokelau. The Council of Faipule is made up of one representative from each of the three atolls that make up Tokelau.

34. And, Mr. President, New Zealand has made available to the Court copies of each of these letters from these countries.

35. Mr. President, when my predecessor appeared here in 1973 in the early phase of this case, he told the Court that New Zealand's concern regarding nuclear testing were strongly shared by the peoples of the South Pacific region. He referred to a regional identity based on ethnic and cultural ties, and to the emerging collective role reflected in the recently formed South Pacific Forum, which is the annual meeting of leaders from self governing countries in the region.

36. This regional identity has grown in the intervening period. The South Pacific Forum had seven members in 1973. In 1995 the membership has grown to 15.

37. The region's leaders, speaking through the South Pacific Forum, and bilaterally, have consistently opposed nuclear testing in the South Pacific, and the region's use for nuclear purposes generally. This stance has been expressed in a great number of resolutions adopted in the Forum's annual meetings.

38. Forum Communiqués and resolutions over the years show not only strong political opposition to nuclear testing in the region but also serious concern about the risks to the environment as a result of the tests. This concern for the environment is reflected in numerous requests that have been made by the region for full and open scientific access to the testing sites. Regrettably, these requests have never been satisfactorily met by France.

39. It was with great relief, therefore, that the South Pacific Forum welcomed the decision of France in 1992 to cease nuclear testing in the region. The Forum's strong wish - and, indeed its expectation, given the public statements by the French President - was that this decision would lead to a permanent end to nuclear testing in the South Pacific. There is now deep disappointment in the region that the moratorium on testing has been broken.

40. Traditionally this region has been dependent on the marine environment for sustenance and survival. Many Pacific peoples live on small islands and atolls where land resources are very limited. This has lead to a strong dependence on the oceans.

41. The value placed on the marine environment was demonstrated by the conclusion in 1986, of the Convention for the Protection of Natural Resources and Environment of the South Pacific regions, known as the Noumea Convention. This Convention, which entered into force on 22 August

1990 reflects the collective wish of all countries in the region to take concrete steps to protect the environment, and to engage in this process those nuclear powers which are valued partners in the region. Indeed, it was particular concern about radioactive contamination which triggered the negotiations on the Convention.

And the region welcomed France's ratification of that Convention on 17 July 1990.

42. Now while there are many environmental conventions around the world, the Noumea Convention is perhaps unique in that it specifically addresses the issue of radioactive contamination from nuclear testing. The parties are expressly obliged to "take all appropriate measures to prevent, reduce and control pollution in the Convention Area which might result from the testing of nuclear devices". There are also other quite specific requirements, including those relating to Environmental Impact Assessments.

43. Mr President, this language, the language of the Noumean Convention, was very carefully chosen. It is not intended to condone testing in the region. But it did impose quite specific obligations on any Party which has tested in the past, and any which might fly in the face of regional wishes in testing in the future.

44. It is clear that the only way France could carry out its obligations under the Convention would be to do an Environmental Impact Assessment. I can also do no better, Mr President, than to repeat the words used by the French Foreign Minister, in an open letter to the Australian public published in the Sydney Morning Herald on 28 July 1995: and he stated *"openness is the sole remedy against fear"*. France has stated many times that it is committed to a policy of transparency in relation to its nuclear testing. This assurance has been given time and again at both the political and diplomatic level. But that transparency has never been fully evident, and the concerns of New Zealand and the other countries of the region have never been fully satisfied.

45. It is important to the region to have an Environmental Impact Assessment, because France is conducting its underground nuclear tests in a unique environment. Whereas other underground nuclear tests have taken place in continental land masses, France is conducting its test in the fragile marine environment of two small atolls. The atoll structure is porous, and water saturated and

interacts directly with the oceans.

46. Indeed, I would suggest that the reason France has chosen Mururoa and Fangataufa for its current testing sites has nothing to do with their inherent suitability for underground testing. Rather, it was because the infrastructure for conducting nuclear tests was already in place as a legacy of the atmospheric tests conducted on the atolls until 1974. And indeed, the French Ambassador to the United States has said as much.

47. The quest for information about the tests has been a central feature of the region's approach to France on this issue. In particular the region has pressed for access to the testing sites by scientific missions.

48. While some access has been allowed on three occasions, in each instance access has been strictly controlled, and the missions have been narrowly focused and of limited duration. My Government would like to make clear that none of the scientific investigations permitted by France to date satisfy New Zealand or indeed the rest of the region about the safety of the tests. Nor do they meet France's obligations under general international law or under the Noumea Convention to conduct an Environmental Impact Assessment. There has never been a comprehensive Environmental Impact Assessment carried out in accordance with contemporary environmental standards.

49. On the contrary the information which is available regarding the risks of contamination surrounding underground nuclear testing at Mururoa has further fuelled the fears and legitimate concerns of the South Pacific States.

Summary of New Zealand case on continuity

50. Mr President, I turn now with your leave, to explain in summary form the nature and legal objective of the Requests that have been made to this Court. This summary will be developed by my colleagues present with me now: the Solicitor-General of New Zealand, Mr John McGrath, QC; the President of the New Zealand Law Commission, Sir Kenneth Keith, QC; the Legal Adviser of the Ministry of Foreign Affairs and Trade, Mr Don MacKay; and Professor Elihu Lauterpacht, CBE, QC.

51. The first point which will be made is that this is *not* a new case. Rather New Zealand is relying upon the right reserved to it by the Court in the previous phase of this case in 1974.

52. When New Zealand commenced this case, France was conducting atmospheric nuclear weapons tests in the South Pacific region. After protesting strongly against the nuclear weapons tests for a period of 10 years, New Zealand took the decision to bring legal proceedings against France in this Court.

53. One basis of the proceedings commenced in 1973 was that the nuclear tests were in violation of international law in that they violated the rights of all members of the international community to the preservation of the terrestrial, marine and aerial environment from unjustified artificial radioactive contamination. At the same time the New Zealand Government sought from the Court a determination that the conduct of nuclear tests in the South Pacific region that 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 such tests.

54. Because of the urgency of the situation New Zealand also sought interim measures of protection from the Court in the form of an order that France refrain from conducting any further nuclear test that gave rise to radioactive fall-out until the Court had decided the case.

55. This request for interim measures of protection was granted and the Court indicated that the Parties should take no action to aggravate the dispute or to prejudice the rights of the other party and that in particular the French Government should avoid nuclear tests causing the deposit of radioactive fall-out on the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands. At the same time, the Court ordered that the next stage of the proceedings should be addressed to the questions of the jurisdiction of the Court to entertain the dispute and of the admissibility of the Application. Notwithstanding the 1973 Order France conducted further atmospheric nuclear tests later in 1973 and in 1974.

The Court's decision and the right reserved to New Zealand

56. In 1974 the Court heard oral argument on those questions of jurisdiction and admissibility.

However, both before and after that oral hearing, the French Government had made a number of statements concerning its intentions as to future nuclear testing in the South Pacific region. The Court at that time interpreted these statements as constituting a binding undertaking on the part of the French Government to cease atmospheric tests. In paragraph 29 the Court held that the claim of New Zealand was to be interpreted as applying to atmospheric testing only. The Court concluded that as a consequence of the undertaking by France that the essential New Zealand concerns had been met.

57. And accordingly, the Court concluded that it was not at that time necessary for it to make any further pronouncement on the case. However, this conclusion was subject to the qualification reflecting the fact that the only testing then conducted, *the only testing then conducted*, in the South Pacific was atmospheric testing. The Court recognized that case was clearly decided on this basis. In reaching this conclusion, however, the Court specifically reserved to New Zealand a most important right, the right to return to the Court in the event that the basis of the Judgment was affected. In that event, New Zealand could request an examination of the situation in accordance with the provisions of the Statute. This right was specifically spelled out in paragraph 63 of the judgment of the Court delivered on 20 December 1974.

58. The Court also added that the denunciation by France in January 1974 of the 1928 General Act on which New Zealand relied as one of the bases of jurisdiction in the case could not "by itself constitute an obstacle to the presentation of such a request". This addition is highly significant because, for reasons which will be elaborated later, it shows clearly that the Court in adopting this unprecedented procedure had in mind that any proceedings which might subsequently be taken would represent a continuation of the same case, not the commencement of a new case.

59. In 1974 the assumption was made by all involved that the French decision to terminate nuclear testing in the atmosphere and to shift its tests underground met the immediate concerns of New Zealand about the contamination of the environment. But New Zealand's wider concerns remained, as New Zealand's application indeed made clear. Those wider concerns related to future conduct by France. No thought was given at that time to whether underground nuclear testing might

lead to some of the same environmental consequences that were the subject of New Zealand's application. And the only testing taking place in the South Pacific at this time was atmospheric testing.

60. Underground testing at the moment of the Judgment was not in issue, and the Court had before it no evidence that such testing either could or could not lead to radioactive contamination of any part of the environment.

61. The essentials of the matter are that in 1974 the Court adopted a novel device for dealing with the situation before it. In this respect the Court was using its inherent power to regulate its own procedure and to do as it thinks appropriate for the achievement of justice. The procedure adopted in 1974 was in the same line of development as the procedure which it was to adopt, the Court has adopted in its Judgment of 1 July 1994 in the case of *Qatar* v. *Bahrain (I.C.J. Reports 1994*, p. 112). In the operative part of that Judgment the Court did not respond to the submissions of either party - on the part of Qatar that the Court had jurisdiction in the case and on the part of Bahrain that it had not. Instead, it took the very unusual course of remitting the matter to the parties in order to afford them the opportunity to submit to the Court the whole of the dispute. In so acting, in the absence of any specific authority in the Statute, the Court was doing no more than exercising its inherent power to regulate its own procedure. In each case of the exercise of such power it is for the parties to bring themselves within the specific terms of the procedure laid down by the Court. And this is precisely what New Zealand is seeking to do in its present Request for an Examination of the Situation.

62. The Court has asked us to address the issue of whether our current Requests fall within the provisions of paragraph 63 of the 1974 judgement. In order to answer this it is necessary to consider the circumstances in which the right reserved to New Zealand can be exercised.

63. One possibility certainly is that it might be affected by a resumption by France of atmospheric nuclear testing. And if that were the sole possibility, if France started atmospheric testing again, then New Zealand, if that was the only possibility that we could come back to the Court on, then we would not be able to maintain these present proceedings.

