

INTERNATIONAL COURT OF JUSTICE

**NUCLEAR TESTS
(NEW ZEALAND v. FRANCE)**

**APPLICATION FOR PERMISSION TO INTERVENE UNDER ARTICLE 62
DECLARATION OF INTERVENTION UNDER ARTICLE 63**

**SUBMITTED BY
THE GOVERNMENT OF THE MARSHALL ISLANDS**

24 AUGUST 1995

NUCLEAR TESTS CASE (NEW ZEALAND v. FRANCE)

**APPLICATION TO BE PERMITTED TO INTERVENE UNDER
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DECLARATION OF INTERVENTION UNDER ARTICLE 63

MADE BY THE GOVERNMENT OF THE MARSHALL ISLANDS

I have the honour, as the Agent for the Government of the Marshall Islands, to submit to the International Court of Justice the present request for intervention in the case concerning *Nuclear Tests (New Zealand v. France)*.

PART A. Introduction

1. The Marshall Islands seeks to intervene in the case on two separate grounds.
 - (1) The Marshall Islands applies for permission to intervene under Article 62 of the Statute. This application relates both to the phase of provisional measures, and to the phase of the merits. The Marshall Islands considers that it has an interest of a legal nature which may be affected by the decision of the Court at each of these phases of the case.
 - (2) The Marshall Islands understands that the New Zealand Request invokes certain articles of the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, signed at Noumea on 24 November 1986,¹ and that the construction of the Convention is in question within the meaning of Article 63 of the Statute. In such a case a State notified of this fact by the Registrar has a right of intervention under Article 63.²

1 (1987) 26 International Legal Materials 38; Australian Treaty Series 1990, No 31 (hereafter referred to as the Noumea Convention).

2 It should be noted in this context that Article 71 (1) of the 1972 Rules (corresponding to Article 82 (3) of the 1978 Rules) provides that a declaration "may be filed by a State that considers itself a party to the convention the

Under the unusual circumstances of the present case, and having regard to the urgency of the matter, the Marshall Islands hereby declares its intention to intervene as of right under Article 63, both in relation to the phase of provisional measures, and the eventual phase of the merits.

2. These requests for intervention are cumulative and alternative.³ They are examined separately below.

Applicable Rules

3. The Marshall Islands understands that the Rules of Court applicable to the present Request and Declaration are the 1972 Rules. The 1978 Rules are specifically stated not to apply "in respect of any case submitted to the Court before 1 July 1978, or any phase of such a case" (1978 Rules, Preamble, emphasis added). To such a case or phase, therefore, the 1972 Rules continue to apply. To assist the Court, this Request and Declaration will as far as possible provide the information called for by the 1978 Rules, as well as that required by the 1972 Rules. This is done, however, without prejudice to the contention that the permissibility or admissibility of this Request and Declaration are governed, subject to the Statute itself, by the 1972 Rules.

The Facts

4. The facts underlying the dispute are outlined in the Court's decisions of 1973 and 1974. Subsequent developments will have been referred to in New Zealand's Request of 21 August 1995. At this stage, the Marshall Islands would only make the following additional observation. In fact, and as clearly reflected in New Zealand's initial Application, the dispute between New Zealand and France as to nuclear testing in the Pacific raises issues which are more than bilateral in character. Nuclear testing has the potential seriously to impact on the environment of the region, and that cannot be reduced to the terms of a bilateral relationship. Moreover the norms on which New Zealand relies are either general international law norms having an *erga omnes* character, and relating to legally protected interests common to New Zealand and other States in the region which may be affected by the tests, or, in the case of the Noumea Convention, derive from a regional convention recognising and protecting a common, collective, interest.

5. The preamble to the Noumea Convention refers to "the special hydrological, geological and ecological characteristics of the region which require special care and responsible management", to "the unique

construction of which is in question but has not received the notification referred to in Article 63 of the Statute".

