

INTERNATIONAL COURT OF JUSTICE

WHALING IN THE ANTARCTIC
(*AUSTRALIA v. JAPAN*)

WRITTEN OBSERVATIONS OF AUSTRALIA ON
THE DECLARATION OF INTERVENTION BY THE
GOVERNMENT OF NEW ZEALAND

18 DECEMBER 2012

On 20 November 2012, New Zealand, invoking Article 63 of the Statute of the Court (“the Statute”), filed a Declaration of Intervention (“the New Zealand Declaration”)¹ in this case. By letter of the same date, the Registrar of the Court, acting in accordance with Article 83 of the Rules of Court (“the Rules”), forwarded a certified copy of the Declaration to the Agent of Australia and fixed Friday, 21 December 2012 at 5 p.m. as the time-limit within which the Governments of Australia and Japan may furnish their written observations on the New Zealand Declaration.

2. The observations of the Government of Australia on the New Zealand Declaration are set out below. In summary, Australia is of the view that the Declaration fulfils the requirements of Article 63 of the Statute as well as those in the relevant Rules and is admissible.

3. An intervention under Article 63 of the Statute is an intervention as of right.² Australia notes that provided the Court is satisfied that New Zealand has met the conditions that attach to the exercise of the right of intervention under Article 63 of the Statute and Article 82 of the Rules, “the Court is bound to admit the intervention, and has no discretionary power in the matter ...”³

The conditions for the application of Article 63

4. The conditions that must be met in order to exercise the right of intervention under Article 63 of the Statute are those set out in Article 63 itself as well as those in Article 82 of the Rules. Article 82 of the Rules provides:

¹ *Declaration of Intervention pursuant to Article 63 of the Statute of the Court by the Government of New Zealand*, signed by the appointed Agent of the Government of New Zealand, Dr Penelope Ridings.

² *Statute of the International Court of Justice*, Article 63(2); *Haya de la Torre (Colombia/Peru)*, Judgment, I.C.J. Reports 1951, 71, 76; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Application to Intervene*, Judgment, I.C.J. Reports 1981, 3, 13, para. 21; *Territorial and Maritime Dispute (Nicaragua v. Colombia) Application by Honduras for Permission to Intervene*, Judgment, 4 May 2011, para. 35.

³ G Fitzmaurice, “The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure” (1958) 34 *British Year Book of International Law* 1, 127. In particular, in addressing Article 63 at page 127, Fitzmaurice states:

Although intervention under this Article is as of right, provided the conditions stated in it are fulfilled, it is naturally for the Court to decide whether they are actually satisfied or not ... Thus, it will be for the Court to say whether the construction of a convention is involved, whether the convention is of the kind specified, whether the intervening State is a party to it, and so on. Given that these conditions are present, the Court is bound to admit the intervention, and has no discretionary power in the matter ...

1. A State which desires to avail itself of the right of intervention conferred upon it by Article 63 of the Statute shall file a declaration to that effect, signed in the manner provided for in Article 38, paragraph 3, of these Rules. Such a declaration shall be filed as soon as possible, and not later than the date fixed for the opening of the oral proceedings. In exceptional circumstances a declaration submitted at a later stage may however be admitted.

2. The declaration shall state the name of an agent. It shall specify the case and the convention to which it relates and shall contain:

- (a) particulars of the basis on which the declarant State considers itself a party to the convention;
- (b) identification of the particular provisions of the convention the construction of which it considers to be in question;
- (c) a statement of the construction of those provisions for which it contends;
- (d) a list of the documents in support, which documents shall be attached.

3. Such a declaration 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.

5. Australia is of the view that the New Zealand Declaration meets all of the requirements that must be fulfilled in order to exercise a right to intervene under Article 63 of the Statute.

6. On the matter of timing under Article 82(1) of the Rules, in Australia's view, a declaration of intervention under Article 63 is within time if it is filed prior to the opening of the oral hearings. The New Zealand Declaration was filed "as soon as possible" in addition to being filed well before "the opening of oral proceedings".

