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INTRODUCTION

On September 22, 1995, the International Court of Justice (ICJ) entered an order dismissing New Zealand's claims in the dispute between New Zealand and France over nuclear testing in the South Pacific. [1] This order was prompted by a request from New Zealand for an examination of the nuclear testing situation in accord with a special provision contained in a previous 1974 judgment of the ICJ[2] The original dispute between the two countries arose out of France's proposed atmospheric nuclear tests in the South Pacific and New Zealand's objection to those tests. After New Zealand received an interim order from the ICJ asking France to refrain from nuclear testing until the Court considered New Zealand's substantive claims,[3] France announced that it would halt all plans for atmospheric nuclear testing. The Court found that this action rendered the dispute between the parties moot,[4] and consequently dismissed New Zealand's claims against France in its judgment of December 20, 1974.[5] Since the case was dismissed on jurisdictional grounds, the Court never reached New Zealand's substantive international law claims. However, in an unprecedented move, the Court included within its decision a special provision in paragraph 63 of its 1974 judgment that "if the basis of this Judgment were to be affected, [New Zealand] could request an examination of the situation in accordance with the provisions of the [ICJ] Statute."[6]

France announced in 1995 that it would conduct a series of eight underground nuclear weapons tests in the territory of French Polyne-

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1. 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 (N.Z. v. Fr.), 1995 I.C.J. 288 (Sept. 22).

2. *See* Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).

3. *See* Nuclear Tests (N.Z. v. Fr.), 1973 I.C.J. 135 (Interim Protection Order of June 22).

4. STATUTE OF THE COURT, art. 38, para. 1 limits the Court's jurisdiction to "[s]uch *disputes* as are submitted to it. . ." (emphasis added).

5. *See* 1974 I.C.J. 457.

6. *Id.* at 477.

sia.[7] New Zealand used the paragraph 63 special provision to again protest France's proposed nuclear weapons tests. However, the Court found that the "basis" of the 1974 judgment had *not* been affected (as the language in paragraph 63 required) because that judgment was based solely on France's promise not to conduct any further *atmospheric* nuclear tests and the present situation involved *underground* nuclear tests.[8] Therefore, the Court again dismissed New Zealand's claims against France without reaching any of New Zealand's compelling substantive international law claims.

Part One of this article introduces the case by examining the background of the dispute. Part Two examines the Court's judgment and reasoning in the 1995 New Zealand v. France Nuclear Tests case. Part Three considers the decision of the Court and argues that by prematurily dismissing New Zealand's claims, the Court missed an opporunity to advance the development of international law.

PART ONE

The dispute between New Zealand and France that led to the Court's 1995 judgment originated with New Zealand's objection to France's proposal in 1973 to conduct a series of atmospheric nuclear tests in the South Pacific. France proposed atmospheric nuclear testing at Mururoa and Fangataufa Atolls, 600 miles from Tahiti and 2,500 miles from New Zealand.[9] Both Australia and New Zealand filed Applications in the ICJ claiming breach of legal norms in the testing of atmospheric nuclear weapons, unlawful action by allowing radioactive fallout to cause atmospheric and marine pollution in their territories, and interference with maritime and air navigation.[10] The Court's jurisdiction was originally invoked on two bases: (1) Articles 36(1) and 37 of the Statute of the Court and Article 17 of the General Act for the Pacific Settlement of International Disputes [hereinafter "General Act"], to which New Zealand and France both had acceded; (2) Articles 36(2) and 36(5) of the Statute of the Court. New Zealand received an interim protection order from the Court on June 22, 1973, which stated that the French government should avoid conducting any nuclear tests in the region until the Court had rendered a decision in the case.[11]

While the case was pending before the Court, France announced

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7. *See* Craig R. Whitney, *France Planning Nuclear Tests Despite Opposition, Chirac Says*, N. Y. TIMES, June 14, 1995, at A3, *available in* 1995 WL 2180971.

8. *See* Nuclear Tests Case (N.Z. v. Fr.), 1995 I.C.J. 288, 306.

9. *See* Barbara Kwiatkowska, *New Zealand v. France Nuclear Tests: The Dismissed Case of Lasting Significance*, 37 VA. J. INT'L. L. 107, 111 (1996).

10. *Id.* at 112.