3 Nothing in the Statute precludes a State from relying both on Article 62 and 63 in relation to the same case. Cf *The Wimbledon* PCIJ Ser A No 1 (1923).

environmental quality of the region" and its "special requirements". In addition, the independent island States which are members of the South Pacific Forum⁴ have consistently opposed activity related to nuclear weapons and nuclear waste disposal in their Region, for example by seeking to establish and guarantee the status of the Region as a nuclear free zone.⁵

The New Zealand Requests

6. The New Zealand Request for an Examination of the Situation has two separate elements:⁶

- (1) The first element of the New Zealand Request asks the Court to adjudge and declare that it would be unlawful for France to conduct nuclear tests at Mururoa or Fangataufa Atolls without first carrying out an environmental impact assessment of the effect of such tests in accordance with accepted international standards, which assessment must establish that the tests will not give rise to radioactive contamination of the marine environment. This is a matter which is covered by Article 16 of the Noumea Convention.
- (2) The second element of the New Zealand Request asks the Court to adjudge and declare that the conduct of the proposed nuclear tests will violate New Zealand's rights under international law, as well as those of other States. This is a matter which is covered by Article 4 (6) of the Noumea Convention, which itself reflects the position under general international law and which is embodied in other applicable international conventions (e.g. Article 3 of the Biodiversity Convention of 1992⁷).

7. New Zealand has also requested the Court to indicate further provisional measures.⁸ In essence, these are that France refrain from conducting any further nuclear tests at Mururoa and Fangataufa without first carrying out an environmental impact assessment in accordance with accepted international standards, such assessment establishing that the tests will not give rise to radioactive contamination of the marine environment. New Zealand also asks the Court to indicate that France and New Zealand should ensure that no action is taken which might

4 The South Pacific Forum was founded in 1971. A South Pacific Forum Secretariat was established by an Agreement concluded at Pohnpei, Micronesia on 29 July 1991 (in force 23 April 1993): see Australian Treaty Series 1993 No 16.

5 See South Pacific Nuclear Free Zone Treaty, Raratonga, 6 August 1985, preambular paragraph 10: "Determined to keep the region free of environmental pollution by radioactive wastes and other radioactive matter". For the text of the Convention see (1985) 24 International Legal Materials 1440.

6 These are summarized in ICJ Communiqué 95/22, 21 August 1995.

7 (1992) 31 International Legal Materials 822.

8 These are summarized in ICJ Communiqué 95/22, 21 August 1995.

aggravate or extend the dispute or prejudice the rights of the other Party. A main focus of the provisional measures sought by New Zealand is therefore to preserve its rights under the Noumea Convention, as well as under other international conventions and general international law, pending the final decision of the Court.

PART B. Application for Permission to Intervene: Article 62 of the Statute

8. Article 69 of the 1972 Rules, under which this application is made, requires the application to include "a statement of law and fact justifying intervention" (cf 1978 Rules, Article 81 (2)).

Interest of a legal nature

9. A State requesting intervention under Article 62 must establish an "interest of a legal nature... it considers may be affected by the decision in that case" (cf 1978 Rules, Article 81 (2) (a)).

10. The Marshall Islands has a legal interest:

- (a) in the prevention of any unlawful introduction into the marine environment of *radio-active material*, whether within the South Pacific region beyond the limits of national jurisdiction, or within its own maritime areas;
- (b) in compliance by States with essential procedural obligations, whether under applicable treaties or general international law, intended to assist in the achievement of that objective.

11. At the level of prevention, New Zealand asserts that it "is unlawful for France to conduct such nuclear tests before it has undertaken an Environment Impact Assessment according to accepted international standards". The Marshall Islands has a legal interest in the apparent failure by France to carry out an environmental impact assessment, and in its failure to comply with other aspects of Article 16 of the Noumea Convention. The obligation under Article 16 is owed to all other Parties to the Convention. In particular there is an obligation on the State Party concerned to communicate its assessments to the South Pacific Commission so that they may be made available to interested Parties (Article 16 (3)). That obligation is not qualified by any phrase such as "where appropriate". Article 16 is a manifestation of the precautionary approach and, given the potential for damage to the marine environment beyond the limits of national jurisdiction, all States Parties to the Noumea Convention have a legal interest in compliance with it.

12. In addition, at the level of responsibility, New Zealand has submitted that "entry into the marine environment of radioactive material in consequence of the further tests to be carried out at Mururoa or Fangataufa Atolls" would constitute a violation of international law and of applicable treaties. In this regard Article 4 (6) of the Noumea Convention restates and affirms the obligation of each State Party to "ensure that activities within its jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of its national jurisdiction".

13. Article 4 (6) embodies an obligation now of long standing in international law. As a source of obligation it falls clearly within the scope of paragraph 28 of New Zealand's Application of 9 May 1973. Paragraph 28 complained *inter alia* that the French nuclear testing in the South Pacific region...

