

Fukushima and New Zealand v. France Nuclear Tests: Can Japan be Brought to the International Court of Justice for Damages Caused by the Fukushima Plants?

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On March 11, 2011, an earthquake caused a tsunami that damaged the cooling system of the nuclear reactors in Fukushima and ultimately caused an explosion that released and spread radioactive materials.¹ Judging from the contamination of the nearby area and the release of the contaminated water into the Pacific Ocean, it is certain that the damage done by radioactive materials will affect the land and the ecosystem in the Pacific Ocean.² The Pacific Ocean borders a great number of nations, with South Korea, North Korea and Russia only a few hundred miles away from the damaged nuclear power plant. While the magnitude of damage is hotly debated,³ the impact will reverberate decades or even centuries afterwards.⁴

This Note will discuss whether the neighboring nations will have a cause of action against Japan in the International Court of Justice (“ICJ”) by comparing it to *New Zealand v. France Nuclear Tests*, another case involving nuclear damage in the Pacific. The focus will be on the ICJ, as it holds the position as the “principal judicial organ of the United Nations”

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1. *Fukushima Accident 2011*, WORLD NUCLEAR ASS'N, <http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Fukushima-Accident/> (last visited Jan. 29, 2015).

2. Evan Osnos, *The Fallout: Letter from Fukushima: Seven Months Later: Japan's Nuclear Predicament*, NEW YORKER 46, 58 (Oct. 17, 2011).

3. See Krista Mahr, *Do I Dare Eat a Peach? Fukushima Citizens and Farmers Struggle with Food Safety*, TIME (Aug. 8, 2011), <http://science.time.com/2011/08/08/do-i-dare-to-eat-a-peach-fukushima-citizens-and-farmers-struggle-with-food-safety/>; Krista Mahr, *A Long Road to Recovery*, TIME (Aug. 29, 2011), <http://www.time.com/time/magazine/article/0,9171,2089361,00.html>.

4. See Osnos, *supra* note 3, at 53.

and has been the court for previous conflicts.⁵ Part I of the Note looks at the ICJ's reasoning for accepting New Zealand's Application and its request for an Interim Order of Protection to see if similar grounds could be established against Japan in the ICJ. In Part II, with the initial burden of showing jurisdictional basis met, the Note will focus on the existence of legal rights that the Court has power to preserve. Part III will focus on the potential roadblocks an action may find should it reach the merits stage. Finally, the Note concludes that no practical cause of action exists at this stage for most countries, even if they are found to have suffered harm.

I. BACKGROUND

A. NEW ZEALAND V. FRANCE, 1974: THE ORIGINAL CASE

On May 9, 1973, New Zealand filed an application in the ICJ registry for France's nuclear weapons testing at Mururoa and Fangataufa Atolls in the South Pacific Ocean.⁶ The atolls were situated 2,900 miles from New Zealand.⁷ Among the relevant actions claimed illegal is the unlawfulness in the modification of the physical conditions of their territories by radioactive fallout resulting in marine pollution, which was relied on in the following resolutions:

The U.N. General Assembly, . . . the U.N. Stockholm Declaration, . . . as well as on works carried out by the U.N. Sea-Bed Committee, the International Atomic Energy Agency ("IAEA"), the World Health Organization ("WHO"), the Food and Agriculture Organization ("FAO"), . . . the U.N. Scientific Committee on the Effects of Atomic Radiation ("UNSCEAR"), the International Commission on Radiological Protection ("ICRP"), and many other regional for a and organizations.⁸

5. I.C.J. Press Communiqué No. 97/2 (Feb. 6, 1997).

6. Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 458 (Dec. 20).

7. Michael Field, *Mururoa Fallout Worse Than First Thought*, STUFF.CO.NZ (Mar. 7, 2013, 9:53 AM), <http://www.stuff.co.nz/world/south-pacific/8872214/Mururoa-fallout-worse-than-first-thought> ("Radiation levels frequently rose in New Zealand 4700 kilometers away following each test").

8. See Barbara Kwiatkowska, *New Zealand v. France Nuclear Tests: The*

France contested the ICJ's jurisdiction and did not participate in the course of the Nuclear Tests proceedings.⁹ New Zealand argued that the ICJ had compromissory jurisdiction under Articles 36(1) and 37 of the ICJ Statute.¹⁰ Article 17 of the General Act on Pacific Settlement of International Disputes of September 26, 1928 was a basis of compromissory jurisdiction along with its declaration under the Optional Clause.¹¹ France withdrew from the Optional Clause on January 2, 1974¹² before final judgment was given on December 20, 1974.¹³ The ICJ upheld its *prima facie* jurisdiction and, after New Zealand's Request for Interim Measures of Protection, ordered that the French Government avoid nuclear tests on June 22, 1973. But with French officials publicly stating that they would cease testing, the ICJ delivered a judgment finding that New Zealand no longer had any object, ultimately declaring that there was nothing on which to give judgment.¹⁴

B. NEW ZEALAND V. FRANCE, 1995: NUCLEAR TESTS RESUME
BUT THE CASE DOES NOT

When France announced that it would resume nuclear testing in June 1995 – this time underground – France had already denounced the General Act and withdrew from the compulsory jurisdiction of the Court, eliminating those jurisdictional bases.¹⁵ Thus, this time a “Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case” was submitted.¹⁶ Through

Dismissed Case of Lasting Significance, 37 VA. J. INT'L L. 107, 112 (1996).

9. Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 458 (Dec. 20).

10. See Kwiatkowska, *supra* note 9, at 113–14.

11. See General Act for the Pacific Settlement of International Disputes, Sept. 26, 1928, 93 L.N.T.S. 342.

12. See Nuclear Tests (N.Z. v. Fr.), Verbatim Record: Public Hearing Held Sept. 11, 1995, 3:30 p.m. (CR 95/19).

13. Nuclear Tests (Austl. V. Fr.), 1974 I.C.J. 253, 272 (Dec. 20).

14. Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, 458 (Dec. 20).

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

16. Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case (N.Z. v. Fr.), 1995 I.C.J. 288 (Sept. 22)[hereinafter *Request*].

the Request, New Zealand sought to reopen the 1974 case, but on September 22, 1995, the ICJ dismissed it.¹⁷ New Zealand's application in 1973 centered on "nuclear tests" of whatever nature and stated that the bases of jurisdiction has not changed from 1973 and was preserved in the 1974 Judgment.¹⁸ The Request was accompanied by a Further Request for the Indication of Provisional Measures¹⁹ that relied on Article 33(1) of the General Act and Article 41 of the Court's Statute.²⁰ This restricted the claim to "principles and rules governing radioactive marine pollution and the need for an environmental impact statement."²¹ As in 1974, France claimed that the Court had no jurisdiction, that the 1974 Judgment was limited to atmospheric tests, and that the 1995 Request could not be linked to the 1973 New Zealand Claim. Even if it did, France argued that it "had no object" after its declaration of abandoning atmospheric tests.²²

Oral hearings were held on September 11th and 12th. Here, both New Zealand and France reiterated their views presented in writing while clarifying and answering questions presented by the Court.²³ During the proceeding, New Zealand notably used "resume" as opposed to "reopen" in describing its intention,²⁴ while France was adamant in its position that the present proceedings were "hearings about hearings" and thus unrelated to the 1973 case.²⁵ Specifically, New Zealand contended that the "basis" in Paragraph 63 of the 1974 judgment referred to France's declarations that it would cease

17. See Prudence Taylor, *Testing Times for the World Court: Judicial Process and the 1995 French Nuclear Tests Case*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 199, 200 (1997).

