COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

DEMANDE D'EXAMEN DE LA SITUATION AU TITRE DU PARAGRAPHE 63 DE L'ARRÊT RENDU PAR LA COUR LE 20 DÉCEMBRE 1974 DANS L'AFFAIRE DES *ESSAIS NUCLÉAIRES (NOUVELLE-ZÉLANDE c. FRANCE)*

ORDONNANCE DU 22 SEPTEMBRE 1995

1995

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

REQUEST FOR AN EXAMINATION OF THE SITUATION IN ACCORDANCE WITH PARAGRAPH 63 OF THE COURT'S JUDGMENT OF 20 DECEMBER 1974 IN THE *NUCLEAR TESTS (NEW ZEALAND* v. *FRANCE)* CASE

ORDER OF 22 SEPTEMBER 1995

Mode officiel de citation:

Demande d'examen de la situation au titre du paragraphe 63 de l'arrêt rendu par la Cour le 20 décembre 1974 dans l'affaire des Essais nucléaires (Nouvelle-Zélande c. France), *C.I.J. Recueil 1995*, p. 288

Official citation:

Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand *v.* France) *Case*, *I.C.J. Reports 1995*, p. 288

ISSN 0074-4441
ISBN 92-1-070730-3

N° de vente:
Sales number **666**

INTERNATIONAL COURT OF JUSTICE

YEAR 1995

1995
22 September
General List
No. 97

22 September 1995

REQUEST FOR AN EXAMINATION OF THE SITUATION IN ACCORDANCE WITH PARAGRAPH 63 OF THE COURT'S JUDGMENT OF 20 DECEMBER 1974 IN THE *NUCLEAR TESTS (NEW ZEALAND* v. *FRANCE)* CASE

ORDER

Present: *President* BEDJAOUI; *Vice-President* SCHWEBEL; *Judges* ODA, GUILLAUME, SHAHABUDDEEN, WEERAMANTRY, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, FERRARI BRAVO, HIGGINS; *Judge* ad hoc Sir Geoffrey PALMER; *Registrar* VALENCIA-OSPINA.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 48 of the Statute of the Court,

Having regard to the Judgment delivered by the Court on 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case, and in particular its paragraph 63,

Makes the following Order:

1. Whereas on 21 August 1995 the New Zealand Government filed in the Registry a "Request for an Examination of the Situation"; whereas it is indicated therein that the Request concerned "aris[es] out of a pro-

posed action announced by France which will, if carried out, affect the basis of the Judgment rendered by the Court on 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case"; and it is stated therein that "the immediate circumstance giving rise to the present phase of the Case is a decision announced by France in a media statement of 13 June 1995" by the President of the French Republic, according to which "France would conduct a final series of eight nuclear weapons tests in the South Pacific starting in September 1995";

2. Whereas in that "Request for an Examination of the Situation" it is recalled that the Court, at the end of its Judgment of 20 December 1974, found that it was not called upon to give a decision on the claim submitted by New Zealand in 1973, that claim no longer having any object, by virtue of the declarations by which France had undertaken not to carry out further atmospheric nuclear tests; and whereas, moreover, New Zealand emphasizes therein that the Court included in that Judgment paragraph 63 "to cover the possibility that France might subsequently cease to comply with its undertakings regarding atmospheric testing or that something else underlying the Court's Judgment was no longer applicable";

3. Whereas New Zealand expressly founds its "Request for an Examination of the Situation" on paragraph 63 of the Judgment of 20 December 1974, worded as follows:

> "Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of such a request" (*I.C.J. Reports 1974*, p. 477);

whereas it asserts that this paragraph gives it the "right", in such circumstances, to request "the resumption of the case begun by Application on 9 May 1973"; and whereas it observes that the operative part of the Judgment concerned cannot be construed as showing any intention on the part of the Court definitively to close the case;

4. Whereas in its "Request for an Examination of the Situation" New Zealand argues that the key passage in paragraph 63 of the Judgment of 20 December 1974 is the phrase "if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute"; that, although this passage does not expressly identify the "basis" of the Court's Judgment, it is most likely that the Court intended to refer to the declarations constituting legal obligations, by which France had entered into a binding com-

mitment not to carry out further atmospheric nuclear tests in the South Pacific region; that, however, it was stated in the Application of 1973 that the dispute concerned nuclear contamination of the environment arising from nuclear testing of whatever nature; that the scope of the Judgment of 1974 must be measured not by reference to atmospheric testing as such, but rather by reference to the true and stated object of the Application; that in 1974 the only mode of testing used by France in the Pacific was atmospheric and such tests were then New Zealand's primary concern; that the Court had therefore "matched" the French undertaking with New Zealand's primary concern and had felt able to treat the dispute as resolved, but that the "matching" would doubtless not have been made had it realized, in 1974, that a shift to underground testing would not remove the risks of contamination; that, according to a variety of scientific evidence, underground nuclear testing at Mururoa and Fangataufa has already led to some contamination of the marine environment and risks leading to further, potentially significant, contamination; that the basis of the 1974 Judgment has therefore been altered and that, consequently, New Zealand is entitled to seek a resumption of the proceedings instituted in 1973, the bases of the jurisdiction of the Court remaining the General Act for the Pacific Settlement of International Disputes of 26 September 1928, as well as France's acceptance of the Optional Clause as it stood at the time of the original Application;