"violates the rights of all members of the international community, including New Zealand, that no nuclear tests that give rise to radioactive fallout be conducted;

violates the rights of all members of the international community, including New Zealand, to the preservation from unjustified artificial radioactive contamination of the terrestrial, maritime and aerial environment and, in particular, of the environment of the region in which the tests are conducted..."⁹

The obligations correlative to these rights were specifically characterised by New Zealand as obligations *erga omnes*.¹⁰

14. As the Court noted in the *Barcelona Traction* case, all States have a legal interest in the prevention of a violation of an obligation owed *erga omnes*.¹¹ That all States *share* this legal interest does not prevent it from being a genuine legal interest of *each* of those States, one which they are entitled to protect before the Court by steps taken in conformity with the Statute.

15. The relevance of intervention in such contexts was noted by the Permanent Court in *Railway Traffic between Lithuania and Poland*. There the Court affirmed third party interests in freedom of transit and communications and commented that "nevertheless no third State has

⁹ See *ICJ Pleadings, Nuclear Tests*, vol 2, p 8. It may be noted in this context that the *Shorter Oxford English Dictionary* (3rd rev edn, 1959) vol 2, p 2490 defines "fall-out" as "Radioactive refuse of an atomic bomb explosion", without any specification that this be atmospheric.

¹⁰ See e.g. New Zealand Memorial, *ICJ Pleadings, Nuclear Tests*, vol 2, p 143 (para 191). See also Dr Finlay, counsel for NZ, in oral argument: *ibid* at pp 264-266.

¹¹ *Barcelona Traction Case (Second Phase)* ICJ Reports 1970 p 3 at p 32 (paras 33-35).

considered it necessary or expedient to intervene..."¹² If absence of intervention is relevant in the case of rights or obligations in the general interest, so too must be the fact of intervention.

16. South Pacific Forum States Parties to the Noumea Convention, including the Marshall Islands, share a legal interest with all States in seeking to ensure compliance with obligations owed *erga omnes*. They have a further legal interest arising from their proximity to the proposed test sites and from their legitimate concern for the "special hydrological, geological and ecological characteristics of the region which require special care" (Noumea Convention, preamble).

Purpose of intervention

17. The 1972 Rules do not in terms require a State requesting permission to intervene to specify the purpose of intervention, unlike Article 81 (2) (b) of the 1978 Rules. Nevertheless the Court is bound to consider whether the object of the requested intervention "corresponds to what is contemplated by the Statute".¹³

18. The Marshall Islands requests permission to intervene in order to protect its legal interests under general international law and under applicable treaties by all means available in conformity with the Statute of the Court. Those means include intervention in cases where a legal interest of the State may be affected by the decision. The Marshall Islands seeks to inform the Court of its interests before any decision that might affect them is made, as well as to affirm the collective character of the obligations involved. In the *Land, Island and Maritime Frontier Dispute* the Chamber held it to be a proper function of intervention "to inform the Court of the nature of the legal rights of Nicaragua which are in issue in the dispute".¹⁴

19. Most requests for permission to intervene have been in boundary delimitation disputes, where the third party interest is to a greater or lesser extent opposed to those of the parties to the proceedings. In such cases the Court has been very reluctant to allow intervention: the issues in a boundary dispute have been treated as essentially bilateral ones. By contrast, disputes about obligations owed *erga omnes* have an inherent unity and are not divisible in this way. It is significant that Nicaragua was accorded permission to intervene only where there was a "community of interests" in the waters of the Gulf of Fonseca. Such

12 PCIJ Ser A/B No 42 (1931) at p 108.

13 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) Application by Nicaragua for Permission to Intervene*, ICJ Reports 1990 p 92 at p 128 (para 85).

14 *Ibid* at p 130 (para 90).

"community of interests" embraced Nicaragua which accordingly had a legal interest in the resolution of the claim.¹⁵

20. Similarly the Marshall Islands has an interest in the subject matter of the dispute between New Zealand and France resting upon the community of interest in the fulfilment of obligations owed *erga omnes*. The legitimacy of action taken to protect that interest is heightened and reinforced by the common interest of the South Pacific Forum States in the environment of the Region - a common interest specifically recognised in the Noumea Convention.

Jurisdiction

21. The Marshall Islands is not seeking to introduce a new dispute before the Court, or to become a party to the proceedings between New Zealand and France. It is seeking permission to assert its legal interests in an existing dispute in accordance with Article 62 of the Statute.

22. The Chamber in the *Land, Island and Maritime Boundary Dispute* determined that the distinctive juridical nature and purposes of intervention mean that such a link is not required. It said:

"On the contrary, the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party."¹⁶

The Marshall Islands respectfully adopts this conclusion. Any other conclusion would render meaningless the procedural facility of intervention specifically recognised by Article 62 of the Statute.