18. Request, *supra* note 17.

19. See Nuclear Tests (N.Z. v. Fr.), Further Request for the Indication of Provisional Measures (Aug. 21, 1995), available at <http://www.icj-cij.org/docket/files/97/8588.pdf>.

20. *Id.* at 1-2, ¶ 2.

21. See Kwiatkowska, *supra* note 8, at 129.

22. Request, *supra* note 16, at 293.

23. See Nuclear Tests (N.Z. v. Fr.), Verbatim Record: Public Hearing Held Sept. 11, 1995, 3:30 p.m. (CR 95/19); Nuclear Tests (N.Z. v. Fr.), Verbatim Record: Public Hearing Held Sept. 12, 1995, 2:30 p.m. (CR 95/21), available at <http://www.icj-cij.org/docket/index.php?p1=3&k=cd&case=97&code=nzfr&p3=2>.

24. See Verbatim Record, Nuclear Tests (N.Z. v. Fr.), ICJ Doc. CR 95/19, §32 (Sept. 11, 1995), available at <http://www.icj-cij.org/docket/files/97/4755.pdf>.

25. See Verbatim Record, Nuclear Tests (N.Z. v. Fr.), ICJ Doc. CR 95/21, §36 (Sept. 11, 1995), available at <http://www.icj-cij.org/docket/files/97/4759.pdf>.

nuclear testing.²⁶ Although the French government specifically declared that it would stop atmospheric nuclear testing, New Zealand based its argument on the wording of its Application that stated “nuclear testing of whatever nature.”²⁷ New Zealand argued that scientific evidence showing some damage to the marine environment allowed the resumption of the 1973 proceedings.²⁸

France argued that in 1974, despite what New Zealand’s application said, the Court specifically narrowed the judgment to atmospheric tests.²⁹ Thus, when France declared the end of atmospheric testing, the Court properly declared there was no object, closing the case.³⁰ The only possibility of resuming the case, France conceded, was limited to atmospheric nuclear tests that cause radioactive fallout on New Zealand Territory.³¹ In addition, France offered evidence that the radioactivity on the testing sites were the same as other Atolls in the Pacific, but declined to provide the additional data that New Zealand requested.³²

According to France, “an examination of the situation in accordance with the provisions of the Statute” in Paragraph 63 of the 1974 judgment must abide by Articles 60 and 61 of the ICJ statutes.³³ But since Article 61 specifically states “no application for revision may be made after the lapse of ten years from the date of the judgment,” New Zealand’s Request, filed in 1995 could not utilize Article 61.³⁴ With a revision precluded, it necessarily had to be a new Application that would have to establish jurisdiction in accordance with Article 38(5) of the Court’s Rules.³⁵ New Zealand, however, claimed that the judgment of 1974 afforded its own basis of

26. Request, *supra* note 16, at 289–90.

27. *Id.* at 290.

28. *Id.*

29. Request, *supra* note 16, at 44 (“For purposes of the Application, the New Zealand claim is to be interpreted as applying only to atmospheric tests, not to any other form of testing . . .”).

30. I.C.J. Verbatim Record, CR 95/20, 45 (Sept. 11, 1995).

31. Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J., at 466.

32. Request, *supra* note 16, at 56.

33. See Kwiakowska, *supra* note 8, at 150.

34. See Statute of the International Court of Justice art. 61, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

35. See Rules of the International Court of Justice art. 38(5), 1978 I.C.J. Acts & Docs. 4 (as amended Apr. 14, 2005).

jurisdiction.³⁶ Additionally, it argued that the Court had never terminated the case after the judgment, nor did New Zealand discontinue the case, maintaining a continuity that allowed the jurisdiction of the 1974 case to apply to the present case.³⁷

Instead of answering whether New Zealand's Request met the conditions of the 1974 judgment, the Court looked at what procedure Paragraph 63 demanded and whether the basis of the 1974 judgment was affected within the meaning of Paragraph 63.³⁸ The Court decided that the procedure in Paragraph 63 was not limited to the procedures suggested by France or by any other procedures in the Statute, but instead called for a "procédure spéciale" if circumstances affecting the "basis" of the judgment defined in Paragraph 63 were to arise.³⁹ However, the Court found that the basis of the 1974 judgment was not affected because it was based on France's promise not to conduct any further atmospheric tests and their current tests were conducted underground.⁴⁰ The Court reiterated its statements made in 1974, when it said that New Zealand's objective was to enjoin France from continuing its atmospheric nuclear tests, and when France publicly made statements to that effect, the object of the claim disappeared leaving no matter in front of the court.⁴¹ Thus the court declared that the only way the "basis" of the judgment could be affected would be for France to resume its atmospheric nuclear tests, denying New Zealand's Application.⁴²

C. FAST FORWARD TO FUKUSHIMA

While nuclear testing, atmospheric or underground, has become less common, till 2011 December, there are over 400 nuclear reactors in operation around the world.⁴³ The number of reactors will likely increase despite Germany's decision to

36. See Request, *supra* note 16, at 295.

37. *Id.* at 294.

38. *Id.* at 301-02.

39. *Id.* at 303-04.

40. *Id.* at 306.

41. *Id.* at 305.

42. *Id.* at 306.

43. *World Nuclear Power Reactors & Uranium Requirements*, WORLD NUCLEAR ASS'N (Dec. 1, 2011), <http://www.world-nuclear.org/info/reactors122011.html>.

close all of its nuclear power plants by 2022⁴⁴ and Italy's cancelling plans for restarting a nuclear program⁴⁵ as China plans to build ten new plants per year⁴⁶ and as South Korea and India plan to build several more respectively.⁴⁷ Turkey,⁴⁸ United Arab Emirates,⁴⁹ Russia⁵⁰ and the United States are all either arranging to have nuclear power plants built or are approving plans for new nuclear power plants.⁵¹ Despite the large and ever increasing number of nuclear reactors in the world, there is still no international treaty that determines liability in case of nuclear accidents.⁵² This is due to a significant number of states operating nuclear power plants while not participating in any international regime, namely Canada, China, Japan, Korea and India.⁵³ These nations, along with France, Russia and the United States are responsible for about 370 nuclear reactors, or over 85% of the world's nuclear power plants.⁵⁴

On March 11, 2011, an earthquake originating from the Pacific Ocean caused a tsunami that struck the eastern shore of Japan, a country not yet participating in an international

44. Judy Dempsey & Jack Ewing, *Germany, in Reversal, Will Close Nuclear Plants by 2022*, N.Y. TIMES (May 30, 2011), <http://www.nytimes.com/2011/05/31/world/europe/31germany.html>.

