# NUCLEAR TESTS CASE

(*New Zealand v. France*)

(Application of 9 May 1973)

## AIDE-MEMOIRE OF NEW ZEALAND

## OUTLINE

# 1 INTRODUCTION

1. On 30 August 1995 the President of the Court held a meeting with the Co-Agents of New Zealand and a representative of France to discuss procedural aspects of the Request for an Examination of the Situation ("the main Request") and the Further Request for Interim Measures of Protection ("the Interim Measures Request"), both of which documents were filed by New Zealand on 21 August 1995. Towards the close of the meeting, the President invited the Parties to submit by 6 September 1995 an Aide-Memoire restating in summary form their positions on the principal questions considered during the course of the meeting, with a view to assisting the Court at the private meeting which it is to hold on 8 September 1995. The present Aide-Memoire contains New Zealand's response to that invitation.

2. This document is not, of course, a complete restatement of New Zealand's position. It should, therefore, be read together with the main Request. New Zealand wishes to emphasise that the present Aide-Memoire, being entirely informal in character and being presented at the specific request of the President and, as he himself stressed, without any basis in the Statute or the Rules, cannot be regarded as a submission on the material issues sufficient to meet New Zealand's entitlement to a formal, public and proper 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.

II. THE SCOPE OF THE PRIVATE MEETING OF THE COURT SCHEDULED FOR 8 SEPTEMBER 1995

3. A private meeting of the Court is, of course, one with which the Parties would not normally be concerned. New Zealand would not, therefore, venture to make any comments regarding such a meeting were it not responding to the specific request of the President which has just been mentioned. One reason for this request appears to be the submission by France that the New Zealand Request should not be entered on the Court's List. This submission has been expressed by France in the penultimate paragraph of the letter dated 28 August 1995 from the Ambassador of France to the Netherlands to the Registrar of the Court as follows:

> "Ainsi, la démarche de la Nouvelle-Zélande n'a pas lieu, selon lui, conformément aux dispositions du paragraphe 5 de l'article 38 du règlement de faire l'objet d'une inscription au rôle de la Cour."

4. New Zealand must begin by observing, parenthetically at this stage, that no question of the application of Article 38(5) of the Rules arises in the present proceedings. This provision is directed only to a case in which "the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made...". The terms of Article 38(5) thus presuppose that the case to which its provisions apply is a new one.

5. The present Requests are not made by New Zealand in relation to a new case. They are requests made within the framework of an existing case - the one begun by New Zealand on 9 May 1973 - which was never formally terminated and in relation to which the Court, in paragraph 63 of its 1974 Judgment, expressly reserved New Zealand's right to resume the case. However, this point is one which falls to be

discussed in connection with the subject of the continuity of the proceedings commenced in May 1973 dealt with in Part IV below.

6. For the moment, however, the only matter that needs to be considered in the present section is the French request that the New Zealand Requests should not be entered on the Court's List. In the circumstances now prevailing, especially the fact that the President has as yet only tentatively indicated the date for a hearing of the Interim Measures Request, New Zealand understands that the submission made by France is being regarded as a request that the Court summarily dismiss in limine, at the Court's meeting on 8 September, the Requests made by New Zealand.

7. It need hardly be said that, were the Court to take such an unprecedented step at that meeting, it would occasion the greatest concern to the New Zealand Government, to other Governments and to world public opinion. There is no warrant whatsoever - either in the Statute or Rules of the Court, or in its practice - for the Court to deal summarily with an issue of such central importance as the one now before it. This is not a case where a procedural stage is tainted by some manifest defect such as, for example, the failure by the applicant to meet the requirements of Article 34 of the Statute. Indeed, it may be recalled that as regards a request by France couched in almost identical language when the case was first filed in 1973, the Court left the matter until it considered the request for provisional measures and then, in the Order which it made after oral hearings on that request, reached the conclusion expressed thus in paragraph 33 of the Order:

> "... the foregoing considerations do not permit the Court to accede at the present stage of the proceedings to the request made by the French

Government in its letter dated 16 May 1973 that the case be removed from the list". (See ICJ Reports 1973, p.141.)

8. Nor is the situation comparable to that in which the Court decided in 1984, by nine votes to six, "not to hold a hearing on the Declaration of Intervention of the Republic of El Salvador". (See ICJ Reports 1984, p.216.) For one thing that decision related to a declaration of intervention in a case already in progress between two other States, whereas the present situation is one in which a State is requesting the Court to resume its consideration of that State's own case pursuant to an express provision in a judgment of the Court foreseeing such an action.

