

6 FEBRUARY 2013

ORDER

WHALING IN THE ANTARCTIC

(AUSTRALIA v. JAPAN)

DECLARATION OF INTERVENTION OF NEW ZEALAND

CHASSE À LA BALEINE DANS L'ANTARCTIQUE

(AUSTRALIE c. JAPON)

DÉCLARATION D'INTERVENTION DE LA NOUVELLE-ZÉLANDE

6 FÉVRIER 2013

ORDONNANCE

INTERNATIONAL COURT OF JUSTICE

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WHALING IN THE ANTARCTIC

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DECLARATION OF INTERVENTION OF NEW ZEALAND

ORDER

Present: President TOMKA; Vice-President SEPÚLVEDA-AMOR; Judges OWADA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, XUE, GAJA, SEBUTINDE, BHANDARI; Judge ad hoc CHARLESWORTH; Registrar COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 48 and 63 of the Statute of the Court and to Articles 82, 83, 84 and 86 of the Rules of Court,

Having regard to the Application filed by Australia in the Registry of the Court on 31 May 2010, whereby Australia instituted proceedings against Japan in respect of a dispute concerning

“Japan’s continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic (‘JARPA II’), in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling ..., as well as its other international obligations for the preservation of marine mammals and the marine environment”,

Having regard to the Order of 13 July 2010, whereby the Court fixed 9 May 2011 as the time-limit for the filing of the Memorial of Australia and 9 March 2012 as the time-limit for the filing of the Counter-Memorial of Japan,

Having regard to the Memorial filed by Australia and the Counter-Memorial filed by Japan within the prescribed time-limits,

Having regard to the decision of the Court, communicated to the Parties on 2 May 2012, not to direct a Reply by Australia and a Rejoinder by Japan,

Having regard to the notifications addressed by the Registrar on 9 December 2011 to all States parties to the International Convention for the Regulation of Whaling, pursuant to Article 63, paragraph 1, of the Statute of the Court and Article 43, paragraph 1, of the Rules of Court;

Makes the following Order:

1. Whereas, on 20 November 2012, the Government of New Zealand, referring to Article 63, paragraph 2, of the Statute of the Court, filed in the Registry of the Court a Declaration of Intervention in the case concerning *Whaling in the Antarctic (Australia v. Japan)*; whereas the Declaration was accompanied by a document dated 12 November 2012, in which the Hon. Murray McCully, Minister for Foreign Affairs of New Zealand, designated Ms Penelope Jane Ridings as Agent and H.E. Mr. George Robert Furness Troup as Co-Agent;

2. Whereas, in its Declaration, New Zealand recalls that this Court has recognized that Article 63 confers a “right” of intervention, where the State seeking to intervene confines its intervention to the point of interpretation which is in issue in the proceedings, and that this right does not extend to general intervention in the case; and whereas New Zealand underlined that “it does not seek to be a party to the proceedings” but confirms that, in accordance with Article 63, paragraph 2, of the Statute, “by availing itself of its right to intervene, it accepts that the construction given by the judgment in the case will be equally binding upon it”;

3. Whereas New Zealand formulates the following conclusion:

“On the basis of the information set out above, New Zealand avails itself of the right conferred upon it by Article 63, paragraph 2, of the Statute to intervene as a non-party in the proceedings brought by Australia against Japan in this case”;

4. Whereas, in accordance with Article 83, paragraph 1, of the Rules of Court, the Registrar, by letters dated 20 November 2012, transmitted certified copies of the Declaration of Intervention to the Governments of Australia and Japan, respectively, which were informed that the Court had fixed 21 December 2012 as the time-limit for the submission of written observations on that Declaration; and whereas, in accordance with paragraph 2 of the same Article, the Registrar also transmitted a copy of the Declaration to the Secretary-General of the United Nations, as well as to States entitled to appear before the Court;

5. Whereas Australia and Japan each submitted written observations within the time-limit thus fixed; whereas the Registrar transmitted to each Party a copy of the other's observations, and copies of the observations of both Parties to New Zealand; whereas Australia and New Zealand subsequently communicated to the Court their views on certain statements made by Japan in its above-mentioned observations; and whereas the Registrar transmitted to Japan and New Zealand the views expressed by Australia, and to Japan and Australia those expressed by New Zealand;

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6. Whereas Article 63 of the Statute of the Court provides that:

- “1. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.
2. Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it”;

