(c) Case Analysis

Case to the International Court of Justice on Legality of French Nuclear Testing

Keywords: environmental law; France; International Court of Justice; New Zealand; nuclear tests.

1. INTRODUCTION

Last year, for the second time in a little over 20 years, New Zealand asked the International Court of Justice to adjudicate the legality of French nuclear testing. This followed the announcement by the new President of France to the effect that the moratorium that his predecessor had put in place three years earlier, and had promised that France would continue to observe, would be terminated. The action by the New Zealand government was based on a unanimous decision by all political parties in New Zealand. This action reflected the anger of the countries in the South Pacific at the fact that a nuclear-weapon state was still prepared, in 1996, to explode nuclear devices in fragile marine environments on the other side of the world. In short, New Zealand wanted to utilize all available opportunities to persuade France not to proceed.

The jurisdictional difficulties facing this action were clear. In January 1974, in response to proceedings initiated on an earlier occasion, France had withdrawn its declaration accepting the compulsory jurisdiction of the Court and had denounced the 1928 General Act for the Pacific Settlement of International Disputes that had provided a basis for jurisdiction in the original case.[1] However in its judgment in that case, given in December 1974, the Court left an opening for the case to be resumed; it observed 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

1. 93 LNTS 344 (1928).

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of the Statute."[2] New Zealand sought to take advantage of that opportunity.

Once the decision was taken to put the matter before the Court, New Zealand moved very quickly. As in 1973, one of the objectives was to delay the resumption of French nuclear tests by asking the Court to award interim measures of protection. The President of the Court was also asked to exercise his powers under the Rules of Court to ask the parties not to do anything that would change the *status quo*, pending the hearing on the matter. Two documents, the Request for an Examination of the Situation, with various annexes, and a Further Request for the Indication of Provisional Measures, were prepared and submitted to the Court within approximately two weeks, well before the first French test took place.

The circumstances of the case were unique. The parties and the Court were faced with a number of novel issues. What precisely did paragraph 63 of the Court's 1974 Judgment mean? How did one go about resuming a case after an interval of over 20 years? What documents should be used? What procedural rules applied, since there was nothing in the Statute or Rules of the Court that expressly covered the situation? What substantive law could be relied upon: only that applying at the time of the earlier case, or contemporary international law as well?

2. CONDUCT OF THE CASE

The parties, and the Court, responded to these challenges in various ways. As part of its argument that what was being put before the Court was simply a continuation of the earlier case as provided in the 1974 Judgment, New Zealand proceeded by way of a document based on the exact terms of the Court's comment in 1974. It also proceeded under the old (1972) Rules of Court that applied at the time[3] and nominated a new Judge *ad hoc,* but only after obtaining a letter of resignation from the Judge *ad hoc* who had served in the original case.

France, for its part, argued that there was no case to revive and no

2. Nuclear Tests Cases (New Zealand *v.* France), Judgment, 1974 ICJ Rep. 457, para. 63.
3. This was, moreover, dictated by the Preamble to the present (1978) Rules, which provides that the previous Rules shall continue to apply in respect of any case submitted to the Court before 1 July 1978 or any phase of such a case.

case to answer. While continuing to deny the jurisdiction of the Court, it participated in the proceedings (unlike those in 1973 and 1974), but, in terms of hearings, these proceedings were confined to a preliminary meeting with the President of the Court and a public hearing concerned only with the central procedural question (or threshold question) of the scope of the relevant paragraph of the 1974 Judgment. France did not appoint an agent. Its legal team generally did not wear legal attire and addressed the New Zealand Judge *ad hoc,* as if he were not a judge so appointed.

The Court also did not treat this as a normal case. It delayed over the appointment of the new Judge *ad hoc.* It also delayed holding a hearing, with the President of the Court first inviting each party to submit an *aide-memoire* on the issues. Precious days were lost and France exploded its first nuclear device, but a hearing was subsequently held at which New Zealand was able to expound its arguments fully in response to the question posed by the Court. France, in turn, felt obliged to respond to those arguments, notwithstanding its view that the question put forward should be understood as a narrow question. However, the President of the Court declined to act on New Zealand's request to him, repeated by the Prime Minister of New Zealand one day after the explosion of the first French nuclear device, that he use his powers to ask the parties not to do anything that would change the *status quo* pending the outcome of the proceedings. He noted at the outset of the public hearing that the relevant Rules of Court expressly apply to incidental proceedings for the indication of provisional measures (such proceedings being tied, i.e., incidental, to the principal proceedings) and expressed his conviction that, in view of the highly complex and unprecedented nature of the case, New Zealand would understand that it was difficult to accede to the requests without necessarily prejudicing the issues before the Court.[4]

The Court showed that it could adapt its procedures to the unusual circumstances of a case such as this.[5] Vice-President Schwebel, in a separate

4. CR 95/19, at 16, and 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 Case (New Zealand *v.* France), Order of 22 September 1995, 1995 ICJ Rep. 288, para. 29. *See also* publication of the New Zealand Ministry of Foreign Affairs and Trade (MFAT), New Zealand at the International Court of Justice: French Nuclear Testing in the Pacific 133-134 (1996).