9. The compelling difference between the two cases, however, is to be found in paragraphs 2 and 3, and the operative part, of the Court's above-cited Order of 4 October 1984. Paragraph 2 states that

> "The Declaration of Intervention of the Republic of El Salvador, which relates to the present phase of the proceedings, addresses itself also in effect to matters, including the construction of conventions, which presuppose that the Court has jurisdiction to entertain the dispute between Nicaragua and the United States of America and that Nicaragua's Application against the United States of America in respect of that dispute is admissible."

Paragraph 3 notes that El Salvador, in its Declaration of Intervention, reserved the right in a later substantive phase of the case to address the interpretation and application of the Conventions to which it was a party. Accordingly, the Court, in the operative part of the Order, held that the El Salvador declaration of intervention was inadmissible "inasmuch as it relates to the current phase of the proceedings".

10. In short, the effect of the Court's Order was not to exclude El Salvador altogether from the proceedings, but only to defer the moment at which it might participate in them. (See also ICJ Reports 1984, pp 395-396, para 6). The fact that El Salvador did not seek to intervene at a later stage in the proceedings makes no difference. The essential point is that the decision summarily taken by the Court to refuse El Salvador the opportunity to intervene at the jurisdictional phase of the case was not at that moment seen by the Court as depriving El Salvador of all opportunity to assert its interest in the case.

11. The present situation is quite different. If the Court were summarily to reject the two New Zealand Requests it would be deciding the essentials of the case against New Zealand without having given it the opportunity to present its case orally in a proper procedural framework. This would be a manifest and serious departure from the principle reflected in Article 43(1) the Statute, namely, that "the procedure shall consist of two parts: written and oral". Any such departure would be seen as being the more grave by reason of the fact that the Requests made by New Zealand are carefully reasoned and cannot be regarded as superficial or manifestly defective. If the Court should eventually find that, contrary to New Zealand's submissions, it cannot grant New Zealand the relief that it requests, this should be done only after the Court has heard oral argument on the merits of the main Request.

12. A further pertinent consideration is that the request by France that the Requests should be summarily dismissed (misconceived and obliquely expressed as it is) is not accompanied by any reasoning. The French letter contains no more than the repeated assertion that the Court lacks jurisdiction, unsupported by any reasoned

response to the main Request. It would, in New Zealand's submission, be improper, to say the least, if the Court were to dismiss the New Zealand Requests in limine on the basis of so bare an assertion by France. Were the Court to reach such a decision, it would have to be on the basis of a compellingly argued French response to New Zealand's main Request to which, in its turn, New Zealand would have an opportunity to reply.

## III. THE TREATMENT OF THE FURTHER PROVISIONAL MEASURES REQUEST

13. In the submission of New Zealand, the first public procedural step that the Court should take following its private meeting of 8 September 1995 is that of holding a public hearing on the New Zealand Further Request for the Indication of Provisional Measures of Protection filed on 21 August 1995. In accordance with Article 66(2) of the 1972 Rules of the Court, this request must not only have priority over all other cases but is also to be treated as a matter of urgency.

14. Because of the imminence of the resumption by France of underground testing it is necessarily the case that the relief sought in the Provisional Measures Request is very similar to that sought in the main Request. That does not mean, however, that the consideration of the Provisional Measures Request should be as extended as would be the consideration of the main Request.

15. Obviously there will arise, even at the Provisional Measures stage, the threshold question of the continuity of the 1973 proceedings because this goes to the question of the Court's jurisdiction or competence to indicate provisional measures.

16. The proposition is too well established in the Court's jurisprudence to require extensive citation of authority, that any conclusions that the Court may reach at the interim measures stage - whether on jurisdiction or on substance - cannot prejudice the Court's decision on such matters when it comes to deal with them later. It is sufficient to cite the following sentence from the Order of the Court of 10 May 1984 on Provisional Measures in the Case concerning Military and Paramilitary Activities in and against Nicaragua, (ICJ Reports 1984, at p.182, para.31):

> "... the Court in the context of the present proceedings on a request for provisional measures ... cannot make definitive findings of fact, and the right of the respondent State to dispute the facts alleged and to submit arguments in respect of the merits must remain unaffected by the Court's decision."

Moreover, because the urgency of the interim measures stage limits the ability of the Court to examine in depth any questions of jurisdiction that may arise, the Court has consistently taken the view that it is sufficient for an applicant to show a *prima facie* case of jurisdiction.