11. Nuclear Tests (N.Z. v. Fr.), 1973 I.C.J. 135, 142 (Interim Protection Order of June 22).

that it did not plan to proceed with any atmospheric nuclear testing in the South Pacific. The Court thereafter dismissed New Zealand's case without reaching any of the substantive claims.[12] In deciding to dismiss the case, the Court noted that it is called upon "to resolve existing disputes between States"[13] and that the "circumstances that have since arisen render any adjudication devoid of purpose."[14] The Court further explained that "it does not enter into the adjudicatory functions of the Court to deal with issues in abstracto, once it has reached the conclusion that the merits of the case no longer fall to be determined."[15] However, the Court did leave the door slightly open for New Zealand to return to it in the future when it added paragraph 63 to its judgment. The court noted in paragraph 63 that it was not its function to speculate on whether France would keep its word, but 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."[16] The precise meaning of this paragraph became the focal point for New Zealand's claims some twenty-one years later.

On June 13, 1995, France announced that it would conduct a series of eight underground nuclear tests in the territory of French Polynesia in the South Pacific.[17] The announcement by French President Jacques Chirac signaled an end to a voluntary three year moratorium on underground nuclear tests.[18] The decision touched off a worldwide firestorm of controversy and opposition. Besides internal protests by the French population,[19] lawmakers from around the world gathered in Tahiti (just 600 miles from the proposed tests) to protest the French decision.[20] Consumer boycotts of French goods and services were called for in New Zealand and Australia.[21] Greenpeace dispatched a ship to protest the French decision to resume testing which was boarded by French commandos on July 9, 1995.[22] Undeterred, Greenpeace later announced it would send a flotilla of up to 30 boats to the area in a coordinated effort

12. Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 456, 478 (Dec. 20).

13. *Id.* at 476.

14. *Id.* at 477 *quoting* Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 38 (Dec. 2).

15. *Id.*

16. *Id.*

17. *See* Whitney, *supra* note 7.

18. *See Thousands Gather in Tahiti to Protest France's Planned Nuclear Tests*, DALLAS MORNING NEWS, Sept. 3, 1995, at 23A, *available in* 1995 WL 9057718 [hereinafter *Thousands Gather in Tahiti*].

19. *See 3,000 in France Protest Nuclear Tests*, PHOENIX GAZETTE, Sept. 12, 1995, at A7, *available in* 1995 WL 2827420.

20. *See Thousands Gather in Tahiti*, *supra* note 18.

21. *See* Michael Richardson, *Consumers Plan Boycotts Over French Tests*, INT'L. HERALD TRIB., June 17, 1995, *available in* 1995 WL 7546538.

22. *See* Craig R. Whitney, *Paris Defends Seizing Ship in Atom Test Zone*, N.Y. TIMES, July 11, 1995, at A12, *available in* 1995 WL 2194745.

to stop the nuclear tests.[23]

On August 8, 1995, Prime Minister Bolger of New Zealand announced that he would attempt to stop the French nuclear tests by returning to the ICJ and resuming the New Zealand v. France Nuclear Tests case.[24] On August 21, 1995, New Zealand again instituted proceedings against France in the ICJ, basing the Court's jurisdiction on the Court's Judgment of 1974. France's subsequent nuclear test on September 5, 1995, increased the world's interest in the proceedings now underway at the Hague.[25] Shortly thereafter, the European Parliament reaffirmed its opposition to all nuclear tests and called on France to cancel the remaining planned tests.[26]

PART TWO

The jurisdiction of the ICJ in contentious cases is based on the consent of the parties.[27] The required consent, under Article 36(1) of the Statute of the Court, may be either express or implied.[28] A State may also recognize compulsory jurisdiction under Article 36(2)[29] for legal disputes when another State has made a similar declaration.[30]

Since France had denounced the General Act and withdrawn from the compulsory jurisdiction of the Court in 1974, New Zealand had no jurisdictional basis based on consent on which to bring a new case against France.[31] New Zealand's only option was to attempt to reopen

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23. *See* Keith Miller, *Profile: Protests Against France's Nuclear Tests*, NBC NIGHTLY NEWS, Aug. 26, 1995, *available in* 1995 WL 10122216.

24. *See* Michael Munro, *Bolger Seeks to Outlaw Atoll Nuclear Tests*, THE TIMES (LONDON), Aug. 9, 1995, *available in* 1995 WL 7689486.