64. But on the other hand, it is more likely that in considering the idea that the basis of the judgment might be affected in some way the Court was concerned that the resumption by France at some future time of nuclear testing could give rise to artificial radioactive contamination of the environment, and give rise to artificial radioactive contamination of the environment in a manner not foreseen in 1974. That, New Zealand contends, is what the Court must have had in mind. As New Zealand has pointed out in its main Request and spelled out in fuller detail in its *Aide-Mémoire*, is it to be imagined that when France announced its intention to terminate atmospheric testing (precisely, it may be noted, because such testing could lead to radioactive contamination), it did so subject to the following reservation?: "But we reserve the right to cause radioactive contamination of the marine environment by methods other than atmospheric testing, perhaps by underground testing."

65. That notion is absurd. The truth of the matter must be that when France gave up atmospheric testing and indicated that in future underground testing would suffice for its needs, it did so because atmospheric testing was at that time the sole known method of causing the contamination of which New Zealand complained, while underground testing was thought not to give rise to such risks.

66. So it was not *atmospheric* testing that was in issue. It was testing that could cause radioactive contamination not only of the territory of other States but also of the marine environment in which other States have an interest. When France resorted to underground testing, it was not *underground* testing *as such* that it chose, but a method of testing that was at that time thought to be free of the risk of causing radioactive contamination of the environment.

What has triggered New Zealand's exercise of this right - why do we come to the Court now?

67. New developments between the Court's Judgment in 1974 and the present Request have justifiably reactivated New Zealand's original fears regarding the risk of contamination of the environment. These developments are such that the world can no longer be expected to rely upon the bare assertions that these tests are safe.

68. And, accordingly New Zealand exercises the right reserved to it in the 1974 Judgment to return to the Court. It returns to the Court with the Request entitled "Request for an Examination of the Situation" - a title exactly reflecting the wording in which paragraph 63 of the 1974 Judgment expressed the object of such a return to the Court.

69. Until fairly recently the evidence has been that leakage of radioactive material from Mururoa has been gradual and limited. However, recently and somewhat belatedly, increasing evidence has emerged of scientific concern about the possible environmental impacts of underground testing. This includes the work of a noted French vulcanologist, Professor Pierre Vincent, whose article on the environmental risks of nuclear testing at Mururoa is included as an annex to the Main Request. Professor Vincent has written:

> "All the factors now known to be conducive to the destabilisation of volcanoes - major weathering and fracturing of materials, and steep sides - are present at Mururoa. In view of that fact, the shock wave produced by one of the planned new explosions, even if it were conducted beneath the lagoon, could be big enough to cause one or more of the large "pre-perforated" blocks to shear away. This situation, which has no parallel anywhere else, can only be described as high-risk."

And those are the words of Professor Vincent "high-risk". He goes on

> "The immediate consequence of such a destabilisation would be a sudden spill-out of part of the radioactive "stockpile" into the sea and the formation of a tidal wave - or, more accurately speaking, a tsunami - which would threaten the lives of those living not only in Mururoa but in neighbouring archipelagoes."

An example of more extreme scientific concern comes from Dr. Colin Summerhayes, the Director of the Institute of Oceanographic Sciences in the United Kingdom. Research on underwater landslides is new and it is only in recent years that the potentially catastrophic results of a landslide have become known. And Dr. Summerhayes is quoted, just on 9 September 1995, in the Independent newspaper saying that volcanic islands like Mururoa were:

> "inherently unstable and may fail, given an appropriate trigger like an earthquake or a very large explosion. Failure is likely to cause a giant submarine landslide which may demolish parts of the island and could create a tidal wave that may itself damage coastal installations on other islands nearby."

Furthermore he stated that the creation of such a tidal wave was "a general threat to coasts as far

away as New Zealand and Australia".

70. The possibility that the south-western sector of Mururoa in particular may leak as a result of further testing has become apparent in the last few months and it has become apparent from documents published by the French Atomic Energy Agency Commission itself. The data they present shows that the largest tests of the 1970s and 1980s took place in a small area of the western part of Mururoa, and that some had unanticipated effects. Some tests took place closer to the outer flanks than was desirable from a safety point of view. There must now be concern that some of these old detonation chambers could become exposed directly to the ocean if further testing should generate additional fracturing in that area.

71. And it has been known for many years that accidents have occurred on Mururoa. There were three submarine landslides on the outer flanks of the atoll in 1977, 1979 and 1980 as a result of large tests conducted under the rim. The largest of these landslides in which approximately one million cubic metres of material was dislodged generated a tidal wave that swept over part of the atoll, seriously injuring two people.

72. In addition to these accidents, which were acknowledged shortly afterwards by France, there have been at least two accidental releases of radioactivity during post-test sampling operations. These were acknowledged by France only after their occurrence had been established independently. Furthermore, it was only in the monograph published recently by the Atomic Energy Commission that the fact that a device had to be detonated at less than its planned depth in 1979 was finally admitted.

73. One of the essential complaints of the present proceedings is that there is a reasonably founded concern that what France has already done to the two atolls may cumulatively have so weakened their structures that further tests may develop the weaknesses and fracture the structures in a way that leads to a substantial escape of radioactive material and risk to the marine environment. There is now reason to fear that these risks are substantially higher than was previously believed to be the case.

74. As knowledge about the risks of radiation and nuclear testing has increased so too have

the standard applied to these activities by the international community. These increased standards can be seen as a response to the increased understanding regarding the risks to the environment. A notable example of these increased standards is the development of the law on Environmental Impact Assessment.

75. It can now be said that there is a clear legal obligation on France to conduct an Environmental Impact Assessment before carrying out any further nuclear tests at Mururoa and Fangataufa both as a consequence of France's participation in the Noumea Convention and also as a result of customary international law derived from widespread international practice.

76. Closely linked to this is the emergence of a very widely accepted and operative principle of international law: the precautionary principle. In the field of environmental protection it has come to be recognized that insistence that a complainant must carry the burden of proving that the conduct contemplated by the respondent will lead to damage, could rise to situations where irremediable damage would occur.

77. The principle provides that where there are risks of serious or irreversible damage lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. The precautionary principle has been applied in a wide number of situations domestically and internationally and is contained in many international treaties. It is also, significantly, incorporated in French domestic law regarding protection of the environment. Because of the potentially devastating and long-lasting effects of radiation the precautionary principle is particularly applicable to nuclear matters.

78. Mr. President and Members of the Court, again I return to the question before the Court. How do these matters submitted in 1995 fall within the provisions of the 1974 Judgment. Put another way - why does New Zealand contend that the basis of the 1974 Judgment has been affected? It must be kept in mind that in recent years of course France has honoured a moratorium preventing any nuclear testing, but there are three new developments - *three new developments* - providing compelling reasons for New Zealand to make its Requests.

First, there is new evidence regarding the cumulative effect of underground testing which gives

foundation to the fears held by South Pacific nations.

Second, the Noumea Convention requires France to cease testing until at the least an Environmental Impact Assessment has been completed.

And third, new developments in international law particularly the precautionary principle place the onus of proof on France to offer satisfactory evidence that this testing is safe.

Mr. President, can I now request that you allow the New Zealand Solicitor-General, Mr. McGrath, QC, to address the Court.

The PRESIDENT: Thank you very much, Mr. Attorney-General. I give the floor to the Solicitor-General for New Zealand, Mr. John McGrath.

Would you be kind enough to make your statement in such a manner to be ready to interrupt it, let's say around 5.30 p.m. in order to have a break of ten minutes - but of course it's up to you.

Mr. McGRATH: Mr. President, Members of the Court, it is an honour for me to appear before this distinguished Court.

Introduction to Solicitor-General's Submission

1. The Court has asked the Parties to inform it of their views on this question:
Do the Requests submitted to the Court by the Government of New Zealand on 21 August 1995 fall within the provisions of paragraph 63 of the Judgment of the Court of 20 December 1974 in the case concerning *Nuclear Tests (New Zealand* v. *France*)?

2. What the Court is asking is whether New Zealand is able to exercise this right reserved under paragraph 63 to return to the Court so as to pursue the Application that it filed in 1973. Or, to put the question another way: does the Court have jurisdiction or is it competent to deal with the case and to take it up at the stage it had reached in December 1974?

3. Before coming directly to the question put by the Court, I wish briefly to address the standard which the Court should apply in answering that question at this time. Should it for instance set an absolute standard and decide the matter in a definitive way, or should it rather apply a prima facie standard as it does in provisional measures cases?

4. New Zealand submits that in the circumstances the appropriate standard is the prima facie

one. I will give reasons for that submission in a moment, but before doing that I emphasize that New Zealand will contend that the manner in which it responds to the question formulated by the Court will in any event meet the most demanding standard that the Court may decide it should apply. New Zealand has two reasons for contending that the correct standard in this particular process is the prima facie one.

5. The first reason relates to the jurisdictional character of the issue, and the second to the fact that New Zealand has requested provisional measures in relation to this case.

6. On the jurisdiction aspect, New Zealand submits that the principle, the constant jurisprudence of the Court, the Statute and the Rules all require that if jurisdictional issues are to be resolved definitively and finally then that must be done through a careful oral and written process. That is the case even where as here the Respondent has not filed a formal notice of preliminary objection in accordance with the Rules.

7. That careful process involves of course the filing of a written Memorandum, documents in the nature of a Memorial and a Counter-Memorial, and then oral argument. It is usually a process that takes some months. It is not in any sense a summary process. Indeed the only summary process contemplated by the Rules is found in Article 38(5) of their 1978 version and is an administrative one. It applies when the Applicant invokes the *forum prorogatum* procedure, when the applicant invokes no jurisdictional title, but proposes that the potential Respondent will consent for the purposes of the particular case, and if that consent does not eventuate, that is the end of the matter. The case does not get on the Court's list.

8. Now that, of course, is not the present situation. New Zealand is not proposing to commence a new case. Rather it claims to exercise its right to resume the 1973-1974 case.

9. The recognition of the principles of natural justice and due process to be found in the Court's practice, case-law, the Statute and Rules has two purposes:

First it protects the rights of the States party to the litigation, enabling them to present their cases in a full and a responsive way.

And secondly it protects the Court by ensuring that before it makes a final decision on a

matter of jurisdiction, it is fully informed of the relevant arguments of law and fact.

10. That the Court is not following that regular process provides the first reason, Mr. President, for New Zealand's submission that at this stage the Court should make a provisional prima facie determination only. And I will propose the wording for such a test at the end of the consideration of the second reason for my submission to which I now turn.

11. And that second reason, as the Court will recall, relates to the fact that New Zealand has filed a Request for Provisional Measures.