23. A State seeking to intervene must demonstrate convincingly what it asserts, but it need only show that its legal interest "*may*" be affected, not that it will or must be affected.¹⁷ It is respectfully suggested that it is not for the Court to substitute for the State and to determine - especially in advance of pleadings and hearings - that a State's apprehension is not justified. Under the circumstances, the Marshall Islands has demonstrated that it has an interest of a legal nature in the prevention of resumption of nuclear testing by France in the South Pacific region and in the allegation of failure by France to fulfil its obligations under the Noumea Convention and other applicable conventions and rules of general international law. It considers that these legal interests may be affected not only by a decision of the Court on the merits of New Zealand's claims, but also by a refusal to indicate provisional measures.

15 Ibid at pp 121-2, 125 (paras 72, 79).

16 Ibid at p 135 (para 100).

17 Ibid at p 117 (para 61).

Propriety of intervention at the provisional measures phase

24. Article 62 does not limit intervention to any specific phase of the proceedings. Consistently with the text of Article 62 and in the light of its object and purpose, the procedure should be available at whatever stage a State's legal interest may be affected by the decision, including a decision to indicate provisional measures.

25. In the present case, this may well be the only time at which the request can have practical effect. Conduct of the proposed tests will upset the *status quo* in the region and has the potential to cause serious, possibly irreparable harm to the marine environment. The cultures, traditions and well-being of the peoples of the South Pacific States would be adversely affected by the resumption of French nuclear testing within the region in a manner incompatible with applicable legal norms. New Zealand's request for an indication of further provisional measures is concerned to preserve, pending a decision of the Court:

- (a) rights owed *erga omnes* (and thus to the Marshall Islands);
- (b) treaty rights owed equally to all States Parties under the Noumea Convention (including the Marshall Islands).

Similarly, it is concerned to prevent, pending a decision of the Court:

- (c) perceived risk of harm to the environment of the region, an environment recognized by the Parties to the Noumea Convention as having special characteristics and as requiring special protection.

26. Having regard to the importance of *prevention* of harm, it cannot be said in advance that these legal rights and interests will not be affected by any decision at the stage of provisional measures. To put the same point positively, these interests of a legal character "may be affected by the decision in the case". In the circumstances, and having regard to the importance of the interests at stake, it is respectfully submitted that this is sufficient to entitle the Marshall Islands to be permitted to intervene at the stage of provisional measures.

PART C. Admissibility of Declaration of Intervention: Article 63 of the Statute

27. A second and distinct basis for intervention is Article 63 of the Statute. The Noumea Convention is a convention to which States other than New Zealand and France are Parties. In particular, the Marshall Islands is a Party to the Convention by virtue of its ratification of 4 May

1987. The Convention, which entered into force on 22 August 1990, is the most important legal instrument governing the protection of the environment of the South Pacific region, a region which includes Mururoa and Fangataufa.

The Construction of the Noumea Convention is in Question

28. In the Marshall Islands' view, the construction of the Noumea Convention is in question both in terms of the indication or otherwise of provisional measures and in terms of the ultimate relief which New Zealand seeks in relation to the merits.

29. The 1986 Noumea Convention is understood to be the principal treaty instrument relied upon by New Zealand. Relevant provisions include Article 2 (f) (Definitions), Article 4 (6) (General Provisions), Article 12 (Testing of Nuclear Devices), and Article 16 (Environmental Impact Assessment). These provisions are, it is respectfully suggested, clearly "in question". In relation to the merits, they are a principal foundation for the New Zealand claims, falling within paragraph 28 of its Application of 1973. In relation to its further request for provisional measures, the Court will be required to construe these (and perhaps other) provisions of the Convention in order to see whether they provide a basis for the measures sought.

(a) The EIA obligation: Article 16 of the Noumea Convention

30. The Marshall Islands suggests that Article 16 is directly applicable to the proposed French nuclear tests at Mururoa and Fangataufa. In the Marshall Islands' view, Article 16 requires France, before those tests are carried out:

- * to have conducted an environmental impact assessment of the potential effects of the nuclear tests on the marine environment (including the preparation of an environmental impact statement);
- * where appropriate, and in accordance with its national procedures, to have invited public comment on the environmental impact statement;
- * where appropriate, to have invited other Parties that may be affected by the tests (including the Marshall Islands) to consult with it and submit comments; and
- * to have shared the results of the assessment with interested States Parties through the South Pacific Commission.