25. *See* William Drozdiak, *In Angry Words and Marches, World Condemns French Test*, INT'L. HERALD TRIB., Sept. 7, 1995, *available in* LEXIS, News Library, IHT File; *Test and Shout*, ECONOMIST, Sept. 9, 1995, at 2, *available in* 1995 WL 9570473.

26. *See Nuclear Tests: European Parliament Expresses Its Wrath Against France*, EUROPEAN REPORT, Sept. 23, 1995, *available in* 1995 WL 8359349.

27. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 903 cmt. a (1986).

28. STATUTE OF THE COURT, art. 36, para. 1 reads, "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

29. STATUTE OF THE COURT, art. 36, para. 2 provides, in part, "The states. . .may at any time declare that they recognize as compulsory *ipso facto* and without special agreement. . .the jurisdiction of the Court in all legal disputes concerning: the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation."

30. *See supra* note 27, cmt. b. The requirement of "reciprocity" allows a defendant state to invoke an exclusion or reservation that exists in the plaintiff state's declaration but not in its own declaration.

31. *See* Don MacKay, *Nuclear Testing: New Zealand and France in the International Court of Justice*, 19 FORDHAM INT'L. L.J. 1857, 1870 (1996).

the earlier case.[32] The consensus among legal commentators was that New Zealand faced a difficult legal task in its attempt to use the unusual paragraph 63 provision to provide a jurisdictional basis for the Court.[33]

Since there was no precedent for reopening a case in the way that New Zealand was attempting, New Zealand had to choose its method of proceeding very carefully.[34] New Zealand did not want to use the traditional Application, as provided for in the Statute[35] and Rules[36] of the Court, to initiate the case since this would suggest that New Zealand was attempting to open new proceedings.[37] Other options provided for in the Statute, including seeking an interpretation[38] or a revision[39] of the Judgment, were not available since these procedures would be time-barred.[40]

New Zealand asserted that France's announcement that it would conduct new underground nuclear tests triggered the provisions of paragraph 63 of the Court's judgment described above.[41] New Zealand also asserted that the proposed underground nuclear tests affected the "basis" of the Court's 1974 judgment.[42] New Zealand carefully framed the "basis" of the judgment as not being limited to atmospheric nuclear testing,[43] even though the 1974 Court had specifically referred to atmospheric testing in its decision.[44] New Zealand argued that its origi-

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32. *Id.*

33. *Id.*

34. *Id.*

35. *See* STATUTE OF THE COURT, art. 40, para. 1 which provides, "Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application. . ."

36. *See* STATUTE OF THE COURT, art. 35, para. 2 which states, "When a case is brought before the Court by means of an application, the application must, as laid down in Article 40, paragraph 1, of the Statute, indicate the party making it, the party against whom the claim is brought and the subject of the dispute."

37. *See* MacKay, *supra* note 31, at 1871.

38. STATUTE OF THE COURT, art. 60 provides that all judgments are "[f]inal and without appeal." However, a state may request an interpretation of the judgment "[i]n the event of dispute as to the meaning or scope of the judgment."

39. STATUTE OF THE COURT, art. 60, para. 1 states that "[a]n application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision. . . ."

40. *See* MacKay, *supra* note 31, at 1871. Art. 61(5) mandates that "[n]o application for revision may be made after the lapse of ten years from the date of the judgment."

41. Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288, 289 (Sept. 22).

42. *Id.* at 289-90.

43. *Id.*

44. The Court stated in paragraph 29 of its Judgment, "The Court therefore considers that, for purposes of this 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's territory." Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 466 (Dec. 20).

nal application did not refer only to atmospheric testing but to any nuclear testing affecting the environment and that the Court "matched" New Zealand's concern with France's current form of testing.[45] New Zealand continued its argument by asserting that the Court would not have matched New Zealand's concern solely to atmospheric testing if the Court had known in 1974 that underground nuclear testing would not remove the risks of contamination.[46] Therefore, New Zealand argued that the "basis" of the 1974 judgment, limiting it to atmospheric testing, had been altered and that it was entitled to a "resumption of the proceedings."[47]