12. The power of the Court to grant provisional measures under Article 41 of the Statute is by its very nature an urgent one. It is designed to conserve the rights of the parties pending a final decision in the case. The power is exercised to prevent the risk of irreparable damage to those rights which are in issue or in dispute in the case before it.

13. Now at this stage, I will not burden the Court with references to the many orders in which the Court uses tentative and provisional language in this context - the language of *risk* in relation to fact and of *the disputed nature* of the rights being claimed. The Court is not finally deciding anything, about law or fact, in respect of merits or jurisdiction, or anything else. And I say "anything else", Mr. President, given the nature of the issue in dispute in this case and the references in the Rules, in particular in Article 67, paragraph 1, of the 1972 Rules and Article 79, paragraph 1, of the 1978 Rules to procedures for objections to "jurisdiction", "admissibility" and to any other objection the decision on which is requested before further proceedings are to take place on the merits.

14. Priority is another critical aspect of the conservatory nature of interim measures - they are designed to prevent the risk of claimed rights which cannot be repaired. The power is to be exercised urgently and in priority to all other matters.

15. Now, that priority is clear both in the practice of the Court and in the Rules. And there is no other case in which the Court with a Request for provisional measures before it has required an issue to be argued before it considers the Request. As to the Rules, the same position is made clear by Articles 66, paragraph 2, and 51, paragraph 1, of the 1972 Rules and by Articles 74, paragraph 1

and 54, paragraph 2, of the 1978 Rules.

16. Again the Court does not have to be given detailed citations in support of the proposition that interim relief stage issues of jurisdiction, like issues of the merits at that stage are dealt with in a prima facie way. But that jurisprudence arises for reasons of principle and the very nature of interim measures which I mentioned earlier. There is another reason for adopting that standard relating to the rights of New Zealand as a litigant before the Court in this case.

17. New Zealand would have been required to reach that prima facie standard in respect of jurisdiction had the Further Request for Provisional Measures, that had failed, been given priority. New Zealand submits that it ought not be required to match a higher standard at this earlier stage of the case which the Court has introduced into this process.

18. But finally, on this introductory point of the standard that is to be applied, I should state to the Court more precisely what standard it is that New Zealand submits the Court should apply. For the reasons I have indicated, the standard is drawn from the jurisprudence of the Court since 1973. The test is whether the case presented and, in the words of the Court, "appear prima facie to afford a basis on which the jurisdiction of the Court might be founded" (the words of the *Nuclear Tests (New Zealand* v. *France)* case in 1973).

19. The late Judge of this Court, Judge Jiménez de Aréchega who agreed with that test in that Judgment and to its positive application in a number of cases provided a valuable elaboration of the test in some "brief comments" in the provisional measures Judgment of this case. And what he said, in my submission, is very helpful in the present stage. This is what he said in 1973:

> "I do not believe the Court should indicate interim measures without paying due regard to the basic question of its jurisdiction to entertain the merits of the application. A request should not be granted if it is clear, even on a prima facie appreciation, that there is no possible basis on which the Court could be competent as to the merits. The question of jurisdiction is therefore one, and perhaps the most important, among all relevant circumstances to be taken into account by a Member of the Court when voting in favour or against a request for interim measures.

> On the other hand, in view of the urgent character of a decision on provisional measures, it is obvious that the Court cannot make its answer dependent on a previous collective determination by means of a judgment on the question of jurisdiction on the merits.
>
> This situation places upon each Member of the Court the duty to make, at this stage, an appreciation of whether - in light of the grounds invoked and of the other materials before him - the Court will possess jurisdiction to entertain the merits of the dispute. From a subjective point of view, such an appreciation or estimation cannot be fairly described as a mere preliminary or even cursory examination of the jurisdiction issue: on the contrary, one must be satisfied that this basic question of the Court's jurisdiction has received the fullest possible attention which one is able to give to it within the limits of the time and of materials made available for the purpose."

20. I repeat, Mr. President, that Judge Aréchega was not stating a higher standard. He made it clear at the outset in that case that he voted in favour of the Order *for the reasons spelt out in the Order*. He agrees, that is to say, with the established prima facie test.

21. New Zealand certainly accepts that statement as a valuable explanation of the difficult assessment which judges must make in interim assessment cases and submits it is equally helpful in this case.

22. New Zealand will attempt to show that in this case the Court, following such an approach, should find that the situation which New Zealand faces, as indicated in the Requests that is has filed in 1995 read in the context of the Application it filed in 1973 and of the 1974 Judgment as a whole, but in particular paragraph 63, does, to quote that standard again, "appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded".

And I turn now, Mr. President and Members of the Court, to the scope and operation of paragraph 63 and New Zealand's submissions in that respect.

The scope and operation of paragraph 63

23. It is now my purpose to establish that New Zealand brings before the Court a Request of the kind that falls within the words that the Court included in paragraph 63 of the Judgment that it pronounced on 20 December 1974. By that paragraph the Court left open the possibility that New Zealand’s case, initiated on 9 May 1973, might be resumed before the Court. The words are crucial, so let me remind the Court of them:

> "the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation..."

24. New Zealand intends to demonstrate to the Court that, with the announcement of 13 June 1995 by the President of the French Republic, a situation arose of the nature that the Court had in mind in its Judgment in 1974. This change of circumstances warrants New Zealand bringing the situation in 1995 before the Court for examination.

25. At the outset of my argument I want to emphasize that the Request that New Zealand filed on 21 August 1995 seeks the *continuation* of the proceedings New Zealand commenced in 1973. While those proceedings were the subject of a Judgment delivered on 20 December 1974, that Judgment did not bring this case to an end. The current Request is another phase of those proceedings. The right to bring the Request derives from the terms of the 1974 Judgment. It is *not* a new case. I emphasize that New Zealand only seeks remedies within the scope of what it originally claimed. And indeed, the request is further confined to the concerns of New Zealand in relation to effects of nuclear testing on the marine environment.

26. In paragraph 63 the Court first said that it did not anticipate that France would not comply with its commitment to discontinue atmospheric testing of nuclear weapons. The Court next said that a request of the kind New Zealand has presented could be made if the basis of the Judgment were to be affected. By that, the Court indicated that if a factor underlying the Court's Judgment of 1974 ceased to be applicable on account of future conduct by France, then New Zealand had the *right* to return to the Court to continue the case. And the paragraph concludes with a reference by the Court to the denunciation by France on 2 January 1974 of the General Act for the Pacific Settlement of International Disputes of 1928. That Act was and remains one of the bases relied upon by New Zealand for the jurisdiction of the Court to determine its case. The Court's point in paragraph 63 was that as the denunciation could operate prospectively only, and would be ineffective to divest the Court of a jurisdiction it already possessed, it would not impede further consideration by the Court of the case New Zealand had begun in 1973 at a time when, on New Zealand's arguments, France was bound by the General Act.

27. Thus New Zealand says that paragraph 63 is a mechanism enabling the continuation or the resumption of the proceedings of 1973 and 1974. They were not fully determined. 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 in paragraph 63 the Court authorized these derivative proceedings.

And now I wish to discuss an essential feature of paragraph 63, the element that it includes that there is a possibility the case will resume.

Paragraph 63: The Possibility the Case will Resume

28. But for the Court the essential purpose of including the paragraph was to leave open that possibility. And to that end, it exercised inherent powers to preserve its jurisdiction in appropriate circumstances to make a decision that that might happen.

29. In its Ambassador's letter to the Registrar of 28 August 1995, France maintains that New Zealand's Request does not comply with Article 38, paragraph 5, of the Rules of Court of 1978. That letter indicates that France conceives New Zealand's request to be a new proceeding founded on a consent not yet given. But that of course is not the case. However, because France raises the point it is necessary for me to show that as a matter of interpretation in paragraph 63 the Court expressed its purpose of ensuring the Judgment did not bring the case to an end.

30. Members of the Court, this is absolutely clear. New Zealand is given a *right*, in stated circumstances, "to request an examination of the situation in accordance with the provisions of the Statute". Those words are only capable of meaning that the presentation of a Request for such an examination is to be part of the same case and not a new one.

31. If reinforcement of this plain truth were necessary it is provided by the final sentence of paragraph 63, where the Court refers to the denunciation by France of the General Act on which New Zealand in part relies for jurisdiction. That denunciation could not of itself preclude the continuing operation of the acceptance of jurisdiction by France in relation to the 1973 dispute if a Request under paragraph 63 is presented. The reason why the French denunciation would have been ineffective is that it took place after jurisdiction had become vested in the Court in respect of that application and because a Request for examination under paragraph 63 would fall under the rubric

of that application.

32. The 1974 Judgment did not directly determine any of the issues raised in New Zealand's 1973 Application. Indeed, only two matters were finally decided in that Judgment. The first was that the French statements of intention in relation to atmospheric testing were binding obligations in international law. The second was that those commitments met or matched New Zealand's primary concerns in the case, so that there was no purpose in continuing with the case as matters then stood.

33. Now the reasons for that conclusion can readily be discerned from the Judgment of 1974. New Zealand's case at that stage had not moved beyond its preliminary phase. New Zealand had not developed its pleadings on the merits. Nor had the Court addressed the merits of the dispute: indeed, it reminded itself that it should "avoid all expressions of opinion on matters of substance", in the words of its 1974 Judgment. At this point in the case the Court concluded that the unilateral commitment of France matched the essential object of New Zealand's claim and indeed the declaration that New Zealand might then seek from the Court. It followed that the dispute at that time had was moot, and without object, and this meant there was no further purpose in the exercise of the Court's judicial function even at that very early stage in the case.

34. But the Court at the same time recognized that the premises underlying its decision that the case should not proceed further might, depending on the course of future events, no longer become applicable. In its application of 1973 New Zealand had expressed wider concerns than those identified in the 1974 Judgment and future events might so involve those wider issues of the case that, in the interests of justice, New Zealand should be able to proceed with it. The bar to the case proceeding could then be lifted by decision of the Court if New Zealand made the appropriate application, and for those reasons the Court preserved the right of New Zealand to approach the Court, as New Zealand has now done.

35. The Court realized that if its jurisdiction were not so preserved New Zealand's position would be imperilled. France had withdrawn from the Court's jurisdiction after the case had begun. It would have been unjust in those circumstances to require New Zealand to look to a new source of jurisdiction operating at some undetermined future time before it could ask the Court to examine the situation as provided by paragraph 63. New Zealand, the Court decided, should rather be able to rely on the source of jurisdiction that was originally available in 1973. In the next phase of my

argument I wish to place emphasis on the conditions for the operation of paragraph 63.