17. This is what happened in 1973 when the Court held (in paragraph 18) that "the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded". In addition, the Court also stated in paragraph 24 that "it cannot be assumed *a priori* that such claims fall completely outside the purview of the Court's jurisdiction, or that the Government of New Zealand may not be able to establish a legal interest in respect of these claims entitling the Court to admit the Application".

18. It is thus evident that the 1973 Order is itself authority for the conclusion that the 1928 General Act and Article 36(2) of the Court's Statute establish *prima facie* jurisdiction in respect of the case as framed in 1973. No subsequent act of the Court has in any way replaced that interim finding. To the extent that the present proceedings are a continuation of the 1973 proceedings, there is no basis for regarding that determination by the Court of its *prima facie* jurisdiction as other than valid.

19. At the same time, as is already manifest, New Zealand recognises that there is now an additional question that affects the competence of the Court, namely, whether the present proceedings are a continuation of those to which the Court's earlier finding of *prima facie* jurisdiction applies. This additional question must itself be identified as one of jurisdiction or, at the least, as analogous to one of jurisdiction. It is, therefore, also to be determined by reference to the same tests as are applied to other questions of jurisdiction, namely, whether there is a *prima facie* case of jurisdiction or, expressed in terms of the present proceedings, whether there is a *prima facie* case of continuity. New Zealand submits that, for the purposes of the present stage of the proceedings, and on the basis of the considerations set out in Part IV below, such a *prima facie* case does exist.

20. As regards the substance of the request for interim measures, New Zealand recalls the manner in which the Court approached this question in paragraph 30 of the 1973 Order. There the Court used the words:

> "... it suffices to observe that the information submitted to the Court ... does not exclude the possibility that damage to New Zealand might be shown to be caused ...."

In the present phase of the proceedings, of course, the issue is not one of damage to the territory of New Zealand but one of contamination of the marine environment in which New Zealand has an interest.

## IV. CONTINUITY OF THE PROCEEDINGS COMMENCED ON 9 MAY 1973

21. Because of the central position in New Zealand's present initiative of the contention that the two Requests of 21 August 1995 continue, and form part of, the case begun by the Application of 9 May 1973 ("the 1973 Application") New Zealand will now recapitulate its main arguments on these points.

22. This is not a new case. As stated in the main Request, the case which New Zealand began in 1973 did not come to an end with the delivery of the Court's Judgment of 20 December 1974 ("the 1974 Judgment"). The key paragraph in that Judgment was paragraph 63 which stated that if "the basis of this Judgment were to be affected" New Zealand might request the Court to examine the situation. The Court also said that if such an examination were to take place, it would be on the basis that the denunciation by France of the 1928 General Act for the Pacific Settlement of International Disputes ("the General Act") cannot constitute by itself an obstacle to the presentation of such a request.

23. There are three separate aspects to the operation of the paragraph. (A) The first is the right reserved to New Zealand to resume the 1973 case in certain circumstances. (B) The second is the identification of the circumstances in which that may happen. (C) The third is the existence of the circumstances in which the 1973 case may be resumed.

A. The right of New Zealand to resume the 1973 case

24. Paragraph 63 clearly indicates that the Court did not intend to, and did not, bring the case to an end. This is inherent in the very words used: "... the Applicant could request an examination of the situation ...". The natural meaning of the words suggests that such an examination would be seen as part of the same case. If there could be any doubt as to this, it is resolved by the Court's statement that the denunciation by France of the General Act cannot by itself constitute an obstacle to the presentation of such a request. The Court could not have contemplated the ineffectiveness of the French denunciation of that treaty except on the basis that this was an act done after the jurisdiction of the Court had already become established by the 1973 Application. If the Court had considered that the case had been brought to a complete end by the 1974 Judgment, it could not have preserved its jurisdiction in this way. If the case had ended, the Court's jurisdiction would also have ended. Any "resumption" or "continuation" of the case would, on this basis, have required a new source of jurisdiction operative at the time of such resumption or continuation. The Court's preservation of the original basis of jurisdiction is clearly incompatible with any such approach.

B. The circumstances in which the 1973 case might be resumed

25. Quite distinct from the possibility of resuming the 1973 case is the question of the conditions upon which such a resumption might be sought. That situation is described in paragraph 63 of the 1974 Judgment as being "if the basis of the Judgment were to be affected" by pertinent future events.