45. *Italy Nuclear: Berlusconi Accepts Referendum Blow*, BBC NEWS (June 14, 2011), <http://www.bbc.co.uk/news/world-europe-13741105>.

46. *World Nuclear Power Reactors & Uranium Requirements*, INT'L ATOMIC ENERGY AGENCY (Apr. 1, 2013), http://www-pub.iaea.org/MTCD/publications/PDF/RDS2-32_web.pdf.

47. *Id.*

48. *Nuclear Power in Turkey*, WORLD NUCLEAR ASS'N, <http://world-nuclear.org/info/Country-Profiles/Countries-T-Z/Turkey/> (last updated Dec. 2014).

49. *Nuclear Power in United Arab Emirates*, WORLD NUCLEAR ASS'N, <http://world-nuclear.org/info/country-profiles/countries-T-Z/United-Arab-Emirates/> (last updated Dec. 2014).

50. Karl Grossman, *Floating Chernobyls*, HUFFINGTON POST (Sept. 3, 2010, 1:27 PM), http://www.huffingtonpost.com/karl-grossman/floating-chnobyls_b_698550.html.

51. Ryan Tracy, *U.S. Approves Nuclear Power Plants in South Carolina*, WALL ST. J., <http://online.wsj.com/article/SB10001424052702303816584577313873449843> (last updated Mar. 30, 2012, 5:54 PM).

52. See Stephen G. Burns, *A Global Nuclear Liability Regime: A Journey Or A Destination?*, INT'L NUCLEAR LAW ASS'N 3 (Oct. 8–11, 2012), available at http://www.burges-salmon.com/INLA_2012/10156.pdf.

53. *Id.* at 4.

54. The Database on Nuclear Power Reactors, IAEA (Apr. 13, 2012), <http://www.iaea.org/pris/>.

liability regime, damaging the Fukushima Daiichi Nuclear Power Plant Complex.⁵⁵ The reactors were boiling water reactors designed by General Electric Company; a design that is used in U.S. and other parts of the world.⁵⁶ Even though the reactors shut down as designed, the tsunami also disconnected power from the coolant system which caused the reactors to overheat and release large amounts of radiation into the surrounding atmosphere.⁵⁷ Unit 1 reactor lost cooling within hours while Unit 2 and 3 lasted 36 and 71 hours respectively before overheating.⁵⁸

The failure of the cooling system was foreseen during construction, as mid-level engineers voiced concern regarding the vulnerability of the back-up power systems to flooding.⁵⁹ While Tokyo Electric Power Company (TEPCO), the Japanese company commissioning the power plant, made some modifications, it did not move the switching stations connecting the generators and reactor cooling systems, leaving them in the vulnerable turbine buildings.⁶⁰ Had the switching stations been moved, the cooling systems would not have failed, likely preventing the reactors from overheating and releasing radiation.⁶¹ But due to their failure, the government ordered the use of seawater to cool the reactors, a decision that ruined the reactors for future use.⁶² In addition to the reactors

55. *Fukushima Accident*, WORLD NUCLEAR ASS'N, <http://www.world-nuclear.org/info/Safety-and-Security/Safety-of-Plants/Fukushima-Accident/> (last updated Dec. 2014).

56. Bill Dedman, *General Electric-designed Reactors in Fukushima Have 23 Sisters in U.S.*, NBC NEWS (Dec. 18, 2012, 3:23 EST), http://openchannel.nbcnews.com/_news/2011/03/13/6256121-general-electric-designed-reactors-in-fukushima-have-23-sisters-in-us?lite.

57. *Id.* note 6.

58. *Recommendations for Enhancing Reactor Safety in the 21st Century: the Near-Term Task Force Review of Insights from the Fukushima Dai-Ichi Accident*, U.S. NUCLEAR REGULATORY COMM'N, 9 (July 12, 2011), <http://www.psr.org/assets/pdfs/recommendations-for-enhancing-reactor-safety.pdf>.

59. Michael Faure & Jing Liu, *The Tsunami of March 2011 and the Subsequent Nuclear Incident at Fukushima: Who Compensates the Victims?*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 129, 190 (2012).

60. *Id.*

61. See Norihiko Shirouzu & Chester Dawson, *Design Flaw Fueled Nuclear Disaster*, WALL ST. J. (July 1, 2011), <http://online.wsj.com/article/SB10001424052702304887904576395580035481822>.

62. Thomas H. Maugh II, *Japan Quake: 2nd Reactor Cooled with Seawater to Avert Meltdown*, L.A. TIMES (Mar. 13, 2011), <http://articles.latimes.com/2011/mar/13/science/la-sci-japan-quake-reactor->

overheating, a separate fire occurred where spent fuel rods were stored.⁶³ TEPCO also knew that the seawall barriers were insufficient protection against tsunamis in 2002.⁶⁴ Despite knowledge of the barriers' insufficiency, TEPCO also failed to take preventive actions against a potential tsunami after warnings following the earthquake.⁶⁵ Domestically, TEPCO is liable for approximately 382 million dollars⁶⁶ with no limit on liability placed by the Japanese government.⁶⁷

The immediate fallout area was as large as the City of Chicago,⁶⁸ and the area surrounding the plant is estimated to be uninhabitable for a century-and-a-half.⁶⁹ Damage was done not only to the local environment, prompting Japan to ban food produced in the Tohoku region⁷⁰ and displacing local citizens, but also to the economies and environments of Japan⁷¹ and other nations.⁷² Notably, radiation levels rose around the world, including in the United States on the other end of the Pacific Ocean.⁷³ The disaster has been classified as a level seven event

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63. O.M., *Piecing Together Fukushima*, *ECONOMIST* (May 5, 2011, 8:53 AM), http://www.economist.com/blogs/babbage/2011/05/japans_nuclear_disaster.

64. James Garnder Long III, *Independent Unaccountability: The IAEA's "Step Backward" in Regulating International Nuclear Reactor Safety in the Wake of the Fukushima Daiichi Disaster*, 36 *SUFFOLK TRANSNAT'L L. REV.* 155, 160 (2013).

65. *Id.* at 161.