5. Whereas in its "Request for an Examination of the Situation" New Zealand contends that, both by virtue of specific treaty undertakings (in the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region of 25 November 1986 or "Noumea Convention") and customary international law derived from widespread international practice, France has an obligation to conduct an environmental impact assessment before carrying out any further nuclear tests at Mururoa and Fangataufa; and it further contends that France's conduct is illegal in that it causes, or is likely to cause, the introduction into the marine environment of radioactive material, France being under an obligation, before carrying out its new underground nuclear tests, to provide evidence that they will not result in the introduction of such material to that environment, in accordance with the "precautionary principle" very widely accepted in contemporary international law;

6. Whereas at the end of its "Request for an Examination of the Situation" New Zealand states that the rights for which it seeks protection all fall within the scope of the rights invoked in paragraph 28 of the 1973 Application, but that, at the present time, it seeks recognition only of those rights that would be adversely affected by entry into the marine environment of radioactive material as a result of the further tests to be carried out at Mururoa or Fangataufa Atolls, and of its entitlement to

protection and to the benefit of a properly conducted Environmental Impact Assessment; and whereas, within these limits, New Zealand asks the Court to adjudge and declare:

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

further or in the alternative;

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

7. Whereas the "Request for an Examination of the Situation" submitted by New Zealand was accompanied by a letter dated 21 August 1995 from the Ambassador of New Zealand to the Netherlands, by which the Registrar was informed of the appointment by New Zealand of an Agent and two Co-Agents and also of the resignation of the Right Honourable Sir Garfield Barwick, Judge *ad hoc* chosen by New Zealand in 1973, and the choice of the Right Honourable Sir Geoffrey Palmer to replace him;

8. Whereas, in addition to its "Request for an Examination of the Situation", the New Zealand Government also filed in the Registry, on 21 August 1995, a "Further Request for the Indication of Provisional Measures", in which reference is made, *inter alia*, to the preceding document, as well as to the Order for the Indication of Provisional Measures made by the Court on 22 June 1973; whereas in that new document the following provisional measures are requested "as a matter of priority and urgency", in accordance with Article 33 of the General Act of 26 September 1928 and Article 41 of the Statute of the Court:

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

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

(3) that France and New Zealand ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in

respect of the carrying out of whatever decisions the Court may give in this case";

and whereas at the end of that document New Zealand "separately request[s] the President of the Court to exercise his powers under the Rules pending the exercise by the Court of its powers";

9. Whereas the "Further Request for the Indication of Provisional Measures" submitted by New Zealand was accompanied by two letters dated 21 August 1995, one from the Minister for Foreign Affairs of New Zealand, and the other from the Ambassador of New Zealand to the Netherlands, in which the urgency of the situation was referred to and the President was also asked to exercise the powers provided for under Article 66, paragraph 3, of the 1972 Rules of Court, "in force at the time of the institution of the proceedings in 1973";

10. Whereas the same day the Registrar transmitted a copy of all those letters and documents to the French Government; whereas he transmitted a copy of the "Request for an Examination of the Situation" and of the "Further Request for the Indication of Provisional Measures" to the Secretary-General of the United Nations; and whereas he notified all States entitled to appear before the Court of the filing of those documents;

11. Whereas on 23 August 1995, the Australian Government filed in the Registry a document entitled "Application for Permission to Intervene under the Terms of Article 62 of the Statute Submitted by the Government of Australia"; whereas on 24 August 1995 the Governments of Samoa and Solomon Islands each filed a document, similar in content, entitled "Application for Permission to Intervene under Article 62/Declaration of Intervention under Article 63"; and whereas on 25 August 1995 similar documents bearing the same titles were filed, respectively, by the Government of the Marshall Islands and the Government of the Federated States of Micronesia; and whereas these five documents refer both to the "Request for an Examination of the Situation" and to the "Further Request for the Indication of Provisional Measures" submitted by New Zealand;

12. Whereas the Registrar transmitted copies of these documents to the Governments of New Zealand and France, as well as to the Secretary-General of the United Nations, and notified all States entitled to appear before the Court of the filing of those documents;

13. Whereas by letter dated 28 August 1995, received in the Registry the same day, the Ambassador of France to the Netherlands, referring to the two Requests submitted by New Zealand on 21 August 1995, informed the Court, among other things, that his Government considered that no basis existed which might found, even if only prima facie, the jurisdiction of the Court to entertain those Requests; that the action by New Zealand did not fall within the framework of the case which had been the object of the Judgment of 20 December 1974, since that case related exclusively, as the Court itself emphasized in paragraph 29 of that Judgment, to atmospheric tests; that since the Court considered, following the

announcement of the decision taken by France to terminate atmospheric tests and pass to the stage of underground testing, that the claim submitted by New Zealand in 1973 had no object, that claim no longer existed and New Zealand's action of 21 August 1995 could not therefore be linked to it; that as the Court manifestly lacked jurisdiction in the absence of the consent of France, neither the question of the choice of a judge *ad hoc*, nor that of the indication of provisional measures, arose; and that, lastly, the action of New Zealand could not properly be the object of entry in the General List;