26. The "basis of the judgment" thus referred to would clearly have been affected if France resumed atmospheric testing, contrary to its undertaking. There is, however, no indication that the Court believed that this could be the sole circumstance in which the basis of the judgment would be affected. It is perfectly consistent with the Court's words to say that:

i The "basis of the judgment" lay in the Court's assumption that, since France had in 1974 only conducted "atmospheric" testing, the concerns of New Zealand could be related only to atmospheric testing;

ii France had undertaken to discontinue that form of testing;

iii Therefore, on that basis, the claim of New Zealand had no further object as matters stood in 1974.

27. But, at the same time, the Court foresaw that the "basis of the judgment" would be affected if New Zealand's concerns which related to nuclear testing in general terms, became relevant in the future either because the fallout from French nuclear tests produced radioactive contamination violating New Zealand's rights or because French conduct in relation to nuclear testing otherwise violated New Zealand's rights.

28. It is not correct to treat the commitment undertaken by France as controlled by the adjectives "atmospheric" and "underground", so that only atmospheric tests would be banned and any and all underground tests would be permitted. As the Court itself said in paragraph 31 of the 1974 Judgment, "the Court must ascertain the true subject of the dispute, the object and purpose of the claim".

That "true subject" was, as set out in the concluding request of the 1973 Application, a declaration "that the conduct by the French Government of nuclear tests in the South Pacific region that give rise to radioactive fallout constitutes a violation of New Zealand's rights under international law and that these rights will be violated by any further such tests". That request was not limited by the adjective "atmospheric". That omission was not accidental. New Zealand was not opposed simply to atmospheric testing but to any testing that gave rise to environmental contamination - whether by radioactive fallout on the territory of New Zealand or by radioactive pollution of the marine environment. When the adjective "atmospheric" was used in the arguments it was because that word described the only type of testing that had until that time been conducted by France in the South Pacific region and that had given rise to radioactive fallout in the area. It was not because of any suggestion that only atmospheric testing could cause pollution.

29. At several points in the New Zealand pleadings, both written and oral, in the 1973-74 proceedings it was made plain that the concern of New Zealand was with the wider problem of radioactive contamination rather than the narrow issue of atmospheric testing as the single source of such pollution. Thus the 1973 Application referred in paragraph 27 to "... intensified governmental and popular action to control and prohibit nuclear weapons and their testing in the atmosphere and elsewhere ...". In paragraph 28 reference was made to the violation of New Zealand's rights "by nuclear testing undertaken by the French Government in the South Pacific region" without limitation to atmospheric testing (*ICJ Pleadings*, vol.II p.8). Moreover, the rights for which New Zealand sought protection were not rights which could be violated only by atmospheric fallout, namely, the inviolability of New Zealand's

territory. They included also non-territorial rights which could be affected by the kind of contamination that is now in issue, namely, the right to preservation from unjustified artificial radioactive contamination of the maritime environment, the right that no radioactive material enter the territorial waters of New Zealand, the Cook Islands, Niue or the Tokelau Islands and the right of New Zealand to freedom of the high seas, including the freedom to exploit the resources of the sea and seabed, without interference or detriment resulting from nuclear testing (see paragraph 28 of the Memorial, referred to above).

30. The rights of New Zealand were expressed in identical terms in paragraph 2 of its Request for the Indication of Interim Measures of 14 May 1973 and in the interim measures proposed in paragraph 51 thereof.

31. Again, in its Memorial on Jurisdiction and Admissibility, paragraph 171, New Zealand, in describing the rights for which it was seeking protection, wrote of the first two categories of rights it claimed: "Yet the rights are the same for all. They reflect a community interest in the protection of the security, life and health of all peoples and in the preservation of the global environment". The scope of the rights which New Zealand was seeking to protect and, therefore, the absence of limitation of the sources of violation of such rights, was further demonstrated in paragraphs 210 and 213 of the same Memorial, where, in the latter paragraph, New Zealand said:

> "No country has more consistently and clearly expressed opposition to French nuclear testing in the South Pacific. No country has a stronger claim to a legal interest in the protection of the right to inhabit a world free from nuclear testing in the atmosphere and the right to the preservation of the environment from unjustified artificial radioactive contamination".

Although this sentence includes the adjective "atmospheric" the context makes it clear that it was not used as a limiting description but only as the description of the source then responsible for contamination in the region.

32. Moreover, the fact that the term "fallout" was often used in conjunction with the mention of atmospheric testing should not be taken to mean that "fallout" is a concept of a gravitational kind associated only with atmospheric testing. "Fallout" has a wider meaning and in, for example, the Oxford Encyclopaedic English Dictionary, is defined as "radioactive debris caused by a nuclear explosion or accident". Radioactivity can "fallout" of the Mururoa tests equally well by seepage or leakage from its structure.