The Conditions for the Operation of Paragraph 63

36. The right that it gives New Zealand to present a Request is a conditional right. It is only if the "basis of the Judgment is affected" that New Zealand becomess entitled to request an examination of the situation, and that raises the crucial issue: What was "the basis of the Judgment?"

37. Those words refer to the conditions subject to which the Court would be able, at New Zealand's request, to resume hearing the case. Obviously they would include a situation in which France was not complying with the commitment that it made in 1974. But, Members of the Court, there is nothing to indicate that the Court saw this as the only circumstance in which the basis of the Judgment might be affected by future conduct on the part of France.

38. Had it been the Court's intention to confine resumption of the case to a situation where France had reverted to atmospheric testing, the Court would have said so. It did not. Instead it framed the test in broad words which raised the question of whether the rationale underlying the Judgment of 1974 continued to apply. It is argued by France that only future atmospheric testing is covered by the right to go back to the Court. But that, Members of the Court, is contradicted by the very generality and wide scope of the words "if the basis of the Judgment is affected". Indeed, if you look at the whole of paragraph 63, it is impossible to treat the French unilateral undertaking to cease atmospheric testing as the only event that would change the basis of the Judgment. The first sentence of the paragraph says that the Court is not prepared to contemplate a breach of its undertaking by France. How, then, can it be argued that the second sentence contemplated solely that possibility?

39. No less a part of the basis of the Judgment of 1974 was the Court's assumption that since France had in the South Pacific only conducted atmospheric testing, the concerns of New Zealand, although spelt out more widely in its application, could at that stage in fact be equated with such testing alone. France of course had undertaken to discontinue that form of testing. Therefore *and on that basis* the claim of New Zealand had no further object at that time.

The Two Assumptions forming the Basis of the Judgment

40. Thus it can be seen that in reality two assumptions by the Court formed the basis of the 1974 Judgment. One was that France would comply with its commitment to cease atmospheric testing thereafter confining itself to underground testing. The second assumption was that the cessation of atmospheric testing met and matched New Zealand's allegations and concerns regarding nuclear contamination as they stood in 1974. New Zealand will show that it is this second assumption in particular that in 1995 is no longer applicable. In consequence the basis of the Judgment is affected. And, given the recent decision by France to end its moratorium on nuclear testing, New Zealand believes it is now entitled to proceed with its 1973 case.

The Assumptions of the Court

41. As I said, the Court assumed that France would comply with its commitment to give up atmospheric testing; that is explicit in the opening sentence of paragraph 63.

42. The commitment made by France was identified by the Court from its reading of the public statements in 1974 by officials of the French Government. It is true that in these statements France described the nuclear weapons testing it proposed to abandon as "atmospheric" and the testing which it proposed to pursue as "underground". But to interpret the use of those adjectives literally would distort the purpose the Court perceived in the commitment given by France. What France promised, or was understood by the Court to have promised,was that it was ceasing nuclear testing of a kind that contaminated the environment. The Court must have understood this to be the effect of France's promise and New Zealand gave its judgment on this basis. And that's what we say in relation to the first assumption.

43. The second assumption of the Court that I have outlined is, we say, fundamental to the basis of the Judgment. And this was that the atmospheric testing of France, in 1974, could be seen as the practical concern of New Zealand in this case. Now to establish what those concerns were and how they developed during the case it is necessary to go back to the document that initiated the case in 1973. The Court's pertinent observation in 1974 has equal application to the phase of the case of 1995. And in the words of the Court: "The Court must ascertain the true nature of the

dispute, the object and purpose of the claim." (*Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 467.)

44. Now turning to the 1973 Application, New Zealand asked the Court to declare:

> "That the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radio-active fall-out constitutes a violation of New Zealand's rights under international law and these rights will be violated by any further such tests." (*Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 460.)

45. Deliberately, and in contrast to the approach of Australia in its contemporaneous application, New Zealand did not restrict the term "nuclear tests". It was Australia that constantly used the adjective "atmospheric". And the reason for New Zealand's broader focus was that its concern was not just with atmospheric testing but with any testing that gave rise to environmental contamination. That might be by radioactive fallout on New Zealand - which was one aspect of its case. But it might also be by radioactive contamination of the marine environment which was another aspect of the case and is the particular concern leading to the 1995 Request.

46. This broad question was then developed by New Zealand in its pleadings on jurisdiction and admissibility. The statement of its rights that it made and of the manner they were being breached by French nuclear testing was not confined to atmospheric testing. The common theme is rather the protection of the rights of New Zealand and all other countries from unjustified contamination by radiation. In particular New Zealand invoked non-territorial rights, including the right to

> "the preservation from unjustified artificial radioactive contamination of the .... maritime .... environment and, in particular, of the environment of the region in which the tests are conducted and in which New Zealand ..... (is) situated." (1973 Application para. 8 - quoted in Request, para. 13.)

47. As stated in New Zealand's *Aide-Mémoire* to the President in this case, this broad expression of New Zealand's concerns was repeated in its further pleadings such as its Request for Interim Measures made in May 1973 (para. 2) and in particular the measures New Zealand proposed (para. 51). I refer also to its Memorial on Jurisdiction and Admissibility, paragraph 191.

48. Now, perhaps before the adjournment, Mr. President, I would like to make one other important point. In its Ambassador's letter sent to the Registrar on 28 August 1995 France refers to

paragraph 29 of the 1974 Judgment. And the letter argues, in reliance on paragraph 29 that New Zealand is making an entirely new request by bringing into question underground nuclear testing in 1995.

49. New Zealand's view, however, of paragraph 63 is one fully consistent with paragraph 29. In that paragraph the Court refers to statements by two New Zealand Prime Ministers indicating that an assurance that nuclear testing was "finished for good" would meet the object of New Zealand's claim. Therefore, the Court concluded the claim was to be interpreted as applying to atmospheric tests only. That finding, however, was reached on the facts as they then were for that was the basis of the Judgment on this point.

50. New Zealand did not in 1974 abandon and has never since abandoned its wider concerns. True, there was an immediate concern over atmospheric testing and New Zealand's officials did desire that there be an assurance that "atmospheric testing" was "finished for good". The only mode of testing then used by France in the South Pacific was atmospheric testing. But the wider concerns remained. And the Court was fully aware of the wider concerns expressed by New Zealand which I have referred to. The Court's purpose in paragraph 63 was to protect New Zealand if any future conduct by France should legitimately give rise again to those concerns. The Court in 1974 did not have before it any allegations about underground testing nor any evidence of contamination by underground testing. And for the Court in 1974 to have engaged itself in that matter would have involved a speculation inappropriate to the Court's function. Understandably, the Court was not prepared to deal with New Zealand's case then on that basis. But what if that basis were to change? Paragraph 63 is to be read as covering this eventuality, the eventuality that France's change to underground testing with consequences not anticipated by the Court might require further examination. It was such unknown developments that the Court had in mind caused by a future change in the conduct of France as being what might affect the basis of its Judgment.

51. So, New Zealand says the strong likelihood is that the Court deliberately left the phrase in paragraph 63, "the basis of the Judgment" open and undefined, precisely so that a range of future possibilities might be covered. It was not prepared to contemplate a breach by France of its

undertaking not to resume atmospheric testing. But at the same time it accepted that New Zealand must have a right to resume its Application if, despite the cessation of atmospheric testing, its fears of radioactive contamination from nuclear testing could later be shown to have become justified. This apprehension might in future arise from underground testing which contaminated the environment or it might arise from the method chosen by France to store or otherwise dispose of radioactive waste generated by nuclear testing. It might even arise from underwater testing. The Court could not specify.

52. So in short therefore New Zealand says the Court must have left the phrase "the basis of the Judgment" deliberately undefined because it was not prepared to speculate about future possible developments concerning which it had no evidence. However it wished to protect New Zealand generally from future actions of a broad kind. If the assumptions of 1974 were no longer to hold true, if New Zealand's concerns stated in the 1973 Application were to be reactivated by some future conduct by France other than atmospheric testing, then New Zealand should be free to resume its case. Provided always, of course, that in resuming its case New Zealand kept within the framework of its original Application.

Mr. President that would be a convenient time to break.

The PRESIDENT: Thank you very much, Mr. McGrath. The Court will resume this session after a break of 15 minutes.

The Court adjourned from 5.30 to 5.45 p.m.

The PRESIDENT: Please be seated. Mr. McGrath, you have the floor.

Mr. McGRATH: Mr. President, Members of the Court, at the adjournment I had put it to you that New Zealand in 1973 and 1974 brought its case to the Court on the basis that the nuclear testing by France was creating a risk to the environment through emission of artificial radioactive material. The Court reached its conclusion on a confined basis in relation to atmospheric testing. It did that,

New Zealand says, because that was the only form of testing then being conducted and the promise of France to end that form of testing, the Court held, met New Zealand's object. But in providing in paragraph 63 for the possibility that New Zealand might bring back this case to the Court, it was concerned to protect New Zealand and South Pacific countries in case of a change to the situation which could not be anticipated by the Court on the evidence then before it. And that in essence is what speakers later to follow me will demonstrate has actually occurred.

An Image of New Zealand's Concerns

53. But at this stage I wish to depart briefly from the course of my argument to offer the Court an image of the New Zealand perception of its attitude to nuclear testing in the South Pacific. It is represented by three concentric circles. The outer circle represents the most general concerns and the inner the most specific and particular concerns. The outer circle represents New Zealand's concern about all forms of nuclear testing. That concern has never been limited to nuclear testing by France nor to testing in the atmosphere. It is a *political* concern so it has a very limited place in this case and indeed New Zealand, because it is a political concern, does not rely on it.

54. Within that outer circle is a second circle. That represents New Zealand's particular opposition to nuclear testing in the South Pacific region that contaminates the environment. That circle represents New Zealand's legal position. It was the basis of the 1973 application by which New Zealand launched its present case and to which New Zealand seeks to return because the basis of the Judgment delivered has been qffected.

55. And then there is a third circle. Its more restricted area represents a concern specifically over atmospheric testing of nuclear weapons. That was the factual situation that New Zealand faced in the South Pacific region until 1974. It is a very particular concern and in my image it is the innermost of the three circles.