66. Chico Harlan, *As Compensation Payouts Begin, Tepco Pays the Price for Its Nuclear Disaster*, *WASH. POST* (Oct. 9, 2011), available at http://www.washingtonpost.com/world/asia_pacific/as-compensation-payouts-begin-tepco-pays-the-price-for-its-nuclear-disaster/2011/10/06/gIQRQwvXL_story.htm.

67. Taiga Uranaka, *Japan Says No Limits to Tepco Liability from Nuclear Disaster*, *REUTERS* (May 2, 2011), available at <http://www.reuters.com/article/2011/05/02/us-japan-tepco-idUSTRE7412PK20110502>.

68. Osnos, *supra* note 2, at 58.

69. *Id.* at 53.

70. 'Radiation' Land is Uninhabitable, *SUNDAY HERALD* (Glasgow, U.K.) (Aug. 28, 2011).

71. See Hiroko Tabuchi, *Citizens' Testing Finds 20 Hot Spots Around Tokyo*, *N.Y. TIMES* (Oct. 14, 2011), <http://www.nytimes.com/2011/10/15/world/asia/radioactive-hot-spots-in-tokyo-point-to-wider-problems.html?pagewanted=all>.

72. Catherine Butler, Karen A. Parkhill & Nicholas F. Pidgeon, *Nuclear Power After Japan: The Social Dimensions*, *ENV'T: SCI. AND POL'Y FOR SUSTAINABLE DEV.* 3, 4–5 (Nov.–Dec. 2011).

73. *Japanese Nuclear Emergency: EPA's Radiation Monitoring*, EPA, <http://www.epa.gov/japan2011/> (last updated Sept. 11, 2012).

on the International Nuclear Event Scale, its severity only comparable to the Chernobyl accident in 1986.⁷⁴ It was also the first multi-unit accident in the history of nuclear power.⁷⁵

D. POTENTIAL INTERNATIONAL LIABILITIES AND A HISTORY OF DOMESTIC LIABILITY

Japan, unlike France in 1995, declared that it would recognize the jurisdiction of the ICJ since July 9, 2007.⁷⁶ Under Article 36 of the Statute of the ICJ, states may declare acceptance of jurisdiction “unconditionally, or on condition of reciprocity on the part of several or certain states, or for a certain period of time.”⁷⁷ This compulsory jurisdiction only applies if the other states accepted the same obligation.⁷⁸

Aside from its acceptance of compulsory jurisdiction of the ICJ, Japan is not part of a liability treaty regime. However, Japan is a signatory of the Convention on Nuclear Safety that was adopted by the IAEA in Vienna, 1994.⁷⁹ The IAEA has strengthened its regulatory powers in 1994 with the Convention on Nuclear Safety that establishes standards for member states, but it cannot verify whether the standards are being met nor penalize nations for failure to comply.⁸⁰ But Japan is not a signatory of the Nuclear Energy Agency’s Paris Convention on Third Party Liability in the Field of Nuclear Energy in 1964, which imposes standards for nuclear-related liability.⁸¹ Therefore people in other countries must sue where

74. Richard Shears, *Fires Still Raging at Stricken Fukushima Nuclear Reactor One Month After It Was Destroyed by Tsunami*, DAILY MAIL, <http://www.dailymail.co.uk/news/article-1375981/Japan-nuclear-crisis-Radiation-bad-Chernobyl-level-7-reached-2nd-time-history.html> (last updated Apr. 12, 2011, 11:00 AM).

75. AM. SOC’Y OF MECHANICAL ENGINEERS, FORGING A NEW NUCLEAR SAFETY CONSTRUCT 2 (2012).

76. See *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Oct. 1, 2014).

77. Statute of the Court, International Court of Justice 36(3).

78. *Id.* at 36(2).

79. *Convention on Nuclear Safety*, INTERNATIONAL ATOMIC ENERGY AGENCY, http://www.iaea.org/Publications/Documents/Conventions/nuclearsafety_status.pdf (last visited Oct. 1, 2014).

80. IAEA, *Convention on Nuclear Safety*, IAEA Doc. INFCIRC/449 (July 5, 1994) [hereinafter *Convention*].

81. Nuclear Energy Agency, Paris Convention on Third Party Liability in

the defendant, TEPCO, is located, or where the nuclear accident occurred, or even where they are injured.⁸²

Still, Japan follows a similar system, holding operators infinitely liable and requiring a financial security amount of approximately 1.4 billion dollars to obtain a license to operate.⁸³ But when the damage is caused by a grave natural disaster, the nuclear operator can be exonerated from liability.⁸⁴ The government is then required to relieve victims and is also tasked with preventing further damage.⁸⁵ Also, the Japanese government is liable for compensating losses caused by public officials who illegally inflicted losses while performing their duties.⁸⁶ While its Supreme Court ruled that the government is liable under State Compensation Law when human life is in danger and the government does not exercise its regulatory power over the cause of danger, no case law exists to govern nuclear damage.⁸⁷

This is despite a history of nuclear accidents occurring prior to Fukushima, beginning with the accident at the Tsuruga Nuclear Power Plant in Fukui Prefecture in 1981.⁸⁸ After forgetting to shut down a valve, sixteen tons of radioactive waste was spilled on the west coast of Japan.⁸⁹ The radioactive levels of seaweed in the area were found to be ten

the Field of Nuclear Energy (July 29, 1960, amended Nov. 16, 1982).

82. Currently such treaties are: the Paris Convention on Third Party Liability in the Field of Nuclear Energy, the Vienna Convention on Civil Liability for Nuclear Damage, and the Convention on Supplementary Compensation for Nuclear Damage.

83. Convention on Nuclear Safety National Report of Japan for the Fifth Review Meeting, Japan, Sept. 2010 (yen converted to dollars), *available at* <http://www.nsr.go.jp/archive/nsc/NSCenglish/documents/conventions/2011.pdf>.

84. Genshiryoku Songai no Baisho ni Kansuru Horitsu [Act on Compensation for Nuclear Damage], Law No. 147 of 1961, art. 3 (Japan), *translation available at* <http://www.oecd-nea.org/law/legislation/japan-docs/Japan-Nuclear-Damage-Compensation-Act.pdf>.

85. *Id.* art. 17.

86. Kokka Baisho Ho [Law Concerning State Liability for Compensation], Law No. 125 of 1947 (Japan), *translation available at* <http://www.refworld.org/docid/3fbc02764.html>.

87. Eri Osaka, *Corporate Liability, Government Liability, and the Fukushima Nuclear Disaster*, PAC. RIM L. & POL'Y J. 450, 450 (2012).

88. *Japanese Power Plant Leaks Radioactive Waste*, HISTORY, <http://www.history.com/this-day-in-history/Japanese-power-plant-leaks-radioactive-waste> (last visited Oct. 5, 2014).