33. Indeed, if the Court were to accept the present insistence by France upon the controlling force of the adjectives "atmospheric" and "underground" alone, the Court would in effect be subscribing to the following propositions:

(i) that in 1974, when New Zealand was thought by the Court to have requested it to declare atmospheric testing illegal, New Zealand would still have been content that the Court should permit other forms of testing that could give rise to nuclear contamination of a kind similar to that which New Zealand was seeking to stop;

(ii) that in 1974, when France undertook to stop atmospheric testing, it would have been acceptable for it, without changing the content of that commitment, to have expressly reserved the right to cause similar kinds of nuclear contamination provided that it did so by means of non-atmospheric, e.g. underground, testing; and

(iii) that in 1974, when the Court treated the commitments entered into by France as meeting the concern expressed by New Zealand that nuclear testing should be ended, the Court regarded both New Zealand's claim and France's undertaking as subject to an exception permitting nuclear contamination of the environment, provided that it was not caused by atmospheric testing.

34. One only needs to spell out in this way the implications of treating the adjectives "atmospheric" or "underground" as controlling factors to demonstrate the unreality of the interpretation which France now seeks to put upon the use of those words.

35. Thus the conclusion must be reached, in relation to the circumstances in which the 1973 case might be reopened, that the basis of the Court's 1974 judgment was not solely the Court's recognition that France had undertaken to give up all atmospheric testing. It was rather that, whilst in 1974 the French commitment met New Zealand's immediate concerns, any new development which re-activated those concerns by raising new fears of contamination of the environment would affect the basis of that judgment. 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.

C. <u>The existence of the circumstances in which the 1973 case may be resumed</u>

36. The third aspect of the operation of paragraph 63 of the 1974 Judgment is that the basis of the Judgment should be affected by subsequent conduct on the part

of France. This requires some consideration of whether the conduct of France, either past or prospective, has affected the basis on which the Court concluded in 1974 that the claim of New Zealand no longer had any object. This is, first, a matter of identifying the standard of proof applicable in such circumstances; and, second, a question of whether this standard is satisfied by the facts before the Court.

(1) The standard of proof

37. In approaching this matter, it is necessary to bear in mind the evolution during recent years of the international law of the environment. The relevance of evolution in the pertinent law has been clearly pointed out by the Court in the *Aegean Sea (Jurisdiction) Case (ICJ Reports 1978, p.3,* at pp.32-34), where the Court held that the meaning of the expression "the territorial status of Greece" in a reservation attached by Greece to its acceptance of the 1928 General Act must have been "intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time". Again, at p.34, the Court stated that it "has to take account of the evolution which has occurred in the rule of international law concerning a coastal State's rights of exploration and exploitation over the continental shelf". If the evolution of customary international law is relevant to the interpretation of a reservation to a jurisdictional provision, it is no less relevant to the determination of the Court's approach to the standard to be applied in assessing the significance of pertinent scientific information.

38. In terms of the present case, the relevant evolution of the law to be taken into account is that relating to the protection of the environment, nationally and internationally. In particular, States have become aware that in this area of activity it

is no longer sufficient to rely on concepts which previously determined the obligations of States. The general proposition, in relation to international claims, that a State alleging that the conduct of another had or would have transboundary consequences must prove the existence of harm or damage, has now, in relation to environmental matters, been significantly altered by the evolution of the "precautionary principle" and of the associated procedural requirement of the conduct of environmental impact assessments (EIAs). No longer is it correct for a State whose conduct in the environmental field is challenged to say: "We may proceed unless and until you, the complainant, can prove that our conduct has caused damage or that our proposed conduct will, or is likely to, cause damage". The burden of proof has, in effect, been reversed. It now rests upon the State which proposes to act (especially in nuclear matters) to show through appropriate procedures, in the form of EIAs, that its proposed conduct will not cause environmental harm. Indeed, for France there is a specific obligation in this respect by virtue of the Noumea Convention. This shift in the onus of proof is essential in the environmental field because normally - and certainly in this case - the facts are largely in the possession of the State planning the activity. It is self-evident that New Zealand does not have access to the Mururoa Atoll. In the present document it is not necessary to develop this point further. The Court is respectfully referred to paragraphs 105-107 of the main Request.