56. Now, as I say, New Zealand has argued in political fora over the issues represented by the wider circle - that is appropriate for political concerns. In 1973 New Zealand came before this Court to put its legal claim in terms of the second circle's concerns. That application asserted illegality in international law of all French testing in the South Pacific that contaminated the

environment. The Court in its 1974 Judgment appears to have viewed New Zealand's essential concerns as being more restricted, indeed as matching those of the third circle - a concern over atmospheric testing. New Zealand's point is that the basis of the Court's view at that time was that no other testing that contaminated the environment was being undertaken in New Zealand other than atmospheric testing. The reality was therefore in 1974, for the Court, that the second circle and the third coincided and that is the basis on which it dealt with the case.

57. Now it is interesting to recall the reaction of the Prime Minister of New Zealand the day following the Judgment of this Court, 21 December 1974. He said "the Court's finding achieves in large measure the immediate object for which these proceedings were brought". Now I stress the phrase "in large measure", because New Zealand saw immediately that the 1974 Judgment met its immediate concerns. However, New Zealand equally at that time did not see the Judgment as one dealing fully with its Application.

58. Applying this image of New Zealand's position to the present phase of the case before this Court, New Zealand says that the new facts and the developing law show that New Zealand has a situation in which it is justified in seeking to resume its Application. What it will seek are orders of Court that cover the area of the second circle rather than just the third. The assumption that since France was in 1974 only conducting atmospheric testing, and that therefore the concerns of New Zealand could be met by the cessation of atmospheric testing in 1995, is no longer valid as a matter of fact. In other words in 1974 the Court considered that New Zealand's essential concerns, represented by the second circle, the prohibition of all testing that could give rise to nuclear contamination, should be seen as coinciding with concerns about atmospheric testing, the third circle. But in 1995 the assumption is no longer possible. It has not survived.

59. As is said in paragraph 20 of New Zealand's Request, if the Court had realized in 1974 that a shift by France to underground testing would give rise to the same concerns as those originally expressed, the Court could not have "matched" the French undertaking with what it saw as New Zealand's primary concern. But given at the stage the case was at, the Court had no evidence at the time that underground testing would take place or if it did that it might have adverse and

detrimental effects. As I have said, it had no reason to doubt that the match it made was appropriate.

60. New Zealand in 1995 says there is such evidence and for that reason the basis of the Judgment has been affected.

The conditions for resuming the case have been met

61. New Zealand, having outlined the assumptions that formed the basis of the 1974 Judgment, now turns to demonstrate that the situation has changed so much as to materially affect that basis.

62. I accept that not every change in the situation since 1974 would warrant this Court agreeing to allow New Zealand to proceed with its 1973-74 case. The change must be one to meet the test of paragraph 63 that sufficiently strikes at the rationale on which the case was barred from proceeding in 1974 to warrant its resumption in 1995.

63. I have said that in 1974 the Court assumed that cessation of atmospheric testing would end contamination of the environment by radioactive material, and I have said that this premise was part of the basis of the Judgment of 1974. The Court did not anticipate, I have said, that the other form or forms of testing that France might turn to would have those consequences. It had no evidence, it could not speculate, but instead it decided to protect New Zealand's position in case a situation requiring examination arose by expressly recognizing the *right* of New Zealand to resume its case.

64. In September 1995, when France has resumed nuclear testing, there is evidence of the potentially adverse and detrimental effects of underground testing in the South Pacific regions of Mururoa and Fangataufa Atolls. Contamination of the marine environment is a real risk. As the counsel to follow me will indicate in the course of their arguments, in 1995 international law requires that the State which wishes to undertake conduct potentially having detrimental transboundary consequences for the environment must prove in advance that its activities will not cause contamination. Since 1974 the law has developed greatly. Whatever the burden of proof might have been seen in 1974 it is now clear from State practice and conventions that the burden rests on a State

to show that it will carry out activities with these effects in a manner that will not damage the environment, and this is particularly so of activities leading to nuclear contamination. My colleagues will demonstrate to the Court that France is not complying with international obligations in this respect. Because the scientific knowledge is in the possession or control of France exclusively it is not possible for New Zealand to prove from its own resources that the detrimental effects will inevitably follow. What New Zealand, however, is entitled to do under the international environmental law of 1995 and in particular the precautionary principle is to require that France demonstrate there will be no detrimental effects.

65. Now, before I conclude I want to touch on one other matter and that is to say it will already, I trust, Mr. President and Members of the Court, be plain to you that New Zealand does not seek revision of the Judgment of 1974. The essence of revision is that an essential fact has been discovered after the Judgment that is of such a kind that, had it been known at the time of the Judgment, it would have caused a different Judgment to be made, and for that reason the Judgment requires correction and rectification. But paragraph 63 of the 1974 Judgment is rather to be read as allowing for further consideration of the subject-matter of the case only in defined circumstances.

66. It would have been strange if the Court in 1974 had thought of the process of returning to it under paragraph 63 as one of seeking revision, because under Article 61 of the Statute of the Court revision can only operate within ten years of the Judgment. There was no reason why this Court would wish to limit the effective duration of the French undertakings to ten years. Furthermore, there was no reason for the Court to provide at all in its Judgment for New Zealand to have a *right* of revision, because Article 61 of the Statute already expressly provides it.

67. Therefore, in summary, when referring in paragraph 63 to a further examination "in accordance with the provisions of the Statute", the Court was contemplating not the discovery of some new fact which ought to have been known in 1974, but some future event or conduct which would reactivate New Zealand's concerns. The Court was accordingly not referring to revision. It was referring to the possibility of a separate derivative proceeding which in the 1974 Judgment it expressly authorized.

68. Mr. President and Members of the Court, I conclude my part in this case by saying that New Zealand's case in 1974 was suspended at an early stage on a premise linked to the Court's understanding of the facts at that time. That was because the Court saw a match between the objective of New Zealand and the unilateral commitments of France. But the Court also recognized that to terminate the case in those circumstances would be wrong. The course of future events in justice might require that New Zealand be permitted to resume, and that is why paragraph 63 was inserted to protect New Zealand in the unusual circumstances of the suspension of the 1974 case. New Zealand now exercises its right to resume the proceedings and does so, it submits, under the conditions the Court established. The circumstances showing how the basis of the Judgment has altered in 1995 will now be developed in our argument by Professor Elihu Lauterpacht, QC.

The PRESIDENT: Thank you very much, Mr. Solicitor-General. I give the floor to Professor Elihu Lauterpacht.

Professor LAUTERPACHT: Mr. President and Members of the Court.

1. Once again it is my privilege and pleasure to appear before you. I cannot let this occasion pass without offering a special word of respectful welcome and congratulation to Judge Higgins upon her election to the Court. It is with special affection that her compatriots see her here. She will fully maintain the tradition of great learning, true practicality and wise judgment that has for so long characterized the work of the Court.

2. Mr. President, it falls to me to take up the thread of the argument at the third main point in its structure, but I must before going any further excuse myself to the Court for both the speed and the conciseness perhaps of what I shall have to say. I do so in deference to the prescription of the President earlier in the day that the Parties should truncate their speeches. Mr. President, you will tell me when you have had enough, but if you do not interrupt me I would propose to try and finish my contribution by the time the Court rises, and that would involve me going on until I think virtually seven o'clock, so if that proves to be too much, just say so and I will interrupt at a convenient spot. Permit me to begin by linking what I have to say to what has already been said and

for a moment there will inevitably be a bit of overlap.

3. You have already heard my learned friend, the Solicitor-General, address you on the first two aspects of the answer to the question that the Court has posed. He has dealt, in the first place, with the concept of continuity itself and has demonstrated that the Court must have intended in paragraph 63 of the 1974 Judgment to open up for New Zealand a channel of return to the Court within the framework of the case begun in 1963 and under certain conditions.

4. In the second place, the Solicitor-General has explored what are those conditions for a resumption of the case by New Zealand. He has examined the meaning of the words in paragraph 63 "if the basis of the Judgment were to be affected". He has shown that "the basis of the Judgment" could only be a reflection of, to use the Court's own words, the true subject, object and purpose of New Zealand's original Application. That subject, object and purpose was the termination by France of conduct leading or capable of leading to nuclear contamination of, amongst other areas, the marine environment.

5. New Zealand's 1973 Application was framed in terms of the prohibition of the broad expression "nuclear testing". It was *not*, in this broad conception, limited to *atmospheric* testing. The adjective "atmospheric" was, however, often used in the argument. But this was only because at that time atmospheric testing was the *only* form of testing that was taking place and which, therefore, could give rise to the harm which New Zealand was seeking to avoid. If New Zealand had at that time been asked: What is your concern - to stop atmospheric testing or to prevent nuclear contamination, its answer could only have been "to prevent nuclear contamination". It would have continued: "It is ridiculous to think that we would be content with the abandonment of atmospheric testing if nuclear pollution were to be allowed to continue by other means. For us it is not the means or the medium of testing that matters. It is the consequences. The fact that the testing is carried out in the atmosphere is only incidental to the consequences of the testing".

6. The reason why New Zealand would have given this answer, and why the Court and indeed France would have given the same answer if asked, is that at that time in 1973-1974, atmospheric testing, by reason of the evident risk of radioactive fall-out from explosions, had come to be

recognized as "bad" or "dangerous" means of testing. By contrast with this, it was assumed that underground testing could be equated with "good" or "safe" testing. The basis of that assumption was that there had already been some use of underground testing by the United States, the Soviet Union, the United Kingdom and France (the latter only in the Sahara, but not in the South Pacific).

7. Admittedly, some underground tests had gone wrong and had released radioactivity into the atmosphere. The United States, for example, had encountered a problem in Nevada, but the cause had been identified. The depth of the burial of the device had proved to be too shallow for the strength of the detonation (which itself may have been greater than planned). So, in consequence radioactivity escaped.

8. This, however, was a specific problem which could be eliminated by appropriate precautions. By 1970 testing practice had become safer as experience was gained. In scientific terms it appeared *at that* time that there was nothing generically or intrinsically wrong with underground testing. It could be safe. Atmospheric testing, on the other hand, had been proved to be inherently unsafe. It could not be made safe. The spread of radioactivity through transport by the winds could not be avoided. Radioactivity from American and Soviet atmospheric tests built up globally, and in the southern hemisphere radioactivity from French atmospheric tests was detectable in New Zealand and elsewhere after it had circled the globe. And so it had to be given up. Atmospheric testing was equated with bad or dangerous testing and underground testing was equated - erroneously, as we now know - with good or safe testing. The Court will permit me to read the following passage from the transcript of a television interview given by Mr. Chirac, the President of France, only last night, Sunday, 10 September 1995. In response to the question as to why France went so far away from France to conduct its tests, the President said - and I will not attempt to read it in French but will endevour to present my own English translation:

> "Pour une raison très simple: vous vous souviendrez que, avant 1974, nous faisions des essais dans l'atmosphère et donc des essais polluants. Nous, les Américains, les Anglais, tous ceux qui faisaient des essais faisaient des essais dans l'atmosphère, donc des essais poullants. Nous avons donc cherché, en France, l'endroit le plus dépeuplé possible et nous avons construit notre site de Mururoa. Là-bas, les effets polluants, indiscutables, polluaient moins que si on les avait faits dans la région parisienne."

