

DECLARATION OF JUDGE OWADA

1. It is my view that when considering the admissibility of a request for intervention, whether it is filed pursuant to Article 62 or Article 63 of the Statute of the Court, the Court, should it find it necessary under the particular circumstances of the case, is in a position to examine and determine *proprio motu* whether such intervention would be in keeping with the principles of ensuring the fair administration of justice, including, *inter alia*, the equality of the Parties in the proceedings before the Court. The Court's authority to examine these matters in considering the admissibility of New Zealand's Declaration of Intervention is inherent in the judicial function of the Court as a court of justice. The Court has the discretion to rule such a declaration inadmissible if its admission should unduly compromise fundamental principles of justice underlying its jurisdiction or the fairness of the proceedings. The Court has the ability to exercise this discretion with respect to intervention, whether it be under Article 63 or under Article 62. In this respect, there should be no difference between intervention under Article 62 and intervention under Article 63 as far as the principle of ensuring the fair administration of justice is at issue.

2. The Court has exercised this inherent power with respect to a State's request to intervene pursuant to Article 62 of the Statute, though the concrete context was quite different. In the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, the Court denied Italy's Application for permission to intervene despite the possibility that Italy might have had "an interest of a legal nature which may be affected by the decision in the case" within the meaning of Article 62 of the Statute. The Court rejected the Italian application for intervention, to which the parties who had brought the case to the Court by Special Agreement had not consented, on the ground that such intervention "would involve the introduction of a fresh dispute" outside the scope of the Special Agreement (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 22, para. 34). The Court held that the procedure of intervention as specified in Article 62 of the Statute cannot "constitute an exception to the fundamental principles underlying its jurisdiction: primarily the principle of consent, but also the principles of reciprocity and equality of States" (*ibid.*, para. 35). Though the intervention in the present case involves a somewhat different factual and legal situation, the Court's Judgment in *Libya/Malta* demonstrates that the Court has the power to deny a request for intervention when such a request would impinge upon fundamental legal principles, including the principle of equality of States, even if the State requesting intervention may have fulfilled the express conditions for intervention set forth in the relevant articles of the Statute.

3. The Order in the present case states that

“[w]hereas intervention under Article 63 of the Statute is limited to submitting observations on the construction of the convention in question and does not allow the intervenor, which does not become a party to the proceedings, to deal with any other aspect of the case before the Court; and whereas such an intervention cannot affect the equality of the Parties to the dispute” (Order, para. 18).

In my view, this statement is an oversimplified and overly categorical approach to the issue of intervention. The reasoning of the Order is based on a highly questionable proposition, as a general statement of the law, that simply because the scope of intervention under Article 63 is “limited to submitting observations on the construction of the convention in question” (*ibid.*), it therefore follows that such intervention “cannot affect the equality of the parties to the dispute” (*ibid.*). This in my view is a *non sequitur*. The Order, however, does not attempt to explain the rationale behind such a conclusion.

4. The Order does not sufficiently examine, in the concrete context of the situation of this case, the serious issues raised by Japan regarding the intervention by New Zealand. Although Japan does not raise a formal objection to the intervention, it seems evident that it is deeply concerned that New Zealand’s intervention could have consequences that would affect the equality of the Parties to the dispute and thus the fair administration of justice. Japan emphasized that “certain serious anomalies . . . would arise from the admission of New Zealand as an intervenor”, stressing that it had “serious doubts concerning the equality of the parties in these proceedings before the Court”. Japan pointed to the fact that

“by pursuing what may in effect be a joint case under the rubric of an Article 63 intervention [Australia and New Zealand could] avoid some of the safeguards of procedural equality under the Statute and Rules of the Court”.

In particular by intervening pursuant to Article 63 of the Statute, thus enabling Australia to preserve its right to appoint a judge *ad hoc*; a right that would have been waived had New Zealand intervened as a party pursuant to Article 62 of the Statute (see Rules of Court, Art. 36 (1)).

5. It is regrettable that a State party to a case before the Court and a State seeking to intervene in that case pursuant to Article 63 of the Statute should engage in what could be perceived as active collaboration in litigation strategy to use the Court’s Statute and the Rules of Court for the purpose of promoting their common interest, as is candidly admitted in their Joint Media Release of 15 December 2010.

6. I have voted in favour of the Order, as I believe that Japan has not substantiated, sufficiently to the satisfaction of the Court, its claim that

the admission of New Zealand as a third-party intervenor under Article 63 could create a situation in which the principle of the fair administration of justice, including the equality of the Parties, would most likely be compromised. Nevertheless, I wish to place on record my serious reservation about the formalistic approach in which the Court has handled this issue without giving sufficient reflection on an important aspect of the principle of equality of the Parties, which forms an essential cornerstone of the fair administration of justice.

(Signed) Hisashi OWADA.