7. Whereas intervention based on Article 63 of the Statute is an incidental proceeding that constitutes the exercise of a right (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Application to Intervene by Honduras*, Judgment of 4 May 2011, para. 36; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Application to Intervene, Judgment*, *I.C.J. Reports 1981*, p. 15, para. 26; *Haya de la Torre (Colombia/Peru)*, *Judgment*, *I.C.J. Reports 1951*, p. 76; *S.S. “Wimbledon”*, *Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 12); whereas the Court, when presented with a “declaration” of intervention based on Article 63 of the Statute, is not required to ascertain whether the State which is the author of that declaration has “an interest of a legal nature” which “may be affected by the decision [of the Court]” in the main proceedings, as it is obliged to do when it is seised of an “application” for permission to intervene under Article 62 of the Statute; whereas, in accordance with the terms of Article 63 of the Statute, the limited object of the intervention is to allow a third State not party to the proceedings, but party to a convention whose construction is in question in those proceedings, to present to the Court its observations on the construction of that convention;

8. Whereas, however, the fact that intervention under Article 63 of the Statute is of right is not sufficient for the submission of a “declaration” to that end to confer *ipso facto* on the declarant State the status of intervener; whereas such right to intervene exists only when the declaration concerned falls within the provisions of Article 63; and whereas, therefore, the Court must ensure that such is the case before accepting a declaration of intervention as admissible (*Haya de la Torre (Colombia/Peru)*, Judgment, I.C.J. Reports 1951, pp. 76-77; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, I.C.J. Reports 1984, p. 216); whereas it also has to verify that the conditions set forth in Article 82 of the Rules of Court are met;

* * *

9. Whereas, in its Declaration, New Zealand, referring to the requirement contained in Article 82, paragraph 1, of the Rules of Court that a Declaration of Intervention “shall be filed as soon as possible, and not later than the date fixed for the opening of the oral proceedings”, states that its Declaration has been filed at the earliest opportunity reasonably open to it; and whereas it is established that the Declaration was submitted before the date fixed for the opening of the oral proceedings in the case concerned;

10. Whereas, in its Declaration, New Zealand, in accordance with Article 82, paragraph 2, of the Rules of Court, states the name of its Agent and specifies the case and the convention to which the said Declaration relates, namely the case concerning *Whaling in the Antarctic (Australia v. Japan)* brought before the Court on 31 May 2010, and the International Convention for the Regulation of Whaling (hereinafter the “Convention”);

11. Whereas, in accordance with Article 82, paragraph 2, of the Rules of Court, a Declaration of Intervention filed under Article 63 of the Statute shall also 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”;

12. Whereas, in its Declaration, referring to the particulars as provided for in Article 82, paragraph 2 (a), of the Rules of Court, New Zealand states that it first deposited its instrument of ratification to the Convention, in accordance with Article X, paragraph 1, thereof, on 2 August 1949; that it later gave notice of its withdrawal from the Convention, in accordance with Article XI, effective 30 June 1969; and that it finally gave notice of its adherence to the Convention, in accordance with Article X, paragraph 2, on 15 June 1976, with effect from that date;

13. Whereas, in its Declaration, referring to the provisions to be indicated under Article 82, paragraph 2 (b), of the Rules of Court, New Zealand submits that the construction of Article VIII of the Convention, and in particular paragraph 1 thereof, is in question in the case; and whereas it recalls that said Article VIII of the Convention reads as follows:

- “1. Notwithstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take, and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.
2. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.
3. Each Contracting Government shall transmit to such body as may be designated by the Commission, insofar as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV.
4. Recognizing that continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries, the Contracting Governments will take all practicable measures to obtain such data”;

14. Whereas, in its Declaration, referring to the statement as provided for in Article 82, paragraph 2 (c), of the Rules of Court, New Zealand states that, because Article VIII of the Convention specifies that a Special Permit may authorize whaling only “for purposes of scientific research”, it follows that whaling for other purposes is not permitted under Article VIII, even if such whaling involves the collection of certain scientific data; whereas New Zealand contends that whether a programme of whaling is for “purposes of scientific research” is not a matter of unilateral determination, but rather must be capable of being established on the basis of an objective assessment; whereas New Zealand contends that a Contracting Government must be able to demonstrate that it has limited the number of whales killed under Special Permit to the minimum level that is both necessary for, and proportionate to, the objectives of the research and that will have no adverse “effect on the conservation of the stock”; whereas New Zealand emphasizes that the substantive constraints in Article VIII are reflected in procedural terms through paragraph 30 of

the Schedule to the Convention, which obliges Contracting Governments to submit in advance any proposed Special Permits to the Scientific Committee set up by the International Whaling Commission to enable that Committee to review and comment on the “objectives of research”, the “number, sex, size and stock” to be taken, and the “possible effect on conservation of stock”; and whereas, according to New Zealand, that obligation gives rise to a duty of meaningful co-operation, requiring the Contracting Government both to seek and to take account of the views and interests of other parties before issuing or renewing a Special Permit;