5. *See* Request for an Examination, Order, *supra* note 4. *See also* MFAT, *supra* note 4, at 247.

Declaration, set out the position most clearly. He expressed his view that "it was obvious from the outset" that New Zealand was entitled to act upon paragraph 63 of the 1974 Judgment.

> Claims that there could be no case, that New Zealand could act only to seek the interpretation or revision of the Judgment or to bring a new case, that there was no room for appointment of agents or a judge *ad hoc*, that the President was not entitled to exercise his authority under the Rules of Court to call upon the Parties to act in such a way as would enable any order the Court might make on the request for provisional measures to have its appropriate affects, and that the Court could not have oral hearings, accordingly were misplaced. [...] Whatever the reservations expressed, it is plain that when fifteen judges gathered in their robes in the Great Hall of Justice of the Peace Palace, and when Judge *ad hoc* Sir Geoffrey Palmer took his oath of office, the Members of the Court did not meet, Pirandello style, in search of a courtroom or a case, but conducted an oral hearing on a phase of a case.[6]

3. INITIATION OF PROCEEDINGS

The document used by New Zealand to resume the case should not have caused the Court any difficulty. The document did not, in terms of the Statute of the Court, constitute a request for an interpretation or revision of the 1974 Judgment. Neither of these procedures was relevant to what New Zealand was seeking or to the terms of the opportunity that the Court had left open in paragraph 63, and the latter would have been time-barred in any event. In its response to questions that the Court asked of the parties at the oral hearing, New Zealand commented that the words "in accordance with the provisions of the Statute' in paragraph 63 of the

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The Order is already generating significant comment. *See, e.g.*, B. Kwiatkowska, *New Zealand v. France Nuclear Tests Case: The Dismissed Case of Lasting Significance,* 9 Georgetown International Environmental Law Review (1996-I); D. MacKay, *Nuclear Testing: New Zealand and France in the International Court of Justice,* 1996 Fordham International Law Journal 701 (forthcoming); B. Kwiatkowska, *New Zealand* v. *France Nuclear Tests Case: The "Little Big" Order of the International Court of Justice of 22 September 1995*, 6 Finnish Yearbook of International Law 1 (1995); N. Horbach, *International Court of Justice: The New French Nuclear Tests Dispute*, 56 Nuclear Law (Bulletin of the Nuclear Energy Agency, OECD) 64 (December 1995); P. Bekker, *Report on International Decisions*, 90 AJIL 280 (1996); and A. Gillespie, *The ICJ Fails to Address the Merits of an International Environmental Concern*, 1996 NZLJ 195.

6. Request for an Examination, Order, *supra* note 4, at 309. *See also* MFAT, *supra* note 4, at 265.

1974 Judgment, involving as they do questions of jurisdiction, related to the examination of the situation by the Court once the request is made and not to the form of the request by the Applicant.[7] The title of the New Zealand document was based exactly on the wording of that paragraph, which had not specified any restriction on when the case might be resumed. New Zealand also contended that the Court, in that paragraph, was acting in the exercise of its inherent jurisdiction, which includes the power under Article 48 of the Statute to make orders for the conduct of the case and authorizes separate derivative proceedings.

The Court acknowledged New Zealand's argument, referring to Article 48 in the preambular part of its Order of 22 September 1995. It noted (unanimously) that the Court in 1974 could not have intended to limit the Applicant's access to legal procedures specified in the Statute, which would have been open to it in any event, but rather was not excluding a special procedure in the event that circumstances affecting the basis of the Judgment were to arise. The Court also reaffirmed, in effect, that this special procedure remains available in those circumstances.[8] Consequent on its finding, by a vote of 12 to 3, that the circumstances did not arise in the present case because the basis of the Judgment had not been affected, it went on to direct that the New Zealand request, but that request only, be removed from the general list of the Court.[9]

4. APPLICABLE LAW

An important consideration in New Zealand's case was New Zealand's contention that the resumption of the earlier case did not in any way 'freeze' the applicable substantive law as it was in 1973-1974. Rather, New Zealand took the view that it was entitled to take account of relevant developments in international law since that time.