89. Tim Shorrocks, *Japan's Nuclear Nightmare*, TIMSHORROCK.COM (Mar. 18, 2011), <http://timshorrocks.com/?p=1137>.

times higher than normal⁹⁰ and later it was found that forty-five workers were exposed to radiation at the same plant.⁹¹ In 1995, a plutonium facility in Monju leaked coolant into the surrounding environment.⁹² The semi-government agency in charge of the plant spent an hour and a half trying to hide the damage instead of immediately shutting down the facility.⁹³ Then in 1999, a nuclear processing plant at Tokaimura exposed over a hundred residents to radiation, resulting in the first nuclear power-related death in Japan.⁹⁴ The exposure occurred when uncertified workers applied non-approved procedures to uranium fuel solutions,⁹⁵ resulting in two deaths, the evacuation of 161 people,⁹⁶ and a warning to another 310,000 people to remain indoors for approximately 18 hours.⁹⁷ Three years later, in 2002, TEPCO, the operator of the Fukushima plant, was caught improperly handling internal inspection records.⁹⁸ It included TEPCO's falsification of data regarding its waste discharge into the sea,⁹⁹ resulting in the shutdown of all of its reactors until 2005.¹⁰⁰ In 2005, a plant in Onagawa was shut down after an earthquake (and seismic monitors confirmed that the earthquake was beyond the plant's design capacity).¹⁰¹ In 2007, an earthquake hit the world's largest nuclear power plant, the Kashiwazaki Kariwa plant.¹⁰² The plant was not designed to withstand an earthquake and

90. *Id.*

91. *Id.*

92. Michiyo Nakamoto, *Japan Reminded of Nuclear Safety Fears*, FIN. TIMES (Mar. 13, 2011, 9:45 AM), <http://www.ft.com/cms/s/0/92ce9b50-4cbb-11e0-8da3-00144feab49a.html#axzz2RDi3NgCC>.

93. *Id.*

94. *Tokaimura Criticality Accident*, WORLD NUCLEAR ASS'N (July 2007), <http://www.world-nuclear.org/info/inf37.html>.

95. *Id.*

96. *Id.*

97. K. Komura et al., *The JCO Criticality Accident at Tokai-Mura, Japan: An overview of the Sampling Campaign and Preliminary Results*, 50 J. ENVTL. RADIOACTIVITY 3, 4 (2000).

98. Hajimu Maeda, *Nuclear Energy in Japan-Current Status and Future*, ATOMIC ENERGY COMMISSION 2 (2004), available at <http://www.aec.go.jp/jicst/NC/iinkai/teirei/siry02004/kettei/speech040627.pdf>.

99. *See generally*, Nakamoto, *supra* note 92.

100. *See generally*, Maeda, *supra* note 98.

101. Kennedy Maize, *A Short History of Nuclear Power in Japan*, POWERBLOG (Mar. 14, 2011, 10:05 AM), blog.powermag.com/index.php/2011/03/14/a-short-history-of-nuclear-power-in-japan/.

102. *See generally*, Nakamoto, *supra* note 92.

released radioactive material into the atmosphere.¹⁰³

II. ANALYSIS

A. BASIS FOR JURISDICTION IN THE INTERIM PROTECTION ORDER OF 22 JUNE 1973 AND ITS EQUIVALENT FOR THE FUKUSHIMA DISASTER

The ICJ's final judgment on December 20, 1974 does not answer the question of jurisdiction, as it found that the "object of the claim [has] clearly disappeared."¹⁰⁴ The ICJ emphasized, however, that "the Court possesses an inherent jurisdiction" to take required action as an initial matter in case jurisdiction is found, as well as to "maintain its judicial character."¹⁰⁵ Using the aforementioned inherent jurisdiction, the court found that New Zealand made a prima facie showing of the ICJ's jurisdiction in this matter.¹⁰⁶ A basis of jurisdiction was found despite France's objection and claim that its declaration in May 1966 excepted it from "disputes concerning activities connected to national defence."¹⁰⁷ In accepting New Zealand's argument, the ICJ noted that there was no "manifest lack of jurisdiction" and that arguments in support of the existence of jurisdiction existed.¹⁰⁸ Thus the standard here is similar to that used by U.S. courts when considering a motion for summary judgment.¹⁰⁹ Finding a genuine issue of material fact, namely whether the General Act remained in force, the ICJ proceeded to examine New Zealand's request for the indication of interim measures of protection.¹¹⁰

Once the ICJ established that New Zealand had basis for jurisdiction, it examined whether it had the power to issue an

103. *Id.*

104. Nuclear Tests (N.Z. v. France), 1974 I.C.J. 457, 477 (Dec. 20) ("The object of the claim having clearly disappeared, there is nothing on which to give judgment").

105. *Id.* at 463.

106. Nuclear Tests (N.Z. v. France), 1973 I.C.J. 135, 137 (June 22) ("the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded").

107. *Id.* at 138.

108. *Id.*

109. See Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law").

110. Nuclear Tests (N.Z. v. France), 1974 I.C.J. 457, 477 (Dec. 20).

Interim Protection Order. The standard used here to determine jurisdiction differed from the standard used under the General Act creating a question of jurisdiction, and it is no longer considered a valid base for the exercise of its power as the Act's applicability was challenged by France.¹¹¹ Instead, the court found power under its own statute, Article 41,¹¹² after looking at two more factors. The initial question was whether "rights claimed in the Application, *prima facie*, appear to fall within the purview of the Court's jurisdiction,"¹¹³ as the purpose of the Article is ensuring that "irreparable prejudice should not be caused to rights which are the subject of dispute."¹¹⁴

The ICJ noted that New Zealand, in its Application, has claimed that France "violated the rights of all members of the international community" which "no nuclear tests that give rise to radioactive fall-out be conducted," the right "to the preservation from unjustified artificial radio-active contamination," as well as violating the right of New Zealand that "no radio-active material enter the territory of New Zealand . . . as a result of nuclear testing," "no radio-active material . . . cause harm, including apprehension, anxiety and concern, to the people" and the "freedom of the high seas" by restrictions placed around the test site.¹¹⁵ Again, the Court did not go into an analysis of the merits, but simply noted that it "cannot be assumed a priori that such claims fall completely outside the purview of the Court's jurisdiction."¹¹⁶

After finding that New Zealand had a right that needs preserving, the court conducted a cursory analysis of the substance of the harm, simply recounting the debilitating effects of radioactive fallout and the absence of a separate agreement between the two states that mitigates harm done to New Zealand.¹¹⁷ Despite acknowledging the French

111. *Id.* at 139 ("it should not exercise its power to indicate provisional measures under Article 33 of the General Act of 1928 until it has reached a final conclusion that the General Act is still in force").

112. Statute of the International Court of Justice, art. 41, para. 1 ("The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party").