On September 8, 1995, the Court announced that it would hold hearings only on the "threshold" issue of whether New Zealand's proceedings fell within the provisions of paragraph 63 of the 1974 Judgment. After consideration of this question, the Court announced its Order of September 22, 1995, that New Zealand's request did *not* fall within paragraph 63 and consequently New Zealand's claims would be dismissed.[48]

In reaching this conclusion, the Court analyzed the question before it as requiring the consideration of two independent questions: first, what types of procedures were envisaged by the Court pursuant to paragraph 63; and, second, whether the "basis" of the 1974 judgment had been "affected" within the meaning of paragraph 63.[49] On the first question, the Court concluded that the inclusion of paragraph 63's option for a "request for examination of the situation" could not have been intended to limit New Zealand to procedures that would otherwise normally be available[50], and that a "special procedure" is available to New Zealand if the second question is answered in the affirmative.[51] Proceeding to the second question, the Court concluded that the 1974 Judgment "dealt exclusively with atmospheric nuclear tests"[52] and since the current situation involves underground nuclear tests, the basis of the judgment had *not* been affected as required by paragraph 63.[53] By dismissing the case for this reason, the Court avoided addressing any of New Zealand's substantive claims under international law.[54]

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45. 1995 I.C.J. 288, at 290.

46. *Id.*

47. *Id.*

48. *Id.* at 307.

49. *Id.* at 302.

50. These other procedures include the option to file a new application (Art. 40 of the I.C.J. statute), request an interpretation (Art. 60), or request a revision (Art. 61). *See supra* notes 35-40 and accompanying text.

51. 1995 I.C.J. 288, at 303-304.

52. *Id.* at 306.

53. *Id.*

54. Specifically, the Court noted it "[c]annot, therefore, take account of the arguments derived by New Zealand. . .[including] the development of international law in recent dec-

Although the Court did not reach the merits of New Zealand's claims, the Court was careful to explain that the decision 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."[55] The Judge's individual opinions in the case contain insightful comments on the proper role of the Court and the development of international environmental law.

Interestingly, a short, separate opinion from the "Member of the Court from the only country which has suffered the devastating effects of nuclear weapons. . ." supported the Court's decision to dismiss New Zealand's claim.[56]

Judge Shahabuddeen, writing separately for the Court, noted the development of the protection of the natural environment in contemporary international law.[57] However, Judge Shahabuddeen found it particularly salient that New Zealand was requesting substantive relief for a "new situation" and "new acts."[58] Judge Shahabuddeen concluded that paragraph 63 was not intended to cover "fresh matters" and that there is no "principle of law which entitles the Court to exercise a terminated jurisdiction over fresh acts occurring after the termination. . . ."[59]

Judges Weeramantry, Koroma, and Judge ad hoc Sir Geoffrey Palmer each filed a strong dissenting opinion. Judge Weeramantry began by stating his agreement with the Court's conclusion that paragraph 63 was intended to provide New Zealand with a special procedure not otherwise available.[60] A review of New Zealand's original 1973 complaint showed that there was no explicit reference to atmospheric nuclear testing, but only a complaint of various types of damage from radioactive fallout.[61] Most importantly, Judge Weeramantry asserted that New Zealand's complaint of a violation of international law was grounded in the fact of the injury – the damage from radioactive contamination – not the specific cause of the injury.[62] This point is emphasized by noting that it would be illogical to believe that New Zealand would be content to endure damage from radioactive contamination as

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ades." *Id.*

55. *Id.*

56. *Id.* at 310 (Judge Oda). While supporting the dismissal of New Zealand's claim, Judge Oda concluded by expressing "[m]y personal hope that no further tests of any kind of nuclear weapons will be carried out under any circumstances in the future." *Id.*

57. *Id.* at 312.

58. *Id.* at 315.

59. *Id.*

60. *Id.* at 320-21.

61. *Id.* at 325-26.