In its request, New Zealand asked the Court to adjudicate and declare

7. Response to questions of Judges Schwebel and Koroma, CR 95/20, at 45 and 46-47. *See also* MFAT, *supra* note 4, at 192-193, and Request for an Examination, Order, *supra* note 4, para. 43.
8. *See* Request for an Examination, Order, *supra* note 4, paras. 52 and 53.
9. *Id.*, para. 66.

relief in two respects.[10] The first was that the conduct of the nuclear tests would constitute a violation of certain rights under New Zealand law as well as that of other relevant states. The rights referred to were those rights invoked by New Zealand in paragraph 28 of its 1973 application that would be adversely affected by entry of radioactive material into the marine environment as a consequence of the further tests to be carried out at Mururoa and Fangataufa.[11] The rights in paragraph 28 included:

1. the right of all members of the international community, including New Zealand, that no nuclear tests that give rise to radioactive fallout be conducted. The genesis of this right was the concerns and obligations on which the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (the Partial Test Ban Treaty) is based;[12]
2. the rights of all members of the international community, including New Zealand, to protection from unjustified artificial radioactive contamination of the terrestrial, marine and aerial environment and, in particular, of the environment of the region in which the tests are conducted and in which New Zealand, the Cook Islands, Niue, and Tokelau are situated. The Stockholm Declaration of 1972 exemplified the origin of these rights;[13]
3. the rights of New Zealand that no radioactive material, shall enter the territory of New Zealand, the Cook Islands, Niue, or Tokelau, including their air space and territorial waters, as a result of nuclear testing. This right rested upon principles of territorial sovereignty;
4. the right of New Zealand that no radioactive material that should enter the territory of New Zealand, the Cook Islands, Niue, or Tokelau, including their air space or territorial waters, will cause harm, including apprehension, anxiety and concern, to the people and government of New Zealand and of the Cook Islands, Niue,

10. Para. 113 of Request, reproduced *in* MFAT, *supra* note 4, at 36.
11. II Nuclear Tests, ICJ Pleadings 8 (1978).
12. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 480 UNTS 43 (1963).
13. United Nations Conference on the Human Environment: Final Documents, 11 ILM 1416 (1972).

and Tokelau. Principles of international law based on the *Trail Smelter* case provided the genesis for this right;[14] and

5. the right of New Zealand to freedom of the high seas, including freedom of navigation and overflight and the freedom to explore and exploit the resources of the sea and seabed, without interference or detriment resulting from nuclear testing. The law of the sea, including maritime freedoms, supported this right.

Some of these rights applied to New Zealand in particular, but others were of an *erga omnes* character, concerning obligations that France owed to the international community as a whole.

The second declaration sought from the Court was that it was unlawful for France to conduct nuclear tests before it had undertaken an Environmental Impact Assessment (EIA) according to accepted international standards and before such an assessment established that the tests would not give rise, directly or indirectly, to radioactive contamination of the marine environment. New Zealand also sought relief in this respect in its Further Request for the Indication of Provisional Measures.

This second order that New Zealand was seeking was based on obligations placed upon France under international law. These were obligations that had developed particularly over the past decade and were supported by reference to treaty law and customary international law. While the proceedings were in the nature of a continuation of the earlier case and not a new case, New Zealand was asserting that French nuclear tests since that time, and in particular the announced resumption of nuclear tests, affected the basis of the 1974 Judgment. Since that Judgment did not exclude, but rather contemplated, that such contemporary events could be brought back before it, New Zealand argued that it was only logical that contemporary developments in international law could also be relied upon. France's failure to comply with these obligations also affected the basis of the 1974 Judgment. New Zealand added, in its response to questions that the Court asked of the parties at the oral hearing,[15] that the lawfulness or unlawfulness of conduct must be determined by reference

14. Trail Smelter, 3 RIAA 1905 (1949).
15. Response to questions of Judge Shahabuddeen, CR 95/20, at 47. *See also* MFAT, *supra* note 4, at 194.

to the law in force at the time of the conduct, in this case conduct occuring in 1995 and 1996, noting further that a case relating to conduct affecting the environment in 1995 could be decided only to the reference to the law of 1995.