7. In relation to paragraph 2(b) of Article 82 of the Rules, quite clearly the construction of the *International Convention for the Regulation of Whaling* ("the ICRW")⁴ to which New Zealand is a party and, in particular Article VIII of the ICRW, is a key element of the instant case. There is no doubt that the New Zealand Declaration "actually relates to the subject-matter of the pending proceedings".⁵ Indeed, the ICRW is more than "incidentally engaged or mentioned, but is at issue"⁶ in the case between Australia and Japan. Therefore, "there is no reason why a third State [in this case New Zealand] cannot intervene over the construction of that provision"⁷. Also, in Australia's view, the content and detail of the statement of construction of those identified provisions contained in the New Zealand Declaration meets the requirements of Article 82(2)(c) of the Rules. In the event that the Court confirms the right of New Zealand to intervene under Article 63, Australia will make

⁴ *International Convention for the Regulation of Whaling*, Washington D.C., 2 December 1946, 161 UNTS 74 (entered into force on 10 November 1948).

⁵ *Haya de la Torre, (Colombia/Peru), Judgment, I.C.J. Reports 1951, 71, 76.*

⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Declaration of Intervention of the Republic of El Salvador, Order, I.C.J. Reports 1984, 215, 239 (Dissenting Opinion of Judge Schwebel).*

⁷ *Ibid* - words in square brackets inserted by Australia.

its observations on the substance of the construction of the ICRW contended by New Zealand in the course of the oral hearings on the merits following receipt of any written observations made by New Zealand under Article 86 of the Rules.⁸

Status of New Zealand as an intervener

8. These observations address one other matter raised in the New Zealand Declaration – that is, the status of New Zealand as an intervener assuming the admissibility of its intervention is confirmed by the Court. In its Declaration of Intervention, New Zealand emphasises that it does not seek to be a party to the proceedings.⁹ Australia takes due notice of this aspect.

9. In its own terms, the New Zealand Declaration is confined to a point of interpretation which is in issue in the proceedings and does not extend to general intervention in the case.¹⁰ It is plain that New Zealand is not intending “to make excursions into other aspects”¹¹ of the dispute between Australia and Japan. Given the limited reach and consequences of an intervention under Article 63, the intervening State cannot and should not be deemed to be a party.¹²

⁸ The letter of the Agent of Japan to the Court dated 10 October 2012 asserts that “New Zealand’s further observations may serve as something similar in essence to the second round [of] written pleadings of the Applicant”. This assertion is both presumptuous and wrong. Australia is a sovereign Party before the Court and will make its own arguments. Also, as noted in paragraph 9 of the text below, the New Zealand Declaration under Article 63 of the Statute is confined to a point of interpretation.

⁹ New Zealand Declaration, paras. 9 and 35.

¹⁰ New Zealand Declaration, para. 7.

¹¹ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application by Nicaragua for Permission to Intervene, Judgment, I.C.J. Reports 1990, 92, 116, para. 58.*

¹² This is confirmed in the Separate Opinion of Judge Oda in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application by Malta for Permission to Intervene, I.C.J. Reports 1981, 3, 28, para. 11:*

In the application of Article 63, no jurisdictional link is apparently required between the intervening State and the original litigant States. The third State may participate in the case, but not “as a party” on an equal footing with the original litigant States because the object of the intervention is not necessarily connected with the claims of the original parties. The third party participates, but not as a plaintiff or defendant or even an independent claimant.

See also C Chinkin, Commentary to Article 63 in A Zimmerman, C Tomuschat, K Oellers-Frahm (Eds), *The Statute of the International Court of Justice: A Commentary* (OUP, 2006) 1385.

Conclusion

10. It is the view of Australia that the Declaration of Intervention filed by New Zealand pursuant to Article 63 of the Statute of the Court is admissible.

W. M. Campbell

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Agent of Australia

18 December 2012