> "For a very simple reason: you remember that, before 1974, we did tests in the

> atmosphere and these were polluting tests. We, the Americans, the English, all those who did tests in the atmosphere, carried out polluting tests. We have thus searched, in France, for the least populated place possible and we have constructed our site of Mururoa. There, the polluting effects, beyond question have polluted less than if they had been done in the region of Paris."

So, we have a certain recognition by even the President of France of the equation between atmospheric testing being bad and dangerous and underground testing being presumably good and safe.

9. Now it was on this basis that the Court could in 1974 identify, as said a moment ago, a match between what New Zealand claimed and what France offered. The New Zealand claim was: stop dangerous testing. The French offer was in substance: "We will stop dangerous testing. We will go underground. That will be safe." That is the only good faith interpretation that can be put upon the French offer. That is how everyone understood the matter - the Court, New Zealand and, I believe, France.

10. Nevertheless, with the foresight and prudence that is a feature of the Court's jurisprudence, the Court said: "If the basis of the Judgment is affected, come back to us and we will examine the situation." What could that have meant except that: "first, we (the Court) will look closely at the matter, look at what you say has happened. Second, if we find that the danger of nuclear contamination that we all thought would be brought to an end by going underground is still there, or has returned, we shall do something about it."

11. There was also another aspect to the reservation thus made by the Court to its Judgment. The basis of the Judgment could also be affected by the development of the law. In 1974, it must be recalled, environmental law was at a relatively early stage of its development, both in the national and international spheres. The then recent Stockholm Conference and Declaration of 1972 would have served to alert the international community, the Court as much as anyone else, to the prospect of a significant forward surge in the evolution of standards and procedures in the field. The Court could not, therefore, have been unaware that the basis of its Judgment might also come to be affected by legal developments by reference to which emerging facts would have to be judged. Nor is it likely that the Court would have taken the position that it would refuse to consider any new law that might

subsequently affect the performance by France of its test activities.

12. So, the basis of the Judgment being that France would be giving up unsafe testing for safe testing, it falls to me to examine whether that basis has been affected. My task will be to look at the scientific aspects of the matter - to look at the facts of the situation in order to determine whether the conditions laid down by the Court have been met. New Zealand's submission will be that the basis of 1974 Judgment has been affected by underground testing that France has been conducting at Mururoa. That is to say, the basis of the Judgment has been affected by reference to facts which have emerged and standards which are to be applied today, standards from which, I respectfully suggest, the Court cannot be seen to be withholding its full and committed support.

13. As I have just said, there are two respects in which the basis of the 1974 Judgment could be affected. One is by a change in the pertinent facts. The other is by a change in the pertinent law. Either kind of change would be sufficient to trigger the process of examination by the Court under paragraph 63. Either can do so independently of the other. In fact changes of both kinds have taken place. I will now deal with the question of changes in the pertinent facts and my colleagues, Sir Kenneth Keith and Mr. MacKay, will deal with the changes in the law.

14. The most convenient starting point of our enquiry is the contention of France that in 1974 it said only that it would discontinue atmospheric testing and henceforth test only underground. That was the basis, says France, of the 1974 Judgment. France now says that it has done what it said it would do. It gave up atmospheric testing and moved to underground testing. Superficially, that is true. Substantively, it is not.

15. New Zealand does not contend that France has resumed atmospheric testing as such. Obviously, if France had done so it would have been in manifest violation of the undertakings on which the Court relied in 1974, and it would have been beyond question that New Zealand would have been entitled to return to the Court and that the Court would have been justified in examining the situation.

16. What New Zealand does say is that the present conduct of France affects the situation

because that expression properly interpreted by reference to the presumed intention of the Court, must refer to the real undertaking given by France. That *real* undertaking was the one which everybody at the time thought that France was giving, namely that it would stop testing in a manner that could give rise to environmental contamination and would thenceforth test only in an environmentally safe manner. It is quite unreal, as the Solicitor-General has already cogently observed, to treat France's unconditional undertakings of 1974 as being subject to a massive escape clause - a clause to the effect that it reserved the right to conduct unsafe testing, unsafe in the sense of giving rise to the kind of contamination which New Zealand was seeking to prevent, provided that it did so underground.

17. I shall now set out the facts which support the proposition that France has not substituted a safe for an unsafe method of testing. It has merely substituted what turns out to be one unsafe system for another. But I must emphasize it is not for New Zealand to prove this proposition to the hilt. It is for France, which is in possession of the facts, to show that the propositions are invalid and that the feared environmental consequences *cannot* ensue.

18. Now, what is the precise contention that New Zealand advances in support of its view that the basis of the 1974 Judgment has been affected? I begin by saying what the contention is *not*. It is not a contention that the underground testing hitherto carried out by France has *already* in any degree affected by nuclear contamination the *territory* of New Zealand or of its associated territories. Nor is New Zealand making an issue now of radioactive contamination that may *already* have taken place in the non-territorial environment.

19. We are concerned *only* with the *prospect*, possibly immediate, of contamination of the *marine environment* as a result of the present series of tests being carried out by France. It is clear that the protection of the marine environment came within the scope of the 1973 New Zealand Application. The relevant paragraphs of page 8 of that 1973 Application are set out in paragraph 13 of the New Zealand main Request filed with the Court on 21 August this year. Most particularly in these words: that the French tests "violate the right ... of New Zealand to the preservation from unjustified artificial radioactive contamination of ... the marine ... environment", as well as "the

freedom to ... exploit the resources of the sea and the seabed, without interference or detriment resulting from nuclear testing".

20. New Zealand says that the continuance of testing on Mururoa Atoll has created a situation which a number of experts believe has seriously weakened the physical structure of the island. There is, therefore, a distinct risk that if a whole series of further tests - or, indeed, any one further test - is carried out - the atoll may either split open or disintegrate in such a way as to discharge into the ocean *some* part of the quantity of radioactive waste that has accumulated there. Exactly how much that quantity may be we cannot tell. However, there cannot be any doubt that substantial amounts of radioactive material are present in the atoll from the 126 underground nuclear tests that France carried out there between 1975 and 1991. And, as Sir Kenneth Keith will show, the international community has taken a clear stand against the introduction of all and any radioactive waste into the marine environment.

21. Now, to sum up the scientific facts that support this apprehension on what may happen to Mururoa. I recite these facts, I may remind you, because they are pertinent to showing that current French conduct is affecting the basis of the 1974 Judgment by doing underground what it promised not to do in the atmosphere, namely to pollute the atmosphere.

22. Mururoa is an atoll within the general area of French Polynesia. 23. An atoll is a marine structure consisting of a volcanic base and a limestone and coral crown. Millions of years ago the volcanic cones of Mururoa were above the sea's surface. But volcanic activity ceased and the volcanic mountain was slowly eroded and sank beneath the surface of the sea. As it sank, coral growths accumulated over its summit and over time they have developed into a limestone layer that is now several hundred metres thick. A narrow band of coral continues to grow, forming the fragile rim of the atoll. Before testing began the average height of this rim above the sea was only 2 metres and no point was higher than 3 metres.

24. Technically, the atoll is an island - an island within the definition contained in Article 121 of the 1982 Law of the Sea Convention. Although it has no indigenous residents it sustains human habitation in the form of up to 2,000 French scientists, armed forces personnel and staff associated

with the testing activity. But, notwithstanding this legal status, the island is physically a maritime feature in that its structure is porous and the ocean waters move slowly through it. Moreover, as has been pointed out by Professor Van Dyke of the University of Hawaii in a 1991 article on "Protected Marine Areas and Low-Lying Atolls" (*Ocean and Shoreline Management*, pp. 87-160 (1991))

> "a low-lying atoll cannot be distinguished from its surrounding marine environment and must be thought of as an inherent part of the ocean ecosystem. An atoll is inevitably subject to typhoons and tsunamies", that is to say tidal waves, "and any hazardous substance on its narrow land area can be swept into the surrounding ocean system. Particularly when one is dealing with long-lived radioactive nuclides ... it is unrealistic to imagine that these materials can be separated from the ocean environment during the entire period that they present dangers."

25. France undertook in 1974 to conduct only underground nuclear testing. In the period, therefore, from the beginning of 1975 to the end of 1991, after which its moratorium became effective, it has, according to one of its own statements, conducted 126 underground tests at Mururoa and according to another official French publication, it has carried out only 124. But whichever is right, last week it added one more to the total.

26. Now, it will come as no surprise to the Court to be reminded that I am not a scientist.

27. From the point of view of the Court, my lack of scientific qualification is both a disadvantage and an advantage.

28. The *disadvantage* is that what I say does not have the authority that would accompany a statement by an expert witness of high scientific standing.

29. On the other hand, the *advantage* of my not being a scientist is that I shall not say anything that *I* do not understand. And it follows that if *I* can understand it, you, Mr. President and Members of the Court, can also understand it. Though the subject as a whole is of course complex, the parts with which New Zealand is inviting the Court to concern itself are not too difficult. The Court will at the present time be concerned only with the questions of the effect of the tests upon the physical integrity of the atoll. Of course what I say, particularly now that I'm saying it so shortly, will leave certain important questions unanswered. That is inescapable - not because of my undoubted limitations but because without the production of necessary evidence by France no satisfactory answer to the questions can be given. One of the major aspects of what I would like to

have said and what I shall be saying very briefly will be the identification of relevant questions that need to be answered, of *why* they need to be answered and of the fact that France, on whom rests the responsibility for answering them, has not done so.

30. In order that the Court may be the better able to appreciate why New Zealand is worried about the physical integrity of Mururoa, I should give some description of the manner in which underground tests are carried out. The process begins with the drilling of a hole or shaft. This is done in much the same way as an oil well is drilled, but with one major difference. The hole is much wider than that normally drilled by the oil industry - about one and a half metres wide in fact. This is necessary in order to be able to receive the cylindrical container in which the explosive device is placed. A nuclear bomb is about 60 centimetres in diameter.