New Zealand also contended that France was under a specific treaty obligation, by virtue of Article 16 of the 1986 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (the Noumea Convention),[16] to conduct a prior EIA if it were to resume its nuclear testing programme. That obligation was reinforced by customary international law and by the application of the 'precautionary principle', by which France was obliged to provide evidence before it carried out further underground nuclear tests on Mururoa and Fangataufa atolls that they will not result in the introduction of any radioactive material into the marine environment. In this latter regard, New Zealand also argued in its submissions that there was an obligation to undertake a risk/benefit analysis, to balance the risks of proposed activities against their possible benefits.

New Zealand followed up these arguments in its submissions at the oral hearings. It noted, *inter alia*, that:

> [a]n evaluation of the effects of an activity after the event such as France has been proposing in various forms is not an EIA. It is, in fact, the very antithesis of an EIA for, in the nature of things, it comes too late to give an assurance that the risk will not materialise [...]
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> [In] Europe, [...] France has accepted quite onerous obligations to carry out Environmental Impact Assessments by way of several regional treaties [...] [If] France were to conduct its nuclear testing in its European territory, would it first carry out an EIA? The answer must, of course, be "yes". It is inconceivable that France would test in Europe without first carrying out an EIA. One wonders [...] why France is not prepared to accept the same obligations to its Pacific neighbours as it does to its European neighbours [...].
>
> How could France say in this instance that it was taking all appropriate measures to prevent, reduce and control pollution in the Convention Area, including its territorial sea, without having first carried out an Environmental Impact Assessment? How could France seriously assert that it was preventing, reducing and controlling pollution resulting from its nuclear testing activities, in the absence of such an assessment? France could not

16. Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, 26 ILM 38 (1987). *See also* Part VI, paras. 74-88 of the Request, reproduced *in* MFAT, *supra* note 4, at 28-30.

> *know* that it was meeting these obligations if it did not first carry out an EIA.[17]

Underpinning these submissions were comments on the scientific and safety aspects of the nuclear tests at Mururoa and Fangataufa atolls. The Request noted that there had been 134 nuclear explosions at those locations since the Court's Judgment in December 1974.[18] Relating this fact to the obligation on France to conduct a prior EIA, the Request made the point that

> [i]t is difficult to conceive any act that more clearly demands such an assessment than a nuclear test: (i) which is conducted beneath a small atoll, (ii) that has already been the scene of numerous substantial explosions, (iii) that must contain significant deposits of radioactive material within the test chambers, (iv) which could be released into the immediately surrounding marine environment, (v) through existing fissures liable to be opened up further by more explosions.[19]

There was also reference made to accidents that had occured in the past.[20] Moreover, a good deal of basic scientific information by which to judge the safety of the tests, including information about their yield, placement and depth, continued to remain unavailable. Contamination, and potential contamination, from underground nuclear tests could not have been argued by New Zealand in 1973 and 1974, for the obvious reason that such tests had not been conducted in the South Pacific up to that time. Bearing in mind that New Zealand had cast the dispute in terms of contamination from all French nuclear testing in the region, the Court had, of course, dealt only with that part of the dispute in respect of which damage could be shown at that time and was now being asked to adjudicate on another phase, since further damage was now being asserted.

The Request also drew attention to the disarmament context in which the nuclear tests were taking place; it pointed to the obligations on states with regard to nuclear testing arising out of the Partial Test Ban Treaty (the PTBT)[21] and the Review and Extension Conference held in 1995 of

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17. Submissions of D. MacKay, CR 95/20, at 26, 31 and 33. *See also* MFAT, *supra* note 4, at 183, 185, and 186.
18. Para. 21 of the Request, reproduced *in* MFAT, *supra* note 4, at 17.
19. *Id.*, at 31, para. 89 of the Request.
20. *Id.*, at 21-23, Part III (F) and (H) of the Request.
21. *Supra* note 12.

the parties to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons.[22] In the case of the PTBT, to which France is not party, the Request commented that customary international law no longer countenances nuclear testing that causes radioactive contamination of the environment outside the territory of the testing state.[23]

5. CONCLUDING COMMENTS

In the end, the Court did not pronounce upon any of these matters of substance, since it decided that the case should not proceed any further. In a split decision, the Court did not accept New Zealand's argument that its concern in the original case had been with contamination, in any manner, from French nuclear tests affecting New Zealand's legal rights. Rather, the Court was at least partly influenced by the same apparent assumption as on the earlier occasion, i.e., that the New Zealand case had been subject to the same limitation to atmospheric nuclear tests as the accompanying Australian case against France in 1973[24] - the fundamental difference between the two cases in this respect was demonstrated by the fact that Australia was unable to take advantage of the corresponding paragraph in the Court's Judgment in its case against France and was instead confined to seeking to intervene in New Zealand's resumed case.[25] The Court ruled that the case could be continued only in the context of atmospheric, and not underground, nuclear tests. In effect, it ruled that it was only in

22. Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161 (1970). *See also* Part IV, paras. 56-60 of the Request, reproduced *in* MFAT, *supra* note 4, at 24-25.