31. Specifically, the Court will face a range of issues of construction, including the following:

- * Issue: the scope of Article 16.

In the Marshall Islands' view, the proposed test program falls within the scope of the "major projects which might affect the marine environment", within the meaning of Article 16 (1). It is therefore a project to which paragraphs (2) and (3) of Article 16 apply.

- * Issue: the nature and extent of the obligation imposed by Article 16 (2).

In the Marshall Islands' view, the assessment to which Article 16 (2) refers must be an environment impact assessment as normally understood in national and international practice. Since such an assessment is well within the capabilities of a State Party such as France, the words "within its capabilities" afford no relevant limitation to the obligation under Article 16 (2).

- * Issue: the nature and extent of the obligation imposed by Article 16 (3) to invite public comment and to consult other Parties.

In the Marshall Islands' view, the words "where appropriate" do not confer on the State Party concerned an unfettered discretion to deny the opportunity to consult and submit comments. In circumstances such as the present, there is no basis for holding that it would be "appropriate" not to consult with other Parties. Moreover the procedures under paragraph (3) must be carried out in time to enable comments to be taken into account before any final decision is made.

- * Issue: the nature and extent of the obligation imposed on France by Article 16 (3) to share the results of its environmental impact assessment with interested States Parties through the South Pacific Commission.

In the Marshall Islands' view, this requires, in the case of the resumption of a nuclear test program, that both the assessment and the communication occur prior to the final decision to undertake the program.

- * Issue: the relationship between Articles 12 and 16 (2) and (3).

In the Marshall Islands' view, the obligations under Articles 16 (2) and (3) apply to the proposed testing of nuclear devices under Article 12, as to any other major project which might affect the marine environment of the Convention Area.

(b) *The obligation not to cause the introduction into the marine environment of radioactive material: Article 4(6) of the Noumea Convention*

32. In the Marshall Islands' view, Article 4 (6) of the Noumea Convention, construed in accordance with Article 4 (4),¹⁸ imposes upon France an obligation to ensure that nuclear tests carried out at Mururoa or Fangataufa do not result in the introduction of radioactive material into the marine environment. Article 4 (6) must be construed "in accordance with international law relating to [its] subject matter" (Article 4 (4)). In the context of the release of radioactive material into the environment, Article 4 (6) is thus to be construed to prohibit the release of any appreciable amount of radioactive material into the marine environment. Any other construction would be incompatible with developments in treaty and general international law, as reflected *inter alia* in the 1993 amendment to the 1972 London Dumping Convention, prohibiting the disposal of any radioactive material in the marine environment,¹⁹ paragraph 22.5 (c) of Agenda 21 prohibiting storage of radioactive material near the marine environment,²⁰ and the obligation to apply the precautionary principle. Since Article 4 (6) is fundamental to the second element of the New Zealand Request, its construction is, in the Marshall Islands' respectful view, clearly in issue.

33. At this stage of the proceedings it is not possible to be exhaustive as to the issues of construction of the Noumea Convention which are in question. Additional issues may be raised by the Respondent State or by the Court itself, and the Marshall Islands respectfully reserves the right to advance additional arguments in that event.

The Existence of a Right of Intervention

34. In this context, it is important to stress that Article 63 of the Statute confers on States a *right* to intervene in any case to which it is applicable.²¹ There is, however, a question relating to the time at which Article 63 begins to operate. Article 63 appears to make the *right* of States to intervene in respect of a convention the construction of which is in issue conditional upon the administrative *procedure* of notification. It is true that there is an obligation on the Registrar to issue a notification "forthwith", and to do so "[w]hensoever the construction of a convention is

18 Article 4 (6) provides, *inter alia*, that:
"Each Party shall ensure that activities within its jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of its national jurisdiction."

Article 4 (4) provides that:

"This Convention and its Protocols shall be construed in accordance with international law relating to their subject matter."

19 Resolution LDC.51 (16).

20 A/CONF/151/26/Rev.1 (vol I) (1993).

21 Cf *Haya de la Torre Case* ICJ Reports 1951 p 71.

in issue" (emphasis added). On the other hand the Rules expressly provide that a declaration under Article 63...

"may be filed by a State that considers itself a party to the convention the construction of which is in question but has not received the notification referred to in Article 63 of the Statute."

(1972 Rules, Article 71 (1); 1978 Rules, Article 82 (3).)

By contrast Article 63 (2) of the Statute is limited to "Every State so notified" (emphasis added). The relation between these various provisions does not seem to have been the subject of any ruling by the Court.