(2) The failure of France to meet the required standard

39. It is not necessary in this Aide-Memoire, intended only to assist the Court in addressing the procedural questions raised by the President, to develop in detail the contention that France has failed in its obligation to apply the precautionary

principle or to carry out an appropriate EIA in accordance with its obligations under the Noumea Convention and customary international law. It is a fact that some 34 atmospheric and 124 underground nuclear tests have already been carried out at the Mururoa Atoll and a further 4 atmospheric and 8 underground tests at Fangataufa Atoll. The French Government has alleged that these tests have not occasioned any significant radioactive contamination of the surrounding marine environment and that their continuation will not do so. In the present proceedings New Zealand is not seeking to condemn France for contamination that has already occurred as a result of such tests - even though there is evidence to contradict the contention of France that there has been no such contamination. The essential complaint of the present proceedings is that there is a reasonably founded concern that what France has already done in the two atolls (particularly Mururoa) may cumulatively have so weakened their structures that further tests of undisclosed force may develop such weaknesses and fracture those structures in a way leading to greater escape of radioactive material into the marine environment. Contrary to French statements, none of the scientific missions to Mururoa has been enabled to form a properly researched or informed opinion of the matter, beyond observing that there has already been some noticeable and possibly significant impact upon the structure of Mururoa.

40. It has not been possible for any responsible independent scientist to conclude that the proposed tests do not carry any environmental risk or that such risks as are involved are justified by any benefit to be gained from the tests. Such scientists have not been given appropriate opportunities to investigate the problem and the French authorities have not provided in relevant scope or detail the information which

is necessary for suitable conclusions to be drawn. In thus failing to provide in advance the necessary information about the tests, France has violated the obligations resting upon it by virtue of international adherence to the precautionary principle. Moreover, it has failed to comply with its own express obligation under the Noumea Convention, as well as its customary international law duty, to carry out an EIA or provide equivalent reassurance to the international community.

D. Conclusions of this Part

41. In the light of the considerations set out above, New Zealand submits the following conclusions:

i In 1974 the Court reserved the possibility of resuming the case if the basis of the Court's Judgment were affected;

ii The circumstances contemplated as affecting the basis of the Court's Judgment were 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;

iii If there is evidence that a risk of radioactive contamination of the marine environment may be produced by France as a result of the proposed tests, then the Court should proceed to an examination of the situation within the framework of the 1973 case. (The question of the prior indication of interim measures has already been mentioned in Part III above.);

iv As matters have turned out, the Court's understanding and belief in 1974 that New Zealand's concerns would be fully met by a cessation of atmospheric testing cannot be maintained because there is now a well-founded apprehension of cumulative damage to the structural integrity of the atolls such as may lead to the further contamination of the marine environment by radioactive material as a result of additional tests;

v The burden of proof does not rest upon New Zealand to show positively that such contamination of the marine environment will, or even may, take place. In view of the development of both treaty and customary international law standards applicable to environmental matters, the burden rests upon France to satisfy the requirements of the precautionary principle and, to that end, to carry out a suitable EIA in order to establish that such contamination will not occur;

vi By reason of the above, the view to be taken of the present proceedings is that they are properly a request to examine the situation arising out of the French proposal to renew underground testing. As such, the request and ensuing examination take place within the framework of the 1973 proceedings and are to be regarded in law as a resumption and continuation thereof.

## V. THE POSITION OF THE *AD HOC* JUDGE CHOSEN BY NEW ZEALAND

42. When the case was commenced in May 1973 New Zealand nominated as Judge *ad hoc* the Rt Hon Sir Garfield Barwick, then Chief Justice of the High Court of Australia. Sir Garfield sat both in the interim measures proceedings and in those relating to jurisdiction and admissibility which led to the Judgment of 20 December 1974. Sir Garfield, being now rather advanced in years, has conveyed his resignation to the Court.

43. In view of the continuity of the proceedings, New Zealand is entitled to choose another *ad hoc* Judge in succession to Sir Garfield. By letter of 21 August 1995, New Zealand communicated to the Court its choice of the Rt Hon Sir Geoffrey Palmer.

44. France has not raised any objection to the selection of Sir Geoffrey. It has taken the same position as it did in 1973. At that time, by a letter of 16 May 1973 to the Registrar of the Court (see ICJ Pleadings, Vol.II, pp.347-48) the Ambassador of France to the Netherlands said:

> "... le Gouvernement de la République estime que la Cour n'a manifestement pas compétence dans cette affaire et qu'il ne peut accepter sa juridiction...
>
> De ce fait, de l'avis de mon gouvernement, la question de la designation d'un juge ad hoc par le Gouvernement Néo-Zélandais ne se pose pas, non plus que celle de l'indication de mesures conservatoires...." (Emphasis supplied.)