62. *Id.* at 327.

long as it was not due to atmospheric nuclear testing.[63]

Judge Weeramantry continued by pointing out that the state of the knowledge in 1974 indicated that underground nuclear tests were safe and therefore that New Zealand's objections to atmospheric nuclear testing were founded on the belief that they were the only form of unsafe testing.[64] Therefore, New Zealand's claims were actually directed at unsafe nuclear testing and present knowledge indicates that underground nuclear tests are unsafe in the same ways that atmospheric tests are unsafe.[65] Judge Weeramantry therefore concluded that the basis of the 1974 judgment was that harm must not be caused by nuclear tests and that New Zealand was entitled to not be exposed to any radioactive contamination from nuclear tests.[66]

Judge Weeramantry noted that New Zealand must make out a prima facie case that the dangers that were present in 1973 were present again in 1995 in order to activate the procedures of the Court.[67] In analyzing this question, Judge Weeramantry proposed two possibilities for the placement of the burden of proof: (1) to place the burden squarely on New Zealand and determine whether a prima facie case has been made out based on the dangers that New Zealand has complained of; or (2) to use the principles of environmental law and place the burden on France to prove that it will not produce the damage that New Zealand has alleged.[68] After a complex analysis of the evidence presented before the Court, Judge Weeramantry concluded that New Zealand had made out a strong prima facie case and had succeeded in showing that the dangers complained of fell within the provisions of paragraph 63.[69]

Judge Weeramantry discussed the importance of the principle of intergenerational equity as a rapidly developing principle of environmental law.[70] Intergenerational equity is a concept of international law that places a responsibility on countries to "protect and improve the environment for present and future generations."[71] In order to promote intergenerational equity, the focus must be on preventing damage from occurring.[72] Although a State has sovereignty over its territory, intergenerational equity limits the exercise of this sovereignty to the

63. *Id.*
64. *Id.* at 328-29.
65. *Id.* at 330.
66. *Id.* at 332.
67. *Id.* at 347.
68. *Id.* at 348.
69. *Id.* at 358.
70. *Id.* at 341.
71. *Id.* at 342 *quoting* The Stockholm Declaration on the Human Environment, principle 1, June 16, 1972.
72. *See* EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 84 (1989).

use and benefit of the resources in its territory only when that use does not destroy the resources for future generations.[73] The Court must consider France's responsibility to future generations when it considers whether New Zealand has made out a prima facie case.[74]

The Judge noted how the precautionary principle allows New Zealand to bring this case before France has conducted the nuclear tests.[75] The precautionary principle provides that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[76] This principle has now been expressed in at least seven international treaties and there exists sufficient state practice to conclude that it has gained broad acceptance on the international level.[77] In this case, New Zealand provided materials that indicate there is a serious threat of irreversible damage from the proposed underground nuclear tests and therefore the Court should postpone the tests until a complete evaluation can be completed.[78] A corollary to the precautionary principle is the requirement of an Environmental Impact Assessment (EIA) before a state undertakes any activity that "is likely to significantly affect the environment."[79] The Noumea Convention[80] contains an explicit obligation to conduct an EIA before beginning any project which might affect the marine environment.[81]

The fundamental principle of modern environmental law that no nation is entitled by its own activities to cause damage to the environment of any other nation also supports New Zealand's claim against France. Judge Weeramantry described this principle as "well entrenched in international law."[82] The origins of this principle can be

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73. *Id.* at 290.

74. *See* Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288, 342 (Sept. 22).

75. *Id.*

76. *Id. quoting Bergen ECE Ministerial Declaration on Sustainable Development*, May 15, 1990, *in* 1 BASIC DOCUMENTS OF INTERNATIONAL ENVIRONMENTAL LAW 558-59 (Harald Hohmann ed., 1992).

77. *See* Phillipe Sands, *The "Greening" of International Law: Emerging Principles and Rules*, 1 IND. J. GLOBAL LEGAL STUD. 293, 299-302 (1994).

78. *Id.* at 343.

79. *Id.* at 344 *quoting* UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP) GUIDELINES 187 (1987).

80. Noumea Convention for the Protection of the Natural Resources and Environment in the South Pacific Region, Nov. 25, 1986, 26 I.L.M. 38 (1987) [hereinafter Noumea Convention].

81. Art. 16(2) of the Noumea Convention provides, "Each party *shall*, within its capabilities, assess the potential effects of such projects on the marine environment. . ." *Id.* at art. 16, 26 I.L.M. at 48 (emphasis added).

82. Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288, 346 (Sept. 22). In its later Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 241-42 (July 8), the Court stated, "The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other States of areas beyond national control is now part of the corpus of international law relating to the

traced to the Trail Smelter Case[83] and it is currently embodied in several international instruments.[84] It is also codified in Section 601 of the Restatement (Third) of the Foreign Relations Law of the United States.[85]

Weeramantry concluded by stating that New Zealand had made out a strong prima facie case and that their claims should be given full consideration by the Court since, when two conclusions are possible, the Court should choose the one that does not shut out enquiry.[86] He expressed regret that "the Court has not availed itself of the opportunity to enquire more fully into this matter and of making a contribution to some of the seminal principles of the evolving corpus of international environmental law."[87]

Judge Koroma's dissent focused on the proper standard that he believes the Court should have used to determine whether New Zealand had established the legal basis for its Request.[88] Judge Koroma believed New Zealand made out a prima facie case and that the Court should have reached New Zealand's substantive claims.[89] A close examination of paragraph 63 in its context revealed that the Court in 1974 believed that ending atmospheric testing would end any possible radioactive contamination of the environment and that formed the basis of the judgment.[90] Judge Koroma indicated that the importance of the claims presented by the case should cause the Court to resolve any close questions in favor of the state alleging that the basis of the judgement had been affected.[91]

Koroma noted that there is probably a duty under contemporary international law "not to cause gross or serious damage which can reasonably be avoided, together with a duty not to permit the escape of dangerous substances."[92] He pointed to several international treaties

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environment."

83. Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).

84. *See, e.g.*, Rio Declaration of the Environment, principle 2 (1992); Noumea Convention, art. 4(6) (1987); Stockholm Declaration on the Human Environment, principle 21 (1972).

85. Section 601(1)(b) provides that a state is required to take necessary measures to "ensure that activities within its jurisdiction or control are conducted so as not to cause significant injury to the environment. . ."

86. 1995 I.C.J. at 362. Here, Judge Weeramanty differs fundamentally from the majority opinion that "[w]hile judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony." Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 477 (Dec. 20).

87. Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. at 362.

88. Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. at 373.

89. Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. at 379.

90. *Id.* at 377-78.

91. *Id.* at 376.

92. *Id.* at 378.

that contain this principle as indicative of a "trend" towards "prohibiting nuclear testing with radioactive effect."[93] In Judge Koroma's opinion, the existence of this trend, combined with the evidence of the risk of radioactive contamination from the French tests, should have caused the Court to impose interim protective measures as a prelude to proceeding to a full examination of the situation.[94]

Judge Palmer's dissenting opinion also noted that New Zealand had made out a prima facie case for an examination of the situation in accordance with paragraph 63.[95] In reaching this conclusion, Judge Palmer suggested that a risk-benefit analysis should be performed, and, when applied to the facts of this case, a risk-benefit analysis shows clearly that a prima facie case has been established.[96] He compared this analysis to a law of torts calculation and noted that the International Law Commission had recently supported this type of test under the section of its draft Articles titled "risk of causing significant transboundary harm."[97] Judge Palmer reviewed the development of international environmental law between 1973 and the date of the decision by first noting that the original 1973 case was commenced shortly after the international meeting at Stockholm which produced the Stockholm Declaration of the United Nations Conference on the Human Environment.[98] There has been an explosion of international environmental agreements in recent years and there currently exist more than a hundred multilateral environmental instruments.[99] Judge Palmer noted two of the most important developments in international environmental law have been the development of the precautionary principle and the environmental impact assessment.[100] Interestingly, there is a corresponding lack of judgments in the area of international environmental law.[101] Judge Palmer advanced his belief that the Court should look to the current state of the applicable law at the date the Court is called on to apply it when considering this type of case.[102] This is an important point since international environmental law has been developing very

93. *Id.* at 378-79.

94. *Id.* at 379.

95. *Id.* at 405.

96. *Id.* at 404-05.

97. *Id.* at 405. The International Law Commission defined this expression as "the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact." *Id.* (quoting *Report of the International Law Commission on the Work of its Forty-Sixth Session, May 2 – July 22, 1994,* U.N. GAOR, 49th Sess., Supp. No. 10, at 400, U.N. Doc A/49/10 (1994)).

98. *Id.* at 405.

99. *Id.* at 407.

100. *Id.* Judge Palmer pointed to the Rio Declaration of 1992 as the primary instrument that "refined, advanced, sharpened, and developed some of the principles adopted at Stockholm." *Id.*

101. *Id.* at 408.