31. The depth of the shaft that is drilled will vary according to the expected yield or strength of the planned explosion. Obviously the stronger the explosion is expected to be, the deeper the shaft must penetrate into the underlying rock if the effects of the explosion - in particular the radioactive material that it creates - are to be safely contained. France has never revealed specific information on the depth of the shafts it has drilled. Nor has it revealed specific figures for the yields of each of its tests. The furthest that it has gone in this respect is to indicate in its own table, which is reproduced as Annex 4 to the Main New Zealand Request of 21 August, into which of three categories, A, B or C, the strength of the detonation falls. A is less than 5 kilotons, B less than 20 kilotons and C less than 150 kilotons. While that indication is interesting in general terms, it is not sufficiently precise to enable independent and objective scientists to make accurate appraisals of the situation. To some extent, external observers can make some assessment of the situation on the basis of seismic readings in distant seismic stations, such as the one at Rarotonga in the Cook Islands, but again these seismic readings can only be approximate in their identification of the size of the detonation.

32. So much for the depth of the shafts. Turning to the location of the shafts, a controlling factor is the limited size of Mururoa. This can be seen from the sketch map of Mururoa which would have been included in the dossier of documents, documents of a public nature, that would

have been conveyed to you in good time and it will come to you in due course. The acceleration of the hearings has, I fear, meant that the preparation of this material has fallen behind. The atoll is only 28 kilometres long. At its eastern end are located the scientific facilities and the residences for personnel. The French Atomic Energy Commission says that the tests must be kept far enough away from these facilities to limit the detrimental effects of the seismic shock waves on them. This means that the testing has been concentrated toward the western end of this short 28 kilometre atoll. This limits the available area of coral rim beneath which the early testing took place. It also limits the available lagoon area. The western end of the lagoon, where the most powerful tests took place until 1988 is only a few kilometres wide.

33. Three specific matters affect the location of the shafts and limit how close together they can be concentrated.

The first is the location of previous shafts. Obviously it is not desirable to place new shafts too near old ones, otherwise the structure of the atoll would be further weakened.

The second factor is the location of the shafts for other planned tests - for the same reason as that relevant to the location of the earlier shafts.

The third matter is the relationship between the shafts and the outer flanks of the atoll. If the explosions take place too near to the side of the atoll, the side or part of it can be blown away or accumulated sediments can be dislodged, possibly generating a tsunami, a tidal wave. This has happened on a number of occasions - in 1977, 1979 and 1980. In 1979 a particularly powerful test in the narrow south-western part of Mururoa dislodged a substantial chunk of the limestone flank of the atoll. As we shall presently see, that accident may increase the likelihood that further testing may cause radioactivity to begin leaking into the ocean.

34. France has not released the details of the location of test shafts. The result is that it is again impossible for an outside observer to make an accurate independent assessment of the effects of testing and of the extent of damage to the structure of the atoll. In consequence, it is impossible to estimate the extent to which *internal* fractures of the atoll caused in any one test are likely to connect with fracturing caused by earlier tests. Furthermore, one cannot assess the likelihood of further

breakdown of the flanks of the atoll.

35. Nevertheless sufficient general information on the location of tests has been published within the past two months by France to permit some general conclusions to be drawn. These are not reassuring. Up until 1981 the most powerful tests took place under the rim in a small area of the south-west of the atoll. Given the small area available, it is probable that fracturing from different tests overlapped and came comparatively close to the atoll's outer flank. France has admitted as I said that three of these tests caused submarine landslides damaging the atoll structure in this critical area. Eventually between 1981 and 1988 the most powerful tests were actually conducted under the lagoon area, or the lagoon adjacent to the coral rim. These tests can only have increased the likelihood of a structural failure connecting one or more of the old detonation chambers to the open ocean through the existing network of fractures.

36. I return now to the procedures connected with testing. After the shaft has been drilled, the test device is lowered into it. The test device consists of the nuclear weapon in its canister. The canister is very much taller than the weapon itself. The weapon will occupy the bottom metre or so of the canister. The rest of this canister or container, as much as 14 metres more, is taken up by racks of electronic equipment which measure the development of the explosion. In the microsecond before they are destroyed by the blast they relay information back to the monitoring station on the surface. This, to the layman a quite miraculous result, is achieved within that infinitesimal amount of moment before everything at the bottom of the shaft is vaporized by the immense heat of the thermonuclear reaction. And because there are so many measurements to be taken in so short a time, many instruments have to be used and that is why the container is so large.

37. The lowering of this container into the shaft is necessarily slow so as to avoid, if possible, the container becoming stuck in the shaft before it has reached its full depth, and this possibility arises because technically it is very difficult to drill a 900-metre or a 1,000-metre shaft in an absolutely straight line, and becoming stuck in it means that the canister cannot be either lowered or raised. And this has happened on at least one occasion in 1979 when the device reached the depth of approximately 987 metres instead of the desired depth of 1,100 metres. None the less, the device

was detonated. The effect was that the actual safety margin around the prospective detonation chamber was 110 metres less than had been planned. The French authorities considered that remaining margin to be adequate. None the less, this was the test that unexpectedly generated the tsunami of which I spoke a moment ago.

38. Once the device is at the bottom of the shaft, the shaft is then plugged. It is packed tight from bottom to top with material of various kinds, including a special kind of concrete, and this is to stop radioactive material from the explosion travelling back up the shaft and escaping into the atmosphere. There have, however, been occasions when there has been an unintended escape of such radioactive material.

39. Once the canister is at the bottom of the shaft the test can take place. The effect of the explosion at the bottom of the shaft is to blast or melt a ball-shaped chamber into the structure of the granitic rock. For a 10-kilotonne explosion, which is typical of the smaller blasts on Mururoa, the chamber thus created will be approximately 50 metres in diameter. For an explosion of 100 kilotonnes, typical of the larger blasts, it will be about 120 metres in diameter. Much of the radioactive material produced by the explosion is contained within this vitrified rock that eventually solidifies within the chamber. That is to say, the immense heat will melt the rock into glass and that glass will retain the bulk of the radioactive material.

40. The explosion will, however, have additional effects. Cracks in the rock base of the atoll will radiate outwards from the detonation cavity, to a distance of about five times the radius of the cavity. So, for a 100-kilotonne blast, the rock for about 300 metres in all directions will be fractured. The roof of the cavity collapses, and this collapse extends upwards, forming a so-called chimney - a space loosely filled with large and small blocks of rock. The final height of this chimney is also about five times the radius of the cavity.

41. Because the entire rock structure of Mururoa is saturated with water, the cavity and chimney created by an explosion rapidly fill with water. Some of the radioactivity created by the explosion dissolves into this water, which then carries it away from the cavity towards the surface through the surrounding network of fissures.

42. To prevent this water and its radioactivity from reaching the surface quickly and contaminating the marine environment, there must be some barrier through which the water can pass only very slowly, if at all. France relies on the volcanic rock itself to act as this barrier. Volcanic rock that is not fractured by an explosion allows water to percolate through it at a rate of only a few centimetres a year. Thus, the practice that France should have adopted is that of conducting each test at a sufficient depth in the volcanic core to ensure that a certain amount of undamaged volcanic rock remains unaffected by the explosion above the zones affected by fissuring and the formation of the chimney. But we do not know how large this safety margin will be, and this is another vital piece of information that France has not officially released.

43. In addition, the explosion will create a significant seismic or earthquake shock registering between 4 and 6 on the Richter scale - and that is not an inconsiderable earthquake. This shock has immediate local effects: it fractures some of the upper limestone layer of the atoll and, as we have seen, may generate submarine landslides down the outer flanks of the atoll, and these landslides in their turn may cause tsunamis. Perhaps some of the Members of the Court may have seen some of the television shots of the moment after the explosion and will have observed that the whole surface of lagoon rises with the effect of the blast. So there must have been an immense seismic wave underneath that to promote that consequence.

44. And just to complete the picture, after the test the scientists drill back down through the shaft - through a much narrower hole this time - to take samples of the debris created by the blast. These samples help them to determine the exact performance of the weapon they are developing, and in particular to measure the yield more precisely. Normally, this process of drilling is safe because the new hole contains mechanical barriers intended to prevent the escape of radioactive material. But sometimes these precautions fail. In 1988, when Commander Cousteau visited the site, he found short-lived radioactive debris in the lagoon, the presence of which could be explained only in terms of a very recent escape of radioactive material. The French authorities eventually acknowledged, though not without reluctance, that this material had been released during a post-test sampling operation a month earlier.

45. There then, Mr. President and Members of the Court, is a very simple account of what happens in an underground nuclear test, but it should suffice to demonstrate that when underground testing is carried out on an atoll over a prolonged period there will be an increasing danger of escape of radioactive material. Initially, it may have seemed safe enough, and so it was assumed to be when the Court reached its 1974 Judgment. Though politically opposed to all nuclear tests, even safe ones, New Zealand has chosen not to raise in *legal* terms any question about the French underground tests in so far as they have already *directly* affected the people and marine resources of the region in which New Zealand has an interest. Those matters of the past are not in issue in the present case.

46. The present case is exclusively about the future and, on the basis that France will honour its promises, it should be a relatively short-term problem. The prospect that France may within eight months complete the series of tests that it has, most regrettably, just initiated, can make no difference to the resumption now of the case that was brought before you in 1973. Nor can the fact that the world will see an end to nuclear testing, at any rate for States who become parties to the Comprehensive Test Ban Treaty (and France has promised to become one of these) make any difference to the present request. The purpose of *the first phase of the case* in 1973 was to stop tests that could damage the environment. The purpose of the *present* phase of the case is to stop a series of tests that could, if the worst were to happen, do serious damage to the environment over the next few months. The situation with which New Zealand is now concerned is that of the *cumulative* effect upon Mururoa of the 126 underground or now indeed 127 tests. On the basis of the table prepared by France which forms Annex 4 of the Main Request, the total yield of all the underground tests carried out by France at Mururoa since 1975 could be as high as 6,805 kilotons. And, it is probably something less than this: New Zealand's own estimates of yield suggest that the total is perhaps 2,300 kilotons. France will no doubt inform the Court of the correct figure and will, in so doing, give the Court the precise yield of each test so that it may be checked against the estimates derived from other sources such as seismic recordings. But even 2,300 kilotons of high explosive is some 150 times the yield of the atomic bomb which devastated Hiroshima just 50 years ago. And this enormous yield has gradually been generated within 126 shafts drilled into a segment of

Mururoa Atoll that is much less than 28 kms long. So, the question that New Zealand asks is, can the world be confident that France will not, in the course of the present series of tests, place upon the camel of Mururoa the straw that breaks its back?