14. Whereas a copy of that letter was immediately transmitted by the Registrar to the Government of New Zealand;

15. Whereas, during a meeting held by the President of the Court on 30 August 1995 with the representatives of New Zealand and France, the latter expressed views which from the outset were very different regarding the legal nature of the New Zealand Requests and of their effects; and whereas the President invited the two States, if they so wished, to assist the Court by briefly presenting, in an "informal *aide-mémoire*", their positions on the points discussed at the meeting;

16. Whereas New Zealand filed its *aide-mémoire* in the Registry on 5 September 1995, stressing its non-official character and declaring that it was not a complete restatement of its position and could not be regarded as sufficient to meet New Zealand's entitlement to a formal and public presentation of its position in relation to the issues raised by the President and by the letter from the French Ambassador dated 28 August 1995;

17. Whereas in that *aide-mémoire* New Zealand recalls that the Court concluded, in its Order for the Indication of Provisional Measures of 22 June 1973, that "the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded" (*I.C.J. Reports 1973*, p. 138, para. 18); whereas New Zealand indicates that the additional question whether the present proceedings are a continuation of those to which that finding of the Court applies must itself be considered as a question of jurisdiction — or as analogous to one — and can therefore be determined by reference to the same criteria as are applied to other questions of jurisdiction in the context of proceedings for the indication of provisional measures; and whereas it concludes therefrom that, since in this instance the Court is seised with a new request for the indication of provisional measures, it only has to determine, at the stage under consideration, whether there is a prima facie case of continuity of the proceedings commenced on 9 May 1973;

18. Whereas in its *aide-mémoire* New Zealand contends that such prima facie continuity is established; that paragraph 63 of the Judgment of 20 December 1974 confers upon it a right to resume the 1973 proceedings and that its wording clearly shows that the Court had no intention to close the case, as evinced, in particular, by the statement that the denunciation by France of the General Act of 1928 could not by itself constitute an obstacle to the presentation of a request for an examination of the

situation; that the effect upon the "basis" of the Judgment, which the paragraph concerned sets as a condition of the resumption of the case, does not relate only to the possible resumption by France of atmospheric nuclear tests, but also to "any developments that might reactivate New Zealand's concern that French testing could produce contamination of the Pacific marine environment by any artificial radioactive material"; and that such "developments" exist in this instance, since France has not shown, as it has a duty to do under the conventional and customary rules of contemporary international environmental law, that no contamination of the marine environment will result from the new tests despite the cumulative damage to the atolls;

19. Whereas at the end of its *aide-mémoire* New Zealand states that, in view of the — at least presumed — continuity of the proceedings and of the principle of the equality of the Parties, it is entitled to choose a new judge *ad hoc*, who must be admitted to the bench forthwith; and whereas it adds that the continuity of the proceedings also implies the maintenance of the jurisdictional basis relied on in 1973, the resumption of the case at the procedural stage which it had reached on 20 December 1974, and the application of the Rules of Court adopted on 6 May 1946 as amended on 10 May 1972;

20. Whereas a copy of the *aide-mémoire* of New Zealand was transmitted to France by the Registrar;

21. Whereas France filed its *aide-mémoire* in the Registry on 6 September 1995, indicating that the document submitted in no way formed part of proceedings governed by the Statute and Rules of Court, in no way constituted acceptance by the French Government of the jurisdiction of the Court and in no way prejudiced its future position;

22. Whereas in its *aide-mémoire* France contends initially that the case instituted by the Application of 9 May 1973 was definitively closed by the Judgment of 20 December 1974 and that the "Request for an Examination of the Situation" submitted by New Zealand on 21 August 1995 has no connection with the operative part of the Judgment of 20 December 1974; that the allegations of New Zealand that the case is not closed because, on the one hand, the initial Application was not limited to atmospheric tests and, on the other hand, the Court could not at the time envisage the negative effects of underground tests, are manifestly incompatible with the reasoning followed by the Court in its Judgment of 1974; that both the structure and the terms of that Judgment (in particular, the terms of its paragraph 29) show that the Court considered that the dispute between the two States related exclusively to atmospheric tests, and that that view was shared not only by the Judges having appended a dissenting opinion to the Judgment, but also, at the time, by New Zealand itself; that paragraph 63 of the Judgment limits the possibility of a request for an examination of the situation to the eventuality of "the basis of [the] Judgment [being] affected" and that in the light of the con-

text of that paragraph, the "basis" can be understood only as "the 'match' between [the] commitment by the French authorities to hold no further tests in the atmosphere and New Zealand's claims *to that effect*"; that underground tests are outside the scope of New Zealand's Application of 1973 and of the Court's Judgment of 1974, and that it was France's commitment to undertake no further atmospheric tests, indissociably linked to its announcement of its intention to carry out underground tests, which constituted the *ratio decidendi* of the Court's decision to the effect that the object of the dispute had disappeared; and that consequently, as the New Zealand Request of 21 August 1995 had a new object, it could not be linked to the Judgment of 20 December 1974;