45. In relation to the present phase of the case, the Ambassador of France to the Netherlands said in his letter of 28 August 1995 to the Registrar of the Court:

> "... le gouvernement de la Republique française estime que la Cour n'a manifestement pas compétence pour connaître de l'action intentée par la Nouvelle-Zélande et qu'il ne peut accepter sa juridiction en l'espèce.
>
> De ce fait, de l'avis de mon gouvernement, la question de la désignation d'un juge "ad hoc" par le gouvernement de la Nouvelle-Zélande ne se pose pas, non plus que celle de l'indication de mesures conservatoires qui n'auraient en tout état de cause peu de justification...." (Emphasis supplied.)

46. In 1973 the President of the Court, at the opening of the oral proceedings on the request for interim measures, referred to the terms of the letter from France of 16 May 1973 quoted in paragraph 36 above and concluded: "Thus the objection on the part of France was not one within the meaning of Article 3, paragraph

1, of the [1972] Rules of the Court [corresponding to Article 35(3) of the 1978 Rules]". Sir Garfield Barwick accordingly sat as the *ad hoc* Judge chosen by New Zealand both at the interim measures stage and at the jurisdiction and admissibility stage. Since the words used by France in its letter of 28 August 1995 are, in this respect, identical with those used in its letter of 16 May 1973, it must be presumed that the Court will treat the words used in the later letter in the same way as it did the words in the earlier letter - that is to say, as not being an objection on the part of France within the meaning of Article 3, paragraph 1, of the 1972 Rules. There is, therefore, nothing on the record that amounts to a relevant objection by France to the immediate participation of Sir Geoffrey.

47. But even if there were such an objection, it would not bind the Court. And if the Court had to decide on the validity of the choice of Sir Geoffrey Palmer, it would, so New Zealand submits, wish to take into account the following considerations. It is clear, as New Zealand suggests, that if Sir Garfield had not resigned and if New Zealand had sought the continuance of the 1973 case on the basis of paragraph 63 of the 1974 Judgment and, let it be assumed, in reaction to, or anticipation of, undoubtedly atmospheric tests, there could be no doubt that Sir Garfield would have been entitled to participate in all meetings and deliberations of the Court, whether public or private, relating to the case. This would flow from the last sentence of Article 31(6) of the Statute which provides that *ad hoc* Judges "should take part in the decision on terms of complete equality with their colleagues". What would be true for Sir Garfield would necessarily be true in respect of his properly nominated successor. New Zealand submits, therefore, that in logic Sir Geoffrey

Palmer should participate in whatever private meeting the Court may hold to discuss the case, such as the one fixed for 8 September 1995.

48. The logic of the situation is reinforced by the important consideration that there is already a member of the Court of French nationality. If he were to participate in the private meeting and Sir Geoffrey were excluded from it, there would thus be an inequality between the Parties which it is the evident intention of Article 31 of the Statute to avoid. This inequality could only be remedied if the Judge of French nationality were to stand down.

49. There is no real difficulty in the situation. It is comparable to any case where an Applicant State, having nominated an *ad hoc* Judge, is then confronted by an objection to the Court's jurisdiction. It has been the practice of the Court to permit the *ad hoc* Judge to sit in the preliminary objection phase, even though the outcome might eventually be a holding that the Court had no jurisdiction and, therefore, implicitly that there was no case in which the Applicant State could originally have nominated the *ad hoc* Judge. The situation in the present case is analogous to this.

50. In any event, New Zealand suggests that there should come into play a presumption of the continuity of the proceedings - a presumption which is created by the very inclusion of paragraph 63 in the 1974 Judgment. In theory, even if the tests to be resumed were manifestly "atmospheric", there might be some other ground than continuity on which France might wish to challenge the validity of a request for examination of the case. Yet it could not be said in such circumstances that the *ad hoc* Judge nominated by New Zealand could not sit. To New Zealand, it appears that

if he could sit in that situation, he is entitled to sit in a case where continuity is the issue.

51. If the Court were to decide otherwise it would, in effect, be violating its Statute. The Court in 1974 opened up the possibility that a request might be made at some later date to resume consideration of the case. It did not then say that in such an event it would exclude the *ad hoc* Judge. Indeed, it could not say so, for the Statute contains no provision authorising the Court to suspend the participation of an *ad hoc* Judge (other than on the grounds indicated in Article 24, which are applicable to all Members of the Court). Furthermore, Article 21(5) of the Statute provides that "the full Court shall sit except when it is expressly provided otherwise in the present Statute". In cases where an *ad hoc* Judge is properly appointed, he or she must be regarded as a member of the "full" Court - by reason, again, of the position of complete equality established by Article 31(6) of the Statute.