47. Now, Mr. President, I still have some time to go, shall I continue?

The PRESIDENT: Yes.

Professor LAUTERPACHT: This is not a fanciful question. It reflects the fact that the policy of transparency that France has asserted it is following in relation to testing at Mururoa, has not extended sufficiently far. It has not extended in a meaningful or sufficient way to the concern which has been expressed at various times and with increasing justification as time goes by, at the impact of the testing upon the geological structure of the atoll and the consequent possibility of the dissemination of radioactive materials into the ocean.

48. Now, why should we care about this possibility. I will be obliged to be extremely summary about this. Not because it is not important, but because I am conscious of the hour and of the restrictions of length imposed upon New Zealand in its presentation. But radioactive material that enters the marine environment will in due course pass into plankton and other living resources of the ocean. It will be taken up in the food chain. Fish, such as tuna, will consume it. These fish when caught and processed will be distributed all over the world. We shall all suffer. Most probably those who diet, most. It will no doubt be said, on behalf of France, that this is an exaggerated narrative, and that there is no sufficient evidence to support it. But that is not the right way to respond to the concern which the narrative reflects, as my learned friends will explain.

49. The burden is now on France to show that hazardous conduct of the kind involved in these tests will not cause the harm that is feared. And the way France must show is this is not by simple assertion or even by monitoring after the event, or monitoring with the assistance of international bodies but by a public investigation *before* the event; in short, by an environmental impact assessment.

50. France has never carried out such a test and has never met its obligations in this respect.

This fact is material, not simply because it involves a breach by France of its international obligations to hold such tests before the explosions. The fact is material in the present context because it means that other States and concerned people do not have the facts on which they can base a conclusive statement of the exact nature and extent of the potential contamination. But this inability on the part of the complainants to show the exact quality of the risk does not mean that there is no risk or that the Court may disregard the possibility of such contamination and its consequences.

51. Over the years, three scientific investigations of testing at Mururoa have been wrung out of the French authorities. One was in 1982 by a group of French scientists, led by Professor Tazieff. The second, in 1983, was by a group consisting of scientists from New Zealand, Australia and Papua New Guinea. The third was in 1987 by Commander Cousteau, the distinguished French oceanographer. Each visit was limited to a few days. Each mission was heavily dependent upon material provided by the French authorities. In the time available none of the missions was able to undertake any significant sampling or research of its own. A brief summary of the work of these missions is given in the Main Request at paragraphs 28 to 31. Each mission expressed some concern at the possible cumulative effects of the tests. Each proposed that certain further information should be made available. But the information was never provided by the French authorities. I could read you substantial extracts from each report which reflect the concern that these scientists felt in respect of the geological state of the atoll and the possibility of the escape of radioactivity from fissures. But neither time nor human fortitude so permit, and I must ask you, Mr. President and Members of the Court, to take the opportunity of perusing the texts of these reports which have been placed in your library.

52. There are more recent expressions of concern. Two items are unequivocal in this respect. One is the article by Professor Pierre Vincent, which has already been read to you by the Attorney-General. It has been submitted to the Court as Annex 5 of the Main Request. As the Attorney has read parts of it, I am sure that the Court will want to look at it for itself. I will not try the Court's patience by reading it again. And so I will pass over a number of important passages in

that report that I would otherwise have intended to read to you. Professor Vincent concluded his article by observing that what now needs to be established is whether or not the energy generated by further blasts would be capable of destabilizing a segment of the coral reef or even a whole flank of the volcano as already occurred when the volcano was still alive.

53. In thus pointing out what needs to be established now, Professor Vincent was doing no more than appealing to the French authorities to provide information by which a large and anxious segment of world public opinion might be reassured that the continuance of testing at Mururoa Atoll would not be risky.

54. No such information of the specific kind called for by Professor Vincent has been forthcoming. There has been evidence on a number of other aspects of the testing in the atoll about radiation and the effect on health of the nearby populations and so on. But that information is not material to our problem, which is a problem of the physical integrity of the atoll and the risk of the percolation through and from the atoll of radioactive waste.

55. Even more important is the position taken by the Directorate-General of the European Commission. In a report dated 4 September 1995 the Commission reports on a meeting held on 25 August 1995 between the French authorities and the Commission concerning radiation protection aspects of nuclear tests in French Polynesia. That report, which will be placed before the Court, lists the material which France had made available to the Commission. Towards the end of the report there are two important substantive passages which I should read to you.

56. First, towards the bottom page 7 there is a paragraph introduced by the letters N.B. - Nota Bene:

> "One must consider the assertion reported by the authors of the scientific evaluations about the possible long term leakage of radioelements. This is considered as the most significant task. A reliable risk assessment would require access to detailed data about movements in the rocks and geological structure. Up to now [and this is August] these data are classified as confidential by the French authorities. While the French authorities consider that a major and sudden rupturing of the atoll structure is unlikely, this cannot be confirmed without having access to the data withheld by them".

Mr. President, I don't really need to cite other authorities when a statement of that kind is made by a body of central importance of the European Commission.

Then on the following page there appears the following passage:

> "The Commission has noted the content of the three volumes of 'les atolls de Mururoa et Fangataufa' (a monograph published by [a body called] CEA/DAM-DIRCEN) [which are French Government authorities in the field of nuclear activity].
>
> The monograph concludes that the stability of the volcanic base would not be endangered [this is the French monograph I must emphasize] by further tests but in fact produces no evidence to support this claim. However, the monograph reports only about slipping of unstable sedimental material accumulated on the volcano's flanks. Such a phenomenon occurred three times between 1977 and 1979. Performing tests under the lagoon was the remedial action."

57. And these passages are significant. They show that the Directorate-General of the European Commission for Environment, Nuclear Safety and Civil Protection is itself uneasy about the problem of long term leakage of radioelements, which it speaks of as the "most significant risk". It is clearly not satisfied with the information that the French authorities have made available. It points out, after having examined the three substantial volumes that represent the most recent provision of information by France, that although the French monograph concludes that the stability of the volcanic base would not be endangered by further tests, it "in fact produces no evidence to support this claim".

58. So here again the Court is confronted by evidence coming from an important and expert source that there is a risk of potential nuclear contamination coming from Mururoa. Underground testing at this location is no longer to be equated with safe testing. Rather it approximates to atmospheric testing. The basis of the Court's 1974 Judgment is affected. The present proceedings fall within the scope of paragraph 63.

59. In short, Mr. President, you have before you material emanating from distinguished authorities and even from the Directorate-General of the European Commission that demonstrates growing awareness of the possible consequences of the continuance of testing at Mururoa. France has produced no evidence to counter this growing apprehension. If what is feared were to happen, it hardly needs saying that the consequences are likely to be serious and they would certainly be irreversible. There would be an escape of radioactive material into the ocean. New Zealand cannot say how much material would escape. Much would depend upon the speed with which the atoll disintegrated. No one except France has the information on which to found an accurate estimate and France is not providing this information. Perhaps some of the difficulty might have been avoided if,

as I have already suggested, France had acted in accordance with prevailing international standards governing the carrying out of hazardous activities by carrying out an environmental impact assessment. Such a process would have led France to provide the information about the number of its tests, the estimated yield of each test, the location and depth of the shaft, especially in relation to the location of the earlier tests, the nature and extent of the radioactivity likely to be released, the evidence of the movement of radioactivity-bearing water within the body of the atoll, and so on. But France does not appear to be prepared to conform to these standards. Instead, it provides limited information about what has happened in the past - information which does not meet the needs of the situation. It offers the possibility of visits to Mururoa *after* the event so that the extent of any radioactive leakage may *then* be determined. But the conduct of investigations after the event is not the way in which modern society approaches the problem of regulating environmental risk.

60. There are two elements in the situation. One is the existence of a basis for international concern and, therefore, for the concern of New Zealand as a State within the region whose interests in the presentation of the marine environment may be adversely affected. That concern relates to a risk the possible occurrence of which is objectively established - established, that is, to the extent that it needs to be, by a party that does not have full access to information and that is denied such access by the State that possesses the information. There is, however, sufficient information available to expose the error of the assumption made in 1974 that the abandonment of atmospheric testing would put an end to these risks which it was the object of the New Zealand litigation to terminate. Thus, the basis of the 1974 Judgment has been affected by the conduct of France, and the situation must, therefore, be re-examined.

61. As I draw towards the close of this necessarily brief exposition of the factual grounds which demonstrate that the formal substitution of underground for atmospheric testing does not represent the substantive alternative in French testing methods that the Court must have had in mind in 1974, there are undoubtedly a number of questions in the mind of the Court which will unavoidably still be unanswered. To the extent that they are not resolved in the ensuing exchanges of arguments between ourselves and our friends, the Court will perhaps specifically put such

questions to the Parties. But there is one question which warrants anticipation. Why, it may be asked, is underground testing at Mururoa sufficiently different from underground testing elsewhere, for example, in the United States, the Soviet Union, Russia or China, to justify New Zealand in mounting this legal challenge to the French tests but not to the others? There are at least three answers.

62. The first is that those other tests are not taking place in a region where, if they go wrong, they can give rise to consequences detrimental to the marine environment. They will not pollute the seas of the South Pacific.

63. The second, and more important, answer is that underground tests conducted within the very body of a continent or of a substantial island are quite different from tests carried out on a relatively insubstantial atoll. The desert in Nevada cannot crumble as a result of repeated underground tests. There is no seawater which moves through the desert sub-stratum and is capable of carrying radioactive material into the oceans. If when France declared in 1974 that it would conduct future tests underground it had proceeded to carry them out in a location comparable to the Nevada desert; if France had then proceeded to prepare and publish the massive environmental impact statement and EIA relating to its proposed testing in the same thorough and open manner as the United States did in relation to the underground tests at the Nevada site; if France had thus acted in compliance with international standards, it might well have been that its conduct would not have affected the basis of the 1974 Judgment. But that is not the way in which France has chosen to proceed.

64. Mr. President and Members of the Court, that brings me to the end of the submissions that I need to make at the present stage of the hearings, and I would respectfully invite you, when the Court resumes its sitting, to call upon Sir Kenneth Heath to continue the presentation of the New Zealand text. Thank you very much.

The PRESIDENT: Thank you very much, Professor Lauterpacht. The Court shall resume its session tomorrow morning at 10. The session is over. Thank you.

The Court rose at 7.15 p.m.

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