15. Whereas, in accordance with Article 82, paragraph 2 (d), of the Rules of Court, New Zealand provides a list of documents in support of its Declaration, which are attached thereto;

*

16. Whereas, in its written observations, Australia indicates that it considers that New Zealand’s Declaration of Intervention fulfils the requirements set out in Article 63 of the Statute and Article 82 of the Rules and is therefore admissible;

17. Whereas, in its written observations, Japan, while it does not object to the admissibility of New Zealand’s Declaration of Intervention, draws the Court’s attention to “certain serious anomalies that would arise from the admission of New Zealand as an intervenor”; whereas Japan emphasizes the need to ensure the equality of the Parties before the Court in light of the joint media release dated 15 December 2010 of the Foreign Ministers of Australia and New Zealand; whereas Japan moreover expresses its concern that Australia and New Zealand could “avoid some of the safeguards of procedural equality under the Statute and Rules of the Court”, including Article 31, paragraph 5, of the Statute of the Court and Article 36, paragraph 1, of the Rules of Court, which exclude the possibility of appointing a judge *ad hoc* when two or more parties are in the same interest and there is a Member of the Court of the nationality of any one of those parties; and whereas Japan, in light of the above, requests, first, that the Parties be given an opportunity to respond in writing to the written observations that New Zealand may present in accordance with Article 86, paragraph 1, of the Rules of Court, secondly, that the time to be allocated to New Zealand in the oral proceedings on the merits “should be significantly less than in the case of intervention under Article 62” and, thirdly, that adequate time be given to Japan to prepare for these oral proceedings, both in the first and the second round;

* *

18. Whereas the concerns expressed by Japan relate to certain procedural issues regarding the equality of the Parties to the dispute, rather than to the conditions for admissibility of the Declaration of Intervention, as set out in Article 63 of the Statute and Article 82 of the Rules of Court; whereas 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;

19. Whereas New Zealand has met the requirements set out in Article 82 of the Rules of Court; whereas its Declaration of Intervention falls within the provisions of Article 63 of the Statute; whereas, moreover, the Parties raised no objection to the admissibility of the Declaration; and whereas it follows that New Zealand's Declaration of Intervention is admissible;

20. Whereas, in exercising its right to intervene in the case, New Zealand will be bound, under Article 63, paragraph 2, of the Statute, by the construction of the Convention given by the Court in its judgment;

* *

21. Whereas the question of the participation in the case of the judge *ad hoc* chosen by Australia was referred to by the Respondent in the context of the latter's discussion of the equality of the Parties before the Court; whereas the Court considers that it must make clear in the present Order that, since the intervention of New Zealand does not confer upon it the status of party to the proceedings, Australia and New Zealand cannot be regarded as being "parties in the same interest" within the meaning of Article 31, paragraph 5, of the Statute; whereas, consequently, the presence on the Bench of a judge of the nationality of the intervening State has no effect on the right of the judge *ad hoc* chosen by the Applicant to sit in the case pursuant to Article 31, paragraph 2, of the Statute;

* *

22. Whereas copies of the pleadings and documents annexed, as filed in the case at present, have already been communicated to New Zealand, on its request, pursuant to Article 53, paragraph 1, of the Rules of Court; whereas, pursuant to Article 86 of the Rules of Court, it is necessary to fix the time-limit for the filing of written observations of New Zealand with respect to the subject-matter of the intervention; and whereas the Court, taking into account the request expressed by Japan that the Parties be given an opportunity to file written observations on those written observations filed by New Zealand, and considering the circumstances of the case, finds that the request should be granted;

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23. For these reasons,

THE COURT,

(1) Unanimously,

Decides that the Declaration of Intervention filed by New Zealand, pursuant to Article 63, paragraph 2, of the Statute, is admissible;

(2) Unanimously,

Fixes 4 April 2013 as the time-limit for the filing by New Zealand of the written observations referred to in Article 86, paragraph 1, of the Rules of Court;

(3) Unanimously,

Authorizes the filing by Australia and Japan of written observations on these written observations of New Zealand and *fixes* 31 May 2013 as the time-limit for such filing;

Reserves the subsequent procedure for further decision.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this sixth day of February, two thousand and thirteen, in four copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Australia, the Government of Japan and the Government of New Zealand, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge OWADA appends a declaration to the Order of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Order of the Court; Judge GAJA appends a declaration to the Order of the Court.

(Initialed) P. T.

(Initialed) Ph. C.