113. Nuclear Tests (N.Z. v. France), 1973 I.C.J. 135, 139 (June 22).

114. *Id.*

115. *Id.*

116. *Id.* at 140.

117. *Id.*

government's contest¹¹⁸ of the claims of radioactive damage made by New Zealand,¹¹⁹ and while the ICJ made clear that its Interim Protection order is not a finding of merits,¹²⁰ the Court found enough to issue an interim order of protection ordering the French Government to "avoid nuclear tests causing the deposit of radio-active fall-out on the territory of New Zealand."¹²¹

Without knowing which basis the Court has used to determine that the aforementioned claims at least have a possibility of falling within the Court's jurisdiction, it is necessary to look whether claims with similar legal grounds could be made against Japan. New Zealand's Memorial on Jurisdiction and Admissibility lists the following as grounds for jurisdiction: first, "Articles 36, paragraph 1, and 37 of the Statute of the Court and Article 17 of the General Act for the Pacific Settlement of International Disputes,"¹²² and separately, "Article 36, paragraph 2 and 5 of the Statute of the Court."¹²³ New Zealand's argument was that a treaty existed between New Zealand and France that is considered "a treat and convention in force"¹²⁴ for the purposes of Article 36, ¶1, and 37¹²⁵ as specifically stated in Article 17 of the General Act for the Pacific Settlement of International Disputes.¹²⁶ Independently, it also argues that the dispute "falls within the scope of Article 36 (2) and (5) of the Statute of the Court",¹²⁷ as both nations have "each declared that they recognize the compulsory jurisdiction of the International Court of Justice

118. *Id.* at 141 ("every precaution would be taken with a view to ensuring the safety and the harmlessness of the French nuclear tests").

119. *Id.* ¶ 28 ("[T]he radio-active fall-out which reaches New Zealand as a result of French nuclear tests is inherently harmful . . .").

120. *Id.* ¶ 34 ("[T]he decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case, or any questions relating to the admissibility of the Application, or relating to the merits themselves . . .").

121. *Id.* at 142.

122. See Memorial of New Zealand, Jurisdiction and Admissibility (N.Z. v. Fr.), 1973 I.C.J. 145, ¶ 2 (Oct. 29, 1973).

123. See Memorial of New Zealand, Jurisdiction and Admissibility (N.Z. v. Fr.), 1973 I.C.J. 145, ¶ 2 (Oct. 29, 1973).

124. ICJ Statutes, *supra* note 34, art. 37.

125. ICJ Statutes, *supra* note 34, art. 36-37.

126. General Act for the Pacific Settlement of International Disputes art. 17, Sept. 26, 1928, 93 L.N.T.S. 345.

127. Memorial of New Zealand, Jurisdiction and Admissibility (N.Z. v. Fr.), 1973 I.C.J. 145, ¶ 214 (Oct. 29, 1973).

under Article 36 (2) of its Statute.”¹²⁸

Following the first argument of the New Zealand Application, we look to General Act for the Pacific Settlement of International Disputes (“GAPSID”) that was cited as one of the basis for jurisdiction.¹²⁹ The Act was ratified by twenty two countries, but Japan is not one of them.¹³⁰ Arguing for a similar basis for jurisdiction, therefore, requires finding a treaty that calls for arbitration in the ICJ, which is also ratified by Japan and the party bringing the action to the ICJ. Japan is not a party to the traditional treaties that concern nuclear damage.¹³¹ Relevant treaties or conventions that Japan is a party to, and possibly serve as a basis, include the Convention on the Physical Protection of Nuclear Material (“Convention”)¹³² and membership in the Asia-Pacific Fishery Commission (“APFIC”),¹³³ both of which establish duties to member states and allow dispute resolution in the ICJ either explicitly or implicitly. The challenge in both will be to establish the dispute that will trigger their respective dispute resolution articles. Unlike GAPSID, a dedicated Act that assumes the existence of a dispute, both the Convention and APFIC are centered on preventing harm and promoting fishing respectively.¹³⁴ The language used in GAPSID for disputes are “disputes with

128. *Id.* ¶ 152.

129. Nuclear Tests Case (N.Z. v. Fr.), 1973 I.C.J. 135, ¶ 15 (June 22) (“[T]he Government of New Zealand claims to found the jurisdiction of the Court on . . . Article 17 of the [General Act for the Pacific Settlement of International Disputes.]”).

130. General Act of Arbitration (Pacific Settlement of International Disputes) (Sept. 26, 1928), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-29.en.pdf>.

131. Currently, the Paris Convention on Third Party Liability in the Field of Nuclear Energy and the Vienna Convention on Civil Liability for Nuclear Damage exist. On the other hand, Japan is party to conventions and treaties concerning oil spills, so it does not seem that there is a national policy towards minimizing jurisdiction.

132. See Int’l Atomic Energy Agency [IAEA], *The Convention on the Physical Protection of Nuclear Material*, IAEA Doc. INFCIRC/274/Rev. 1 (May 1, 1980), available at <http://www.iaea.org/Publications/Documents/Infcircs/Others/inf274r1.shtml>.

133. See Asia Pacific Fishery Commission [APFIC], *the APFIC Agreement*, 25th Sess. of the Comm’n (Seoul, Rep. of Korea, 15–24 Oct. 1996), available at <http://www.apfic.org/attachments/article/83/APFIC%20Agreement.pdf>.

134. See *the APFIC Agreement*, *supra* note 133; *The Convention on the Physical Protection of Nuclear Material*, *supra* note 131; General Act for the Pacific Settlement of International Disputes, *supra* note 126.

regard to which the parties are in conflict,”¹³⁵ the dispute in Convention and APFIC both involve “dispute regarding the interpretation or application of this Agreement”¹³⁶ or “disagreement between two or more Contracting Parties concerning the interpretation or application of this Convention.”¹³⁷ Worse, the Convention does not automatically allow a party to bring this matter in front of the ICJ stating that it shall consult other Contracting Parties.¹³⁸ Still, as in New Zealand’s case, there may be enough ambiguity to prevent dismissal of the case outright, moving the proceeding to the next stage. Also, since the IAEA is a subsidiary of the United Nations, the Convention signed by member nations and the U.N. Charter states that “[a]ll members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.”¹³⁹ Thus, disputes could come to the ICJ although they may not be able to force Japan to appear.

Before discussing whether either agreement can present a legal right that the Court in 1973 used to issue the Interim Protection order, the second independent argument by New Zealand in its Application needs review.¹⁴⁰ It claimed jurisdiction based on Article 36(2) and (5) of the Statute of the Court, stating that they “may at any time declare that they recognize as compulsory *ipso facto* . . . the jurisdiction of the Court in all legal disputes”¹⁴¹ and that “Declarations made under Article 36 of the Statute of the Permanent Court of International Justice . . . to be acceptances of the compulsory jurisdiction of the International Court of Justice.”¹⁴² Japan has made such declaration on July 9, 2007.¹⁴³ While there is no restriction or limitations as to when a nation may make such a declaration, it is important to note that Japan explicitly states

135. General Act for the Pacific Settlement of International Disputes, *supra* note 126.

136. *The APFIC Agreement*, *supra* note 133, art. XIV. See also *The Convention on the Physical Protection of Nuclear Material*, *supra* note 132, art. 17.