23. Whereas in its *aide-mémoire* France further contends that New Zealand's Request of 21 August 1995 cannot be brought within any provision of the Statute; that paragraph 63 of the Judgment of 20 December 1974 is in no manner sufficient of itself and expressly states that the possible steps to which it alludes are subject to compliance with the "provisions of the Statute"; that the Statute of the Court circumscribes the powers of the Court and prescribes the conduct that States must observe; that the "Request for an Examination of the Situation" submitted by New Zealand is not and cannot be either a request for interpretation or an application for revision; and that even if it were a matter of a new application, such an application would inevitably be subject to Article 38, paragraph 5, of the Rules of Court, which would preclude its entry in the General List and any procedural action "unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case";

24. Whereas at the end of its *aide-mémoire* France states that "in the absence of a case coming within the jurisdiction of the Court, no procedural action can be taken"; that the result of this is the preclusion of any public hearing and any incidental proceedings, and that, consequently, in particular, the "Further Request for the Indication of Provisional Measures" submitted by New Zealand cannot be examined by the Court; and that France is not in any sense making preliminary objections within the meaning of Article 79 of the Rules of Court, since the problem facing the Court in this case is "anterior" and the solution to this problem is a "categorical prerequisite" not related to any incidental proceedings;

25. Whereas a copy of the French *aide-mémoire* was transmitted to New Zealand by the Registrar;

26. Whereas on 7 September 1995 New Zealand filed in the Registry a document entitled "Supplementary *aide-mémoire*", which contained comments on certain passages in the French *aide-mémoire*; and whereas the Registrar transmitted a copy of that document to the French Government;

27. Whereas on 8 September 1995 the Registrar addressed to New Zealand and France identical letters worded as follows:

"The Court today held a private meeting in order, *inter alia*, to enable the President to consult his colleagues on various matters relating to the submission of the documents concerned. At the close of that meeting, it was agreed that on Monday 11 September 1995 at 3 p.m. the Court will hold a public sitting in order to enable New Zealand and France to inform it 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)*?'

For the purposes of that sitting, and bearing in mind the composition of the Court at the time when the Judgment was delivered, the Right Honourable Sir Geoffrey Palmer, chosen to sit as Judge *ad hoc* by New Zealand, will join the Court and make the necessary solemn declaration.

The above arrangements shall in no way prejudice any decision which the Court will subsequently take regarding the existence or not of a case before it";

28. Whereas, at a meeting held by the President of the Court with the representatives of New Zealand and France on 11 September 1995, it was agreed that the Court would hold three public sittings on the above-mentioned question, each State being allotted equal speaking time and the opportunity to present a brief reply;

29. Whereas, at the opening of the public sitting of 11 September 1995 (afternoon) devoted to the above-mentioned question, the President of the Court announced that, on 6 September 1995, he had received a letter from the Prime Minister of New Zealand in which the latter, referring to the nuclear test carried out the previous day at Mururoa by the French Government, reiterated the Requests already made by the New Zealand Government that the President should use the powers conferred upon him by Article 66, paragraph 3, of the 1972 Rules of Court; and whereas the President stated that he had been fully aware of the import of those Requests, to which he had given his full attention, but that the powers conferred upon him by the above-mentioned provision of the 1972 Rules of Court, as well as by Article 74, paragraph 4, of the Rules now in force, expressly applied to incidental proceedings for the indication of provisional measures, and that it would therefore have been difficult for him to accede to those Requests without necessarily prejudging the issues submitted to the Court;

30. Whereas, at the public sittings held on 11 and 12 September 1995 in order to enable New Zealand and France to make known their views on the question put by the Court, oral statements were presented:

on behalf of New Zealand:

by The Honourable Paul East, Q.C., *Agent*,
Mr. John McGrath, Q.C.,
Mr. Elihu Lauterpacht, C.B.E., Q.C.,
Sir Kenneth Keith, Q.C.,
Mr. Don MacKay;

on behalf of France:

by Mr. Marc Perrin de Brichambaut,
Mr. Pierre-Marie Dupuy,
Mr. Alain Pellet,
Sir Arthur Watts, K.C.M.G., Q.C.;

and whereas during those sittings questions were put by Judges, to which New Zealand and France subsequently replied in writing, within the prescribed time-limit;

31. Whereas in their oral statements New Zealand and France essentially confirmed the views they had already expressed in writing, while developing certain aspects of their argument;

32. Whereas in its oral statements New Zealand reiterated its essential position, contending that paragraph 63 of the Judgment of 20 December 1974 expressly reserved to it the right, in certain circumstances, to reopen the case instituted by the Application of 9 May 1973; that the Judgment concerned had conclusively decided only two things, namely, that the French statements of intention in relation to atmospheric testing had created binding obligations in international law and that, since the Court had concluded from official New Zealand statements that those commitments met and matched New Zealand's primary concerns, the case no longer had any object; that there was thus no *res judicata* in respect of certain issues raised in New Zealand's 1973 Application and that, by virtue of paragraph 63, those proceedings were not definitively closed; that the words "if the basis of this Judgment were to be affected" should be given a broad interpretation, and that the right to return to the Court would be activated "if a factor underlying the Court's Judgment of 1974 ceased to be applicable on account of future conduct by France"; that the words "the basis of the Judgment" should not be taken to refer solely to France's undertaking to conduct no further atmospheric tests; that New Zealand's Application, unlike that of Australia, was not limited to "atmospheric" testing, and the Court's conclusion, in paragraph 29 of the Judgment of 20 December 1974, that New Zealand's claim was to be interpreted as applying only to atmospheric tests, must be understood on the sole basis that "no thought [had been] 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"; that one of the assumptions underlying the Judgment was that "cessation of atmospheric testing would end contamination of the environment by

radioactive material" because in 1974 the available scientific evidence suggested that while atmospheric tests were dangerous, underground testing was believed to be safe; and that, since this was part of the "basis" of the Court's Judgment, if that basis were to be affected, the conditions for New Zealand to return to the Court would have been met;