35. The Marshall Islands accepts that it is a matter for the Registrar, and ultimately for the Court, to interpret these provisions and to decide whether and to what extent the construction of the Noumea Convention is in question, and at what point the right referred to in Article 63 of the Statute arises. Under the unusual circumstances of the present case, and having regard to the urgency of the matter, it requests the Court to consider the present Declaration as notifying the intention of the Marshall Islands to intervene as of right under Article 63 as soon as the conditions for its doing so have been fulfilled.

The Issue of a Jurisdictional Link

36. The Marshall Islands contends that there is no requirement of a jurisdictional link under Article 63 between either of the parties and the intervenor. This follows *a fortiori* from the decision of the Chamber in relation to Article 62.²² Article 63 is clearly a self-contained regime of a special character, which contains its own preconditions and provides for its own distinctive consequences.²³ There is no basis for reading into Article 63 the general requirements of Article 36 of the Statute so far as parties to contentious proceedings are concerned.

The Question of a Hearing

37. Article 71 of the 1972 Rules provides that the intervening party under Article 63 "shall take part" in the oral proceedings. Similar provision is contained in Article 86 (2) of the 1978 Rules. In the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Declaration of intervention)*, the Court decided by majority not to accord a hearing to El Salvador, which had made a declaration of intervention

22 *Land, Island and Frontier Dispute Case. Application of Nicaragua to Intervene* ICJ Reports 1990 p 92.

23 A party exercising a right of intervention under Article 63 is bound by the construction given to the convention in question.

under Article 63.²⁴ That decision may be explained by the fact that El Salvador's Declaration was considered to relate to the phase of the merits, as distinct from jurisdiction or admissibility (and indeed the Court indicated that El Salvador might wish to intervene at the merits phase). It is suggested that the decision is not authority in relation to any declaration of intervention that relates to the current phase of proceedings.

Conclusion as to Article 63

38. To summarize, the issues of construction referred to in the preceding paragraphs are "in question" in the provisional measures phase because the Court will or may have to consider them in assessing whether a sufficient case has been made out by New Zealand that it has rights which should be protected by an indication under Article 41 of the Statute, pending a final decision of the Court. *A fortiori*, it is the case that those issues of construction are in question in relation to the phase of the merits.

39. In this regard, Article 63 should not be read as limited to issues of construction that the Court necessarily *has* to decide. In any case before the Court, a range of issues will arise. The Court retains freedom to choose those matters it will actually deal with. The right of intervention under Article 63 arises *prior* to the decision of the Court, as soon as it appears that the construction of a convention is "in question". In that context, an issue of construction is "in question" for the purposes of Article 63 if that issue is actually raised by the parties to the proceeding, or either of them, and if it forms a possible basis for the decision, or a possible link in the chain of reasoning leading to the decision.

40. In the present case, the issues of construction identified above are "in question" since they relate directly to the question whether a legal basis for the asserted rights of New Zealand exists or does not exist. The possibility that the Court may be able to decide on New Zealand's request without resolving those issues does not mean that they are not "in question". This is so both as to the phase of provisional measures and as to the phase of the merits. In relation to the phase of provisional measures, it is true that the Court will avoid final decisions as to the existence or non-existence of a right claimed by a party. But the Court could only decide to exercise its powers under Article 41 of the Statute if it first came to the conclusion that the right claimed by the Requesting State appeared to exist and required protection in the circumstances. A judicial body cannot approach a phase of a case with the predetermined view that particular arguments relied on by the parties are irrelevant or will not arise. Thus even at the provisional measures phase, the Court may well have to form a provisional view as to the existence and

24 ICJ Reports 1984 p 392.

significance of a treaty right relied on by the Applicant, and for that purpose it will necessarily have to construe the Noumea Convention.

PART D. Conclusion

41. For the reasons given here (which the Marshall Islands reserves the right to supplement at a hearing before the Court), the Marshall Islands respectfully asks:

- (a) that the Court give it permission to intervene in the proceedings under Article 62 of the Statute, both as to provisional measures and at the eventual phase of the merits;
- (b) that, to the extent that the Court concludes that the construction of the Noumea Convention is in question, the Court should declare that the Marshall Islands is entitled to intervene under Article 63 of the Statute as to those questions of construction, both as to provisional measures and at the eventual phase of the merits.



(Signed) Tuiloma Neroni Slade
Agent for the Government of the Marshall Islands

24 August 1995