137. *The Convention on Nuclear Safety*, *supra* note 80, art. 29.

138. *Id.*

139. U.N. Charter art. 93, para. 1.

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

141. ICJ Statutes, *supra* note 35, art. 36, para. 2.

142. *Id.* at art 36, para. 5.

143. *Declarations Recognizing the Jurisdiction of the Court as Compulsory, Japan (July 9, 2007)*, available at <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=JP>.

in its declaration that:

This declaration does not apply to any dispute in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited or notified less than twelve months prior to the filing of the application bringing the dispute before the Court.¹⁴⁴

This rules out neighboring countries such as South and North Korea, China, Russia, Taiwan, and even the United States on the other side of the Pacific Ocean from bringing an action for damages without other treaties and agreements that trigger Article 36(2). With South Korea, China and Russia having active territorial disputes with Japan,¹⁴⁵ it is unlikely that the three nations will declare acceptance of unconditional compulsory jurisdiction of the ICJ, and any limitations may be challenged by Japan based on the limits it has declared regarding its acceptance. However, for other nations, such as New Zealand that declared acceptance of compulsory jurisdiction on September 23, 1977,¹⁴⁶ there will be no difficulty in forcing Japan to appear in front of the ICJ and accept its judgment. Of the countries that border the Pacific Ocean, the following countries are on this list: Australia, Cambodia, Canada, Honduras, Mexico, New Zealand, Nicaragua, Panama, Peru, Philippines and Japan.¹⁴⁷ Two of the countries that have declared acceptance of compulsory jurisdiction, Cambodia and Philippines, are less than 2,900 miles away from Japan, which equals to the distance between the French nuclear testing site

144. *Id.*

145. See *Territorial Disputes Involving Japan*, NY TIMES (Sept. 20, 2012), <http://www.nytimes.com/interactive/2012/09/20/world/asia/Territorial-Disputes-Involving-Japan.html>.

146. *Declarations Recognizing the Jurisdiction of the Court as Compulsory, New Zealand* (Sept. 22, 1977), available at <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=NZ>.

147. See *Pacific Ocean*, WIKIPEDIA, http://en.wikipedia.org/wiki/Pacific_Ocean#Bordering_countries_and_territories (last visited Feb. 2, 2015); see also *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, available at <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3>.

and New Zealand.¹⁴⁸

B. FINDING A RIGHT THE COURT WILL PRESERVE

For nations other than those that have declared compulsory jurisdiction, it must be for a dispute or, in this case, a disagreement in the application or the interpretation of the Convention or APFIC.¹⁴⁹ As the purpose of the APFIC concerns the “management of fishing and culture operations and by the development of related processing and marketing activities,”¹⁵⁰ the disagreement could come from Article IV(b)(iii), which reads “protect resources from pollution.”¹⁵¹ As with New Zealand’s case in 1973, applicant nation would only need to show an increase in radioactive readings in order to “preserve the right” it has from the “physical and genetic effects to which contamination exposes the people.”¹⁵² It is also possible that such a showing may not be enough today where more scientific data is available on the effects of radioactive damage or lack thereof. But as the Court did not issue the Interim Order after weighing the merits of New Zealand’s Application, while the threshold for showing damage may be different, it will not be at a level where there are genuine issues of material fact.

In the case of the Convention, the cause of action could come from a number of places, all depending on the facts of the disaster. As described in the background section of this note, problems and faults exist in many stages, many of which are covered by the Convention.¹⁵³ For example, Article 18 of the Convention asks its member nations to ensure that “the design and construction of nuclear installation provides for several

148. Declarations Recognizing the Jurisdiction of the Court as Compulsory, Cambodia (Sept. 19, 1957) & Phillipines (Jan.18, 1992), *available at* <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=NZ>.

149. Assuming, of course, that the prospective applicants are members of the said treaties.

150. *The APFIC Agreement*, *supra* note 133, art. IV.

151. *Id.*

152. Nuclear Tests Case (N.Z. v. Fr.), 1973 I.C.J. 135, ¶ 28 (June 22).

153. *See Convention on Nuclear Safety*, *supra* note 80, art. 6, 9, 14, 16 (Article 6 states that existing nuclear installations require updates and shut-downs of plants with problems; Article 9 discusses the responsibility of the license holder; Article 14 mandates verification of safety; Article 16 requires emergency preparedness. The Convention is almost a list of many things that went wrong in Fukushima).

reliable levels and methods of protection.”¹⁵⁴ TEPCO ignored its mid-level engineers’ safety concerns regarding the back-up power system¹⁵⁵ as well as the insufficiency of its barriers.¹⁵⁶ Japan’s failure to ensure that TEPCO put safety first can also be characterized as a failure to follow Article 13 that mandates that “specified requirements for all activities important to nuclear safety are satisfied throughout the life of a nuclear installation,”¹⁵⁷ or a failure to ensure that “each such license holder meets its responsibility.”¹⁵⁸

What would pose a more difficult question is what order the Court can give to preserve the right of the applying party. In 1973, the order was for the cessation of further atmospheric nuclear testing¹⁵⁹ as New Zealand had requested. In an action against Japan, where the government is neither directly responsible nor involved in the actual disaster, the target, scope, and goal of a protective order can all be questioned. The right an applying party could seek to preserve will also differ depending on its status regarding compulsory jurisdiction of the Court. Nations that have accepted compulsory jurisdiction are not restricted by the terms of the Convention or APFIC, with only their assessment and trial strategy shaping the remedies they seek, assuming the existence of an international obligation that was breached by the leakage of radioactive material.¹⁶⁰ For nations that are not a party to the compulsory jurisdiction of the Court, reparation may be limited to the scope of the treaty where the dispute originated from, since the dispute concerns “the interpretation of a treaty.”¹⁶¹ As neither

154. *Convention on Nuclear Safety*, *supra* note 80, art. 18.

155. *Near-Term Task Force Report: Recommendations for Enhancing Reactor Safety In The 21st Century*, *supra* note 58, at 9.

156. *See* O.M., *supra* note 63.

157. *The Convention on Nuclear Safety*, *supra* note 80, art. 13.

158. *Id.* at art. 9.

159. *Nuclear Tests Case (N.Z. v. Fr.)*, 1973 I.C.J. 135, 142 (June 22) (“The Governments of New Zealand and France should each of them ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court or prejudice the rights of the other Party in respect of the carrying out of whatever decision the Court may render in the case; and, in particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands.”).