33. Whereas in its oral statements New Zealand explained in detail that there was a growing body of recent scientific evidence of the potentially adverse and detrimental effects of underground testing in the South Pacific regions of Mururoa and Fangataufa Atolls, and that contamination of the marine environment was a real risk; that the cumulative effect of continued testing on Mururoa Atoll had created a situation which experts now believed had seriously weakened its physical structure so that there was a risk that further tests would cause the atoll to "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"; that, consequently, the assumption made in the 1974 Judgment that the abandonment of atmospheric testing would put an end to the risks was erroneous, and that the basis of the Judgment had been affected by virtue of changes in the factual situation;

34. Whereas during its oral statements New Zealand further contended that changes in the law were capable of affecting the basis of the 1974 Judgment, since the Court must have been aware at the time of the Judgment in 1974 of "the prospect of a significant forward surge in the evolution of standards and procedures" in the field of international environmental law; that such an evolution had indeed taken place both in customary international law and by virtue of the Noumea Convention; that, under current customary law, especially stringent controls applied to the marine environment, so that, in general, the introduction of radioactive material into the marine environment was forbidden; and that, specifically, "any introduction of radioactive material into the marine environment as a result of nuclear tests" was forbidden; that the standard of proof to which New Zealand should be subject in seeking to demonstrate that France was in breach of its obligations was a prima facie test; and that by virtue of the adoption into environmental law of the "Precautionary Principle", the burden of proof fell on a State wishing to engage in potentially damaging environmental conduct to show in advance that its activities would not cause contamination;

35. Whereas New Zealand reiterated in its oral statements that Article 12 of the Noumea Convention required France to "take all appropriate measures to prevent, reduce and control pollution in the Convention Area which might result from the testing of nuclear devices"; that

Article 16 of that Convention required the carrying out of an environmental impact assessment before any major project "which might affect the marine environment" was embarked upon; that a similar obligation existed under customary law; that, moreover, such obligation was not subject to any exception recognized in international law concerning national security; that the Precautionary Principle required France to carry out such an assessment as a precondition for undertaking the activities, and to demonstrate that there was no risk associated with them; and that France's failure to comply with these obligations had affected the basis of the 1974 Judgment;

36. Whereas in its oral statements, with regard to the meaning of the words "in accordance with the provisions of the Statute" used in paragraph 63 of the Judgment of 20 December 1974, New Zealand contended that the nature of its present Request must be distinguished from an application for revision under Article 61 of the Statute, which would require the discovery of an essential fact which, had it been known at the time, would have caused a different judgment to be made; that paragraph 63 defined the circumstances for its own application as a "separate derivative proceeding" authorized by the Court in its 1974 Judgment, without any express basis in the Statute, and in the exercise of its inherent right to determine its own procedure; that the Court would not have found it necessary to express a right already provided by the Statute; and that the correct interpretation was that the examination requested, once allowed, "must continue in terms of the general statutory and indeed regulatory requirements for the procedure of any case";

37. Whereas the New Zealand Government consequently concluded that it should reply in the affirmative to the question put by the Court to both States, as formulated in the letter from the Registrar dated 8 September 1995;

38. Whereas in its oral statements the French Government recalled its essential position that the problem put to the Court, and on which New Zealand and France had been invited to express their views, was a problem which was not even preliminary, but truly a prerequisite of any formal act of procedure, the case brought before the Court by the New Zealand Application of 9 May 1973 having been definitively closed by the Judgment of 20 December 1974, whose operative part and reasons have the authority of *res judicata*; that in reply to the arguments put forward by New Zealand, while maintaining that this was not the subject of the debate with which the Court should be concerned, the French Government submitted data with a view to demonstrating, on the one hand, the harmlessness of underground nuclear tests in the short and longer term and to show, on the other, that France very actively endorsed the latest requirements of international law in the field of environmental protection;