52. New Zealand therefore respectfully urges the Court to proceed on the basis that Sir Geoffrey Palmer is a member of the Court, in the capacity of an *ad hoc* Judge, and that he should sit as such forthwith.

## VI. THE MAINTENANCE OF THE JURISDICTIONAL BASIS OF THE 1973 PROCEEDINGS

53. A further consequence of the continuity of the proceedings is that the present Requests still rest upon the same jurisdictional basis as did the proceedings instituted in 1973, namely, French acceptance of the 1928 General Act and, additionally, the French acceptance of the Optional Clause.

54. In paragraph 18 of the 1973 Order indicating interim measures of protection the Court held that "the provisions invoked by the Applicant appear, *prima facie*, to afford a basis on which the jurisdiction of the Court might be founded".

55. In paragraph 63 of the 1974 Judgment the Court expressly preserved the position under the General Act (whatever that position might be) by stating that

> "the denunciation by France, by letter dated 2 January 1974, of the General Act for that 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".

Logically the same must be true of the withdrawal by France on 2 January 1974 of its declaration of acceptance of the Optional Clause. That logic is unimpaired by the fact that the Court made no reference to this aspect of its jurisdiction.

## VII. THE COURT TAKES THE CASE UP AGAIN AT THE PROCEDURAL STAGE WHICH IT HAD REACHED AT THE DATE OF THE 1974 JUDGMENT

56. Another consequence of the continuity of the 1973 case is that it is still at an interlocutory stage. In its Order of 22 June 1973 the Court called upon the Parties to argue, in the first instance, questions of the jurisdiction of the Court and the admissibility of the Application (*ICJ Reports 1973*, p.142). The Court did not pass upon those matters in its Judgment of 20 December 1974 since it limited itself to the finding that the claim of New Zealand no longer had any object and that the Court was therefore not called upon to give a decision thereon.

57. Accordingly, once the Court has passed the provisional measures stage of the case the next phase would be the resumption of its consideration of the questions of jurisdiction and admissibility, as called for by its Order of 22 June 1973. In view of the fact that these matters have already been fully pleaded in the Memorial filed by New Zealand on 2 November 1973 and in the hearings held on 10 and 11 July 1974, it is unnecessary to plead these matters again in detail. However, the Parties should be given an opportunity to submit a supplementary Memorial to take into account developments subsequent to 11 July 1974 (that is, the date of the closure of the oral proceedings), in particular the significance of the opinions expressed by six Judges in December 1974 to the effect that the 1928 General Act is a valid basis for exercise of jurisdiction by the Court. This supplementary pleading could be combined with a further Memorial developing New Zealand's main Request for an Examination of the Situation. Thereafter the proceedings would continue in such manner as the Court may deem appropriate.

## VIII. THE TREATMENT OF THE APPLICATIONS TO INTERVENE

58. Only passing reference was made at the meeting of 30 August 1995 to the Applications to Intervene which have recently been filed in the case.

59. New Zealand believes that these Applications are of importance as an indication of legitimate regional concern. It raises no objection to them and welcomes them. It does not regard the fact that the Applicant States indicate a wish to participate in the interim measures stage as creating any insurmountable obstacles, though it would hope that such participation would not contribute to any delay in the indication by the Court of provisional measures. It would be quite acceptable to

New Zealand if the Court were to give the Applicant States an opportunity to support their Applications at the hearings immediately after France (if it appears) has replied to New Zealand's opening presentation. New Zealand and France could then offer any comments that they might have on the Applications in the course of their *repliques* and *dupliques*.

## IX. APPLICABLE RULES OF COURT

60. One consequence of the continuity of the proceedings is that the present phase of the case falls within the terms of the last paragraph of the Preamble to the Rules of the Court adopted on 14 August 1978:

> "the following revised Rules of Court ... shall come into force on 1 July 1978, and shall as from that date replace the Rules adopted ... on 6 May 1946 and amended on 10 May 1972, save in respect of any case submitted to the Court before 1 July 1978, or any phase of such a case, which shall continue to be governed by the Rules in force before that date".

New Zealand submits therefore, that the Rules of Court adopted on 6 May 1946, as amended on 10 May 1972, will continue to apply.

Respectfully submitted,

Co-Agents for New Zealand

5 September 1995

A:\L