160. *See* ICJ Statutes, *supra* note 34, art. 36, para. 2 (stating that the Court has jurisdiction in all legal disputes concerning “the nature or extent of the reparation to be made for the breach of an international obligation”).

161. *Id.*

the Convention nor APFIC constitute a disagreement or a dispute in interpretation as a “breach” that would give rise to a decision regarding the “nature or extent” of reparations, the Court will likely limit its judgment to the declaration of the better interpretation and application of the treaties. Thus, in both the Convention and the APFIC, the judgment will simply declare whether Japan’s interpretation and application were reasonable, and if not, which should be followed in the future, as neither treaty discusses penalties for incompliance. Failing to follow the interpretation of the Court would most certainly fall under “a breach of an international obligation,” thus setting the stage for reparations.

C. POTENTIAL ROADBLOCKS

In 1974, the ICJ ultimately ruled to dismiss New Zealand’s application even after issuing an Interim Protection order in its favor.¹⁶² In doing so, the Court cited France’s unilateral statement that it would cease atmospheric nuclear testing, something that New Zealand consistently demanded from France and sought as the judgment of the Court.¹⁶³ Applied to the present case, Japan could argue that the source of the dispute, the Fukushima plant, is no longer functional and it is already doing its best to mitigate the damage caused. Findings must be made that cast doubt to the adequacy of the Japanese nuclear practices in order to prevent such dismissal, which may be possible by highlighting the long history of mismanagement listed in the background section of this note. Even with such historical data, the Court may still dismiss the case for lack of a genuine dispute if Japan simply declares that it will adopt a stricter and more safety oriented approach to nuclear power. The comparison here would be the Court’s dismissal of the 1974 case despite France’s history of atmospheric nuclear experiments, and again its dismissal or refusal to reopen the case in 1995 when France resumed testing, albeit underground at the time.

Similarly, as the Court distinguished between atmospheric and underground nuclear tests when deciding on re-opening the 1974 case, Japan could theoretically argue that the object of the dispute no longer exists by declaring that it shall only build

162. Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457, ¶ 65 (Dec. 20).

163. *Id.* ¶ 55.

heavy water reactors, reactors designed by a different company, or by building reactors far away from the shores, shielding it from future tsunamis. As the distinction in 1995 was made in the context of comparing New Zealand's application to the one made in 1973, it will probably not result in absurdity. However, considering that a lot of the possible adjudications, such as the determination of the proper safety standards and regulations, are intimately intertwined with Japan's sovereign power to formulate domestic policies, the Court may choose to rule in a manner that gives Japan the greatest liberty in choosing its own course.

All these considerations are weighed before even getting to the merits phase, the length and difficulty of which discourage applicants seeking justice in the ICJ. It is also important to note that in the Nuclear Test Case, New Zealand only asked for the ICJ to rule that France could no longer conduct nuclear tests in that area. While New Zealand brought in evidence that radioactive effects reached its shores, it did not quantify the damage and made no effort to seek damages from France. Thus, it is unclear whether the type and level of evidence New Zealand brought would have been sufficient when seeking damages and if that standard would have been higher or lower compared to conventional and non-radioactive damage.

III. CONCLUSION

Unless the applying nation has accepted the compulsory jurisdiction of the ICJ and is thus not bound by the scope of the treaties that Japan has ratified, it seems unlikely that a meaningful course of action exists in the ICJ against Japan. For the countries that have not already accepted compulsory jurisdiction, it would require a treaty with a provision that allows for disputes to be brought to the ICJ, and the dispute would have to be triggered by the Fukushima disaster. With the Convention and APFIC not providing such a provision, simply getting Japan to court is a difficult, if not impossible task.

Even assuming that Japan is brought to the ICJ, perhaps by nations that have accepted compulsory jurisdiction, Japan has a myriad of defenses available that could frustrate the applicant. Although *New Zealand v. France* has little precedential value, it must be noted that the ICJ ultimately dismissed the case stating that the object of the suit no longer

exists. Japan could argue that having shut the Fukushima plant down is the functional equivalent of removing the object of the suit. If that defense fails due to the applicant pointing out Japan's history of nuclear accidents and pointing out numerous other facilities along the Pacific Ocean, Japan can still claim that the specific reasons for the Fukushima disaster are being addressed, and that the reactors thus do not pose the same threat. France has successfully argued this by differentiating atmospheric and underground nuclear tests, leaving Japan room to argue that nuclear power can be differentiated by safety measures or method of generation. Lastly, with the true magnitude of the damage still being debated, it may be difficult to name Fukushima for damages showing up years from now. It is entirely possible that another country, bordering the Pacific, experiences a nuclear disaster before the damage from Fukushima can be ascertained, especially by nations at considerable distance from Japan.

If the applicant prevails in both the jurisdiction question and if the ICJ decides that the object of dispute still exists, it is unclear which side will prevail, as *New Zealand v. France* did not reach the merits stage. Just as *New Zealand* did not have to show the detrimental results of increased radioactive readings to obtain an interim order, nations with radioactive readings that are significantly higher than pre-Fukushima levels may prevail without showing more.¹⁶⁴ It is unclear what relief an applicant could seek from the ICJ as *New Zealand* only obtained an interim order that forbade France from conducting further nuclear tests in the Pacific. Applying the analogy narrowly, the ICJ could order the shutdown of a particular site, or if broadly applied, it could order the shutdown of all sites near the Pacific. But with no report of quantifiable damage, it would be difficult for an applicant to seek damages in the ICJ.

However, the lack of damage at this point also affords nations that have not yet accepted compulsory jurisdiction

164. See *Twice as much Fukushima radiation near California coast than originally reported; Highest levels found anywhere in Eastern Pacific — Scientist: Very little we can do . . . It's unprecedented . . . God forbid anything else happens — Gundersen: Multiple plumes now along west coast . . . Will be coming "for century or more"*, ENENEWS (Nov. 11, 2014), <http://enenews.com/fukushima-radiation-actually-high-california-coast-reported-sample-contaminated-around-north-america-official-levels-ive-interesting-scientist-very-little-unprecedented-god-forbid-happens>.

some options. With the nature of radioactive damage making it unlikely to become apparent immediately and Japan only declaring that it would not reciprocate compulsory jurisdiction against countries that either accept compulsory jurisdiction for the sole purpose of resolving this dispute or nations joining within a year of an action, nations affected by the Pacific Ocean have ample time to fully consider accepting compulsory jurisdiction for the purpose of bringing Japan to the ICJ. While it may not be a worthwhile option for nations in territorial dispute with Japan, for others it may be worth considering, especially nations that are closer to Japan, as their proximity will likely reduce the amount of time they can spend before making a decision.