39. Whereas in its oral statements the French Government, referring to the words "if the basis of this Judgment were to be affected" used in

paragraph 63 of the Judgment of 20 December 1974, contended that the said "basis" of the 1974 Judgment was determined by the subject-matter of the New Zealand Application of 1973 and by the nature of the commitment entered into by France in 1974 as to its future conduct; that the New Zealand Application, as appears in particular from paragraph 29 of the Court's Judgment of 20 December 1974, was concerned only with the ending of tests in the atmosphere likely to cause fallout on the territory of New Zealand; that New Zealand could not, without breaching the principle of good faith, attempt unilaterally to modify, by means of a fresh request, the meaning or scope of its 1973 Application, as determined at the time by the Court with binding force; that the commitment entered into by France in 1974 had two inseparable aspects, namely, on the one hand, an end to nuclear explosions in the atmosphere and, on the other, the shift to a new type of testing, underground testing; that the operative part of the Judgment of 20 December 1974 found that, owing to that commitment, the object of the New Zealand Application had been satisfied; that New Zealand had at that time considered itself reassured by the shift to underground testing because of the safety guarantees it offered and that, in its statements, it advanced no evidence or presumption of an unforeseen danger recently arising in the atolls; that the basis of the 1974 Judgment could not be affected by the resumption of underground testing announced in 1995, for the very reason that it was by the shift to testing of this type that the object of the New Zealand Application had been satisfied; and that it was consequently demonstrated that the first condition set in paragraph 63 of the said Judgment for submission of a "Request for an Examination of the Situation" had not, in the present instance, been fulfilled;

40. Whereas in its oral statements France, referring to the words "in accordance with the provisions of the Statute", used in paragraph 63 of the 1974 Judgment, contended that the only provisions of the Statute capable of permitting the "examination of the situation" contemplated by paragraph 63 of the Judgment of 20 December 1974 were Article 60, concerning the interpretation of a judgment, Article 61, relating to the revision of a judgment, and Article 40, paragraph 1, of the Statute, whereby "cases are brought before the Court", as appropriate, "by a written application addressed to the Registrar"; that New Zealand relied on none of those provisions; that its "Request for an Examination of the Situation" did not constitute a request for interpretation of the Judgment of 20 December 1974, since New Zealand was not seeking the interpretation of the said Judgment but the reopening of proceedings declared closed by the Court; that the action by New Zealand was more akin to a request for revision of the 1974 Judgment, New Zealand insisting on the existence of new facts, but that it was manifest that the conditions imposed by Article 61 of the Statute had not been fulfilled, the French decision taken in 1995 to conduct a final series of underground tests not having by definition existed prior to delivery of the Judgment, and the time-limit of ten years provided for in Article 61, paragraph 5, of the

Statute having expired; that the "Request for an Examination of the Situation" submitted by New Zealand had the appearance, in regard to its content, of an application but that New Zealand claimed, at the same time, that there was no new case; that New Zealand was seeking, through the said Request, to seise the Court of an entirely new dispute to which, according to New Zealand, new legal rules applied; that, in the event of a fresh application, New Zealand would have had to indicate a "present-day" jurisdictional link between itself and France, and that, in the absence of such indication, Article 38, paragraph 5, of the Rules of Court became applicable; that, if such were the case, and failing the consent of France, the New Zealand application or request could not be entered in the General List and no procedural steps could be taken; that it was consequently demonstrated that the second condition set in paragraph 63 of the 1974 Judgment for submission of a "request for an examination of the situation" had not, in the present instance, been fulfilled;

41. Whereas in the course of its oral statements the French Government also indicated that, for want of a principal proceeding, there could not be any incidental proceedings; that the Court could not therefore deal with the "New Request for the Indication of Provisional Measures" submitted by New Zealand and that the conditions laid down by the jurisprudence of the Court for the indication of provisional measures had moreover not, in the present instance, been fulfilled; and that the Court could not deal, either, with the "Applications for Permission to Intervene" and "Declarations of Intervention" filed by five Governments in the Registry of the Court;

42. Whereas the French Government consequently concluded that it had to reply in the negative to the question put by the Court to both States, as formulated in the letter from the Registrar dated 8 September 1995;

43. Whereas in the written replies given by New Zealand and France to the questions put by the Judges during the public sittings the two States clarified some of the arguments they had previously put forward; and whereas, *inter alia*, New Zealand, on the basis of a textual analysis of paragraph 63 of the 1974 Judgment and referring in particular to the position of the words "in accordance with the provisions of the Statute", maintained that: those words could only refer to the procedure applicable to an examination of the situation — and not to the need to have recourse to one of the courses of action expressly laid down by the Statute — and also that it would have been entitled, had it so wished, to submit its request for an examination in the form of a written application within the meaning of Article 40 of the Statute — invoking the same bases of jurisdiction as in its initial Application of 1973 and bearing in mind the indications given in this respect in paragraph 63 of the Judgment — or in the form of a request for interpretation according to Article 60 of the Statute;

* * *

44. Whereas New Zealand has submitted a "Request for an Examination of the Situation" under paragraph 63 of the Judgment delivered by the Court on 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case; whereas such a request, even if it is disputed *in limine* whether it fulfils the conditions set in that paragraph, must nonetheless be the object of entry in the General List of the Court for the sole purpose of enabling the latter to determine whether those conditions are fulfilled; and whereas, consequently, the Court has instructed the Registrar, pursuant to Article 26, paragraph 1 *(b)*, of its Rules, to enter that Request in the General List;

* * *

45. Whereas New Zealand bases its Request on paragraph 63 of the Judgment of 20 December 1974, which provides:

> "Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of such a request";

46. Whereas, in the present instance, the following question has to be answered *in limine*: "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)*?"; and whereas the Court has consequently limited the present proceedings to that question;