23. Para. 109 of the Request, reproduced *in* MFAT, *supra* note 4, at 35. It might be noted that in its Advisory Opinion of 8 July 1996 (ICJ Communiqué No. 96/23), on a Request by the United Nations General Assembly on the legality of the threat or use of nuclear weapons, the Court did not provide any further specific elaboration or clarification of international law concerning nuclear testing.

24. Request for an Examination, Order, *supra* note 4, at 305, para. 58.

25. *See* Application for Permission to Intervene, submitted by Australia on 29 August 1995, reproduced *in* MFAT, *supra* note 4, at 98. Para. 28 of that application states that "unlike the 1973 Application of New Zealand, which complains of nuclear testing generally, and is not confined solely to atmospheric testing, the 1973 Application of Australia specifically requested the Court to adjudge and declare that 'the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with the applicable rules of international law.' [...] The position of Australia is thus entirely different to that of New Zealand."

that context that the basis of the Judgment, in terms of paragraph 63, could be affected.

What the Court's decision boils down to is a determination, on the Court's part, that it was limited, in terms of a resumption of the case, to an analysis of the literal terms of the 1974 Judgment; whether the Court in 1974 had been right or wrong to do so, it had chosen to limit that judgment to nuclear tests of a particular form. The present-day Court (and the parties) were now stuck with that decision. New Zealand, on the other hand, had argued in effect that, in making that choice, the Court in 1974 had, naturally enough, concentrated on the particular form of tests that had taken place to that point in time, as a result of which contamination had been shown. New Zealand went on to emphasize what it perceived that judgment to be truly based on, namely the totality of the concerns that New Zealand had expressed at the time over contamination from any French nuclear tests, i.e., New Zealand's emphasis had been on the fact of contamination and not the method of contamination, having hoped, however (mistakenly, as it turned out), that underground nuclear tests might not give rise to contamination of the external environment.

In New Zealand's view, the references in the Judgment to atmospheric tests could properly be understood neither as a matter of limitation or exclusion of all other possibilities nor as requiring the Judgment to be 'read down', but only in the factual sense that the Court could have specifically addressed only atmospheric nuclear tests because underground nuclear tests had yet to take place and contamination (or possible contamination) therefrom was still unknown. Developments in both fact and law had affected the basis of the Judgment, and paragraph 63 had been included in the Judgment precisely with that possibility in mind. Moreover, the historical record shows that French nuclear testing of either form in the South Pacific, and concern over actual or possible environmental contamination caused by it, had remained a generally consistent source of dispute between New Zealand and France since the 1960s.

The Court did go on to say, however, in paragraph 64 of its Order, that "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."[26] The three judges who dissented from the Court's ruling all went on to comment on matters of substance, and in particular on the developments in international environmental law referred to in New Zealand's submissions. Since these dissenting opinions represent the first occasion on which judges of the Court have considered the recent developments in this area, they may attract particular attention from those seeking to rely on this law in the future. However, it must also be noted that the proceedings were concerned with a particularly dramatic affront to the environment, i.e., the explosion of nuclear devices in a fragile marine environment, which called for the protection of international environmental law to a particularly robust extent. This particular context of the testing of nuclear weapons in a marine environment can be expected to have a bearing on the application of comments in the dissenting opinions as precedents in other contexts.

The dissenting opinions nevertheless contain substantial material of interest on contemporary international environmental law, and may take on added significance in light of the Court's comments on international environmental law in its recent Advisory Opinion of 8 July 1996 concerning the legality of the threat or use of nuclear weapons.[27] In paragraph 32 of that opinion, the Court noted that its conclusion in its Order of 22 September 1995 was "without prejudice to the obligations of States to respect and protect the natural environment" and went on to say that that statement, while having been made in the context of nuclear testing, also applies to the actual use of nuclear weapons in armed conflict. More significantly, in paragraph 29 of the Advisory Opinion, the Court noted that it

> recognises that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognises that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.[28]

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26. *See* Request for an Examination, Order, *supra* note 4, at 306.
27. Note 23, *supra*.
28. *Id.*

Perhaps the Court's recognition of the well-established principle set out in this last sentence provides some vindication of New Zealand's efforts on two occasions, more than 20 years apart, to obtain recognition of these developments in international law in their application to French nuclear testing.

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