102. *Id.* at 413.

recently and very rapidly and there was a much more limited body of law to draw upon when the original nuclear tests case was plead in the mid-1970s. Judge Palmer concluded with his perspective on the proper role of the ICJ in the world today by first criticizing the "formalistic" approach taken by the majority of the Court.[103] He summarized the majority opinion with his statement that "[t]he law appears as some disembodied construct that is far removed from the concerns of the real world."[104] Judge Palmer continued his stinging attack on the majority by concluding that he "find[s] such an approach to legal reasoning arid and intellectually unsatisfying."[105] Finally, Judge Palmer declared that "[t]he Court has a responsibility to declare, develop and uphold international law."[106]

PART THREE

The contrast between the majority opinion and the dissenting opinions is striking and revealing. The New Zealand v. France nuclear tests case illustrates a crucial divergence among the Court members on the proper role of the Court in the development of international law. The majority opinion, even though it failed to reach New Zealand's substantive claims, can not be criticized as incomplete in its legal analysis. Indeed, the twenty-page Court opinion illustrates a very thorough analysis of the pleadings presented and demonstrates the Court's careful consideration of the technical jurisdictional issue presented. However, the Court's conclusion on the jurisdictional issue resulted in the disappointing decision to dismiss New Zealand's claims without reaching their substance. In dismissing New Zealand's claims, the Court missed a golden opportunity to advance the development of international law.

The key issue in the Court's decision, whether the "basis" of the Court's 1974 Judgment had been affected, could have been decided in favor of New Zealand without compromising the integrity of the Court and the requirement for jurisdiction. New Zealand, admittedly, was attempting to use a novel approach to gain jurisdiction. However, the Court recognized the necessity to allow New Zealand to use such a novel procedure to return to the Court when it included paragraph 63 in its 1974 Judgment. Paragraph 63 was written in very general terms and included no mention of atmospheric testing.[107] The Court admitted that New Zealand's application did not specify atmospheric nuclear testing but simply referred to nuclear tests that "give rise to radioactive

103. *Id.*
104. *Id.* at 414.
105. *Id.*
106. *Id.* at 417.
107. *See* Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 477 (Dec. 20).

fall-out."[108] To make the leap to limit the application to atmospheric tests, the Court relied on the fact that New Zealand had argued its case "mainly in relation to atmospheric tests."[109] However, as Judge Weeramantry correctly pointed out, it is illogical to believe New Zealand would have limited its application to atmospheric testing if France had also been conducting or considering underground nuclear testing. Considering the fact that underground nuclear testing was not being conducted at the time and there was insufficient evidence to determine if such testing would cause radioactive contamination, it was extraordinary for the Court to penalize New Zealand twenty-one years later for failing to argue an irrelevant issue. However, the Court did exactly that when it decided to stand-by the proposition that the "basis" of the 1974 Judgment was solely atmospheric nuclear testing.

This result is disheartening to proponents of the increased influence of the rule of international law in relations among States. At the very least, the Court could reasonably have found the provisions of paragraph 63 triggered by New Zealand's request so that the important legal issues raised could have been given a full consideration and treatment. The Charter of the ICJ defines the Court's function as deciding "in accordance with international law" the disputes that are submitted to it.[110] In describing this function, the Charter requires the Court to consider international conventions, international custom, and general principles of law.[111] By reaching an unnecessary conclusion limiting the scope of its earlier decision, the Court effectively failed to undertake a consideration on the merits in accordance with international law and its duty under the Charter.

The process of deciding a case on the merits allows and encourages further development of international law and further respect for the role of international law in the often-anarchical world of international relations. The Court has refused to run from sensitive issues in the past[112] and it is perplexing and disappointing to see it do so in this judgment. As Judge Shahabuddeen noted, the Court in the past has "found opportunity for enterprise and even occasional boldness. Especially where there is doubt, its forward course is helpfully illuminated by broad notions of justice."[113] Hopefully, the future will bring an International Court of Justice with a greater incentive to continue its "forward course" and develop and strengthen the role of international

108. *Id.* at 466.

109. *Id.*

110. STATUTE OF THE COURT, art. 38, para. 1.

111. STATUTE OF THE COURT, art. 38, para. 1.

112. As evidenced by the Court's willingness in the past to consider the politically charged issues of, among other things, the legality of nuclear weapons and the U.S. support of rebel forces in Nicaragua.

113. Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288, 316 (Sept. 22).

law in the world today.