47. Whereas that question has two elements; whereas one concerns the courses of procedure envisaged by the Court in paragraph 63 of its 1974 Judgment, when it stated that "the Applicant could request an examination of the situation *in accordance with the provisions of the Statute*"; and whereas the other concerns the question whether the "basis" of that Judgment has been "affected" within the meaning of paragraph 63 thereof;

* *

48. Whereas, as to the first element of the question before it, New Zealand expresses the following view:

> "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 oppor-

tunity 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";

49. Whereas New Zealand claims that it

"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 of a new one";

and whereas it adds, furthermore, that, in pointing to "the provisions of the Statute", paragraph 63 could only be referring to the provisions concerning the procedure applicable to the examination of the situation once the Request is made;

50. Whereas New Zealand furthermore explicitly states that it is not seeking an interpretation of the 1974 Judgment under Article 60 of the Statute, nor a revision of that Judgment under Article 61;

51. Whereas France, for its part, stated as follows:

"As the Court itself has expressly stated, the possible steps to which it alludes are subject to compliance with the 'provisions of the Statute' . . . The French Government incidentally further observes that, even had the Court not so specified, the principle would nevertheless apply: any activity of the Court is governed by the Statute, which circumscribes the powers of the Court and prescribes the conduct that States must observe without it being possible for them to depart therefrom, even by agreement . . .; as a result and *a fortiori*, a State cannot act unilaterally before the Court in the absence of any basis in the Statute.

Now New Zealand does not invoke any provision of the Statute and could not invoke any that would be capable of justifying its procedure in law. It is not a request for interpretation or revision . . ., nor a new Application, whose entry in the General List would, for that matter, be quite out of the question . . .";

52. Whereas, in expressly laying down, in paragraph 63 of its Judgment of 20 December 1974, that, in the circumstances set out therein, "the Applicant could request an examination of the situation *in accordance with the provisions of the Statute*", the Court cannot have intended to limit the Applicant's access to legal procedures such as the filing of a new application (Statute, Art. 40, para. 1), a request for interpretation (Statute, Art. 60) or a request for revision (Statute, Art. 61), which would have been open to it in any event;

53. Whereas by inserting the above-mentioned words in paragraph 63 of its Judgment, the Court did not exclude a special procedure, in the event that the circumstances defined in that paragraph were to arise, in

other words, circumstances which "affected" the "basis" of the Judgment;

54. Whereas such a procedure appears to be indissociably linked, under that paragraph, to the existence of those circumstances; and whereas, if the circumstances in question do not arise, that special procedure is not available;

* *

55. Whereas the Court must now consider the second element of the question raised and determine whether *the basis of its Judgment of 20 December 1974 has been affected* by the facts to which New Zealand refers and whether the Court may consequently proceed to examine the situation as contemplated by paragraph 63 of that Judgment; and whereas, to that end, it must first define the basis of that Judgment by an analysis of its text;

56. Whereas the Court, in 1974, took as the point of departure of its reasoning the Application filed by New Zealand in 1973; whereas it affirmed in its Judgment of 20 December 1974 that it was its duty "to isolate the real issue in the case and to identify the object of the claim"; whereas it subsequently added that "it has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so", this being "one of the attributes of its judicial function" (*I.C.J. Reports 1974*, p. 466, para. 30); and whereas it continued as follows:

> "In the circumstances of the present case, as already mentioned, the Court must ascertain the true subject of the dispute, the object and purpose of the claim . . . In doing so it must take into account not only the submission, but the Application as a whole, the arguments of the Applicant before the Court, and other documents referred to . . ." (*ibid.*, p. 467, para. 31);

57. Whereas, in the light of this, the Court referred, among other things, to a statement made by the Prime Minister of New Zealand that

> "[t]he option of further atmospheric tests has been left open. Until we have an assurance that nuclear testing of this kind is finished for good, the dispute between New Zealand and France persists . . .";

and whereas it found that

> "for purposes of the Application, the New Zealand claim is to be interpreted as applying only to atmospheric tests, not to any other form of testing, and as applying only to atmospheric tests so conducted as to give rise to radio-active fall-out on New Zealand territory" (*ibid.*, p. 466, para. 29);

58. Whereas on the same date, 20 December 1974, the Court furthermore delivered a Judgment in the *Nuclear Tests (Australia* v. *France)* case, in which Australia had asked, in express terms, that it "*adjudge and declare* that . . . the carrying out of further atmospheric nuclear weapon tests . . . is not consistent with applicable rules of international law" (*I.C.J. Reports 1974*, p. 256, para. 11); whereas, having considered the Application of Australia, the Court employed in paragraph 60 of that Judgment a form of words identical to the one used in paragraph 63 of the Judgment in the *Nuclear Tests (New Zealand* v. *France)* case and adopted, in both Judgments, operative parts with the same content; and whereas for the Court the two cases appeared identical as to their subject-matter which concerned exclusively atmospheric tests;

59. Whereas the Court, in making these findings in 1974, had dealt with the question whether New Zealand, when filing its Application of 1973 instituting proceedings, might have had broader objectives than the cessation of atmospheric nuclear tests — the "primary concern" of the Government of New Zealand, as it now puts it; and whereas, since the current task of the Court is limited to an analysis of the Judgment of 1974, it cannot now reopen this question;

60. Whereas, moreover, the Court, at that time, took note of the communiqué issued by the Office of the President of the French Republic on 8 June 1974, stating that

> "in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed" (*ibid.*, p. 469, para. 35);

whereas it likewise referred to other official declarations of the French authorities on the same subject; and whereas it concluded, with reference to all those statements, that

> "they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made" (*ibid.*, p. 474, para. 51);

61. Whereas the unilateral declarations of the French authorities were made publicly outside the Court and *erga omnes*, and expressed the French Government's intention to put an end to its atmospheric tests; whereas the Court, comparing the undertaking entered into by France with the claim asserted by New Zealand, found that it faced "a situation in which the objective of the Applicant [had] in effect been accomplished" (*ibid.*, p. 475, para. 55); and accordingly indicated that "the object of the claim having clearly disappeared, there is nothing on which to give judgment" (*ibid.*, p. 477, para. 62);

62. Whereas the basis of the Judgment delivered by the Court in the *Nuclear Tests (New Zealand* v. *France)* case was consequently France's

undertaking not to conduct any further atmospheric nuclear tests; whereas it was only, therefore, in the event of a resumption of nuclear tests in the atmosphere that that basis of the Judgment would have been affected; and whereas that hypothesis has not materialized;

63. Whereas, in analysing its Judgment of 1974, the Court has reached the conclusion that that Judgment dealt exclusively with atmospheric nuclear tests; whereas consequently it is not possible for the Court now to take into consideration questions relating to underground nuclear tests; and whereas the Court cannot, therefore, take account of the arguments derived by New Zealand, on the one hand from the conditions in which France has conducted underground nuclear tests since 1974, and on the other from the development of international law in recent decades — and particularly the conclusion, on 25 November 1986, of the Noumea Convention — any more than of the arguments derived by France from the conduct of the New Zealand Government since 1974;

64. Whereas moreover the present Order is without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment;

65. Whereas the basis of the Judgment delivered on 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case has not been affected; whereas the "Request for an Examination of the Situation" submitted by New Zealand on 21 August 1995 does not therefore fall within the provisions of paragraph 63 of that Judgment; and whereas that Request must consequently be dismissed;

66. Whereas, as indicated in paragraph 44 above, the "Request for an Examination of the Situation" submitted by New Zealand in accordance with paragraph 63 of the 1974 Judgment has been entered in the General List for the sole purpose of allowing the Court to determine whether the conditions laid down in that text have been fulfilled in the present case; and whereas, following the present Order, the Court has instructed the Registrar, acting pursuant to Article 26, paragraph 1 *(b)*, of the Rules, to remove that Request from the General List as of 22 September 1995;

* * *

67. Whereas it follows from the conclusions reached by the Court in paragraph 65 above that it must likewise dismiss the "Further Request for the Indication of Provisional Measures" submitted by New Zealand, as well as the "Application for Permission to Intervene" submitted by Australia, and the "Applications for Permission to Intervene" and "Declarations of Intervention" submitted by Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia — all of which are proceedings incidental to the "Request for an Examination of the

Situation" submitted by New Zealand; and whereas the Court has instructed the Registrar to so inform the States concerned in notifying them of the text of the present Order;

* * *

68. Accordingly,

THE COURT,

(1) By twelve votes to three,

Finds that the "Request for an Examination of the Situation" in accordance with paragraph 63 of the Judgment of the Court of 20 December 1974 in the *Nuclear Tests (New Zealand* v. *France)* case, submitted by New Zealand on 21 August 1995, does not fall within the provisions of the said paragraph 63 and must consequently be dismissed;

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Oda, Guillaume, Shahabuddeen, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: *Judges* Weeramantry, Koroma; *Judge* ad hoc Sir Geoffrey Palmer;

(2) By twelve votes to three,

Finds that the "Further Request for the Indication of Provisional Measures" submitted by New Zealand on the same date must be dismissed;

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Oda, Guillaume, Shahabuddeen, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: *Judges* Weeramantry, Koroma; *Judge* ad hoc Sir Geoffrey Palmer;

(3) By twelve votes to three,

Finds that the "Application for Permission to Intervene" submitted by Australia on 23 August 1995, and the "Applications for Permission to Intervene" and "Declarations of Intervention" submitted by Samoa and Solomon Islands on 24 August 1995, and by the Marshall Islands and the Federated States of Micronesia on 25 August 1995, must likewise be dismissed.

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Oda, Guillaume, Shahabuddeen, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: *Judges* Weeramantry, Koroma; *Judge* ad hoc Sir Geoffrey Palmer.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-second day of September, one thousand nine hundred and ninety-five, in three copies, one of which will

be placed in the archives of the Court and the others transmitted to the Government of New Zealand and the Government of the French Republic, respectively.

(Signed) Mohammed BEDJAOUI,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Vice-President SCHWEBEL, Judges ODA and RANJEVA append declarations to the Order of the Court.

Judge SHAHABUDDEEN appends a separate opinion to the Order of the Court.

Judges WEERAMANTRY, KOROMA and Judge *ad hoc* Sir Geoffrey PALMER append dissenting opinions to the Order of the Court.

(Initialled) M.B.
(Initialled) E.V.O.