

**6 FEBRUARY 2013**

**ORDER**

**WHALING IN THE ANTARCTIC**

**(AUSTRALIA *v.* JAPAN)**

**DECLARATION OF INTERVENTION OF NEW ZEALAND**

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**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**

**(AUSTRALIA v. JAPAN)**

**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;

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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;

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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;

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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;

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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;

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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.

(Initialled) P. T.

(Initialled) Ph. C.

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## 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 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

"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" (Order, paragraph 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" (Order, paragraph 18), it therefore follows that such intervention "cannot affect the equality of the parties to the dispute" (Order, paragraph 18). 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) H. OWADA.

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## SEPARATE OPINION OF JUDGE CAÑADO TRINDADE

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### I. INTRODUCTION

1. I have concurred with my vote to the adoption today, 06 February 2013, by the International Court of Justice (ICJ), of the present Order, whereby it declared admissible New Zealand’s Declaration of Intervention under Article 63(2) of the Statute, in the present case concerning *Whaling in the Antarctic*, opposing Australia to Japan. The present decision just taken by the ICJ today (06.02.2013), added to the decision it took one and a half years ago (Order of 04.07.2011), granting permission to Greece’s intervention (under Article 62 of the Statute) in the case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy), constitute two positive steps taken by the Court for the development of the institute of intervention in international legal procedure.

2. Intervention under Article 63 and under Article 62 of the Statute rest on two quite distinct grounds, disclosing various interrelated aspects which have not been sufficiently or satisfactorily studied to date. Given the importance that I ascribe to the matters dealt with by the Court in the present Order, and those underlying it, in the case concerning *Whaling in the Antarctic*, I feel obliged to leave on the records the foundations of my personal position on the matter, in all its

aspects. I feel even more compelled to do so as, although I have reached the same conclusion as the Court and have voted in favour of the adoption of the present Order, I have done so on the basis of a reasoning which is distinct from that of the Court.

3. In the present Separate Opinion, I shall, accordingly, at first, review all the documents conforming the *dossier* of the present case, relating to the proceedings before the Court concerning intervention, namely: a) New Zealand's Declaration of Intervention (under Article 63); b) Written Observations of Australia and Japan on New Zealand's Declaration of Intervention; c) Comments of New Zealand on Japan's Written Observations. I shall then turn to the examination of points of international legal theory which I deem of particular relevance for the consideration of the subject-matter at issue, namely: a) the position beyond State consent; b) discretionary intervention (Article 62 of the Court's Statute) and intervention as of right (Article 63 of the Court's Statute): historical origins, conceptualization, and precedents in the Court's history (PCIJ and ICJ); c) collective interest and collective guarantee; d) the preventive dimension; and e) the *resurrectio* of intervention in contemporary judicial proceedings before the ICJ. The path will then be open for the presentation of my concluding observations on the matter.

## II. New Zealand's Declaration of Intervention

4. In its Declaration of Intervention in the present case on *Whaling in the Antarctic*, lodged with the Court on 20.11.2012, under Article 63(2) of its Statute and Article 82(2) of the Rules of Court, New Zealand relies on the jurisprudence of the Court<sup>1</sup> to claim that the Court has recognized that Article 63 of its Statute confers a *right* to intervene, when the State seeking to intervene confines its intervention to "the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case"<sup>2</sup>. To avail itself of the right of intervention (under Article 63), New Zealand relies on its status as a party to the 1946 International Convention for the Regulation of Whaling (hereinafter "the Convention").

5. New Zealand deems it necessary to intervene in order to place its interpretation of the relevant provisions of the Convention before the Court. It claims that, in relation to the scope of its right to intervene, it presents its views on issues of interpretation relevant to the determination of the case, in particular questions of the construction of the Convention, especially its Article VIII. New Zealand emphasizes that it does not seek to be a party to the proceedings, but it accepts that, in intervening under Article 63, it will be equally bound by the construction given to the Convention by the Judgment of the Court<sup>3</sup>.

6. New Zealand then goes on to review the relevant provisions of the Convention in the present case. It states that the key legal issue in dispute between Australia and Japan is "the legality of large-scale 'special permit' whaling under JARPA II [which] is conducted under a

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<sup>1</sup>In its aforementioned *Declaration of Intervention*, New Zealand refers to the cases of *Haya de la Torre (Colombia versus Peru)*, Judgment of 13.06.1951, *I.C.J. Reports* (1951) p. 76; and of *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application to Intervene, *I.C.J. Reports* (1981) pp. 13 and 15, paras. 21 and 26.

<sup>2</sup>ICJ, case of the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application to Intervene, *I.C.J. Reports* (1981) p. 15, para. 26.

<sup>3</sup>ICJ, *Declaration of Intervention*, pp. 1-3, paras. 1-13. New Zealand further claims that, in accordance with Article 82(1) of the Rules of Court, its Declaration of intervention has been filed at the "earliest opportunity reasonably open to New Zealand". It then reviews the basis for its status as Party to the Convention, recalling its instrument of ratification and the notice of its accession to the Convention, on 15.06.1976, with effect as from that date; *ibid.*, pp. 3-4, paras. 10-11, 14.

Special Permit issued by the Japanese Government by reference to Article VIII of the Convention”<sup>4</sup>. It claims that the construction of Article VIII of the Convention (in particular, its paragraph 1) is directly relevant to the resolution of the dispute<sup>5</sup>. New Zealand next reviews its construction of the provisions at issue<sup>6</sup>. It submits that “Parties to the Convention can engage in whaling only in accordance with the provisions of the Convention and its Schedule”<sup>7</sup>.

7. New Zealand further argues that the Convention provides “a comprehensive legal regime” whose “central objective” is

*“to replace unilateral State action with an effective system of collective regulation for the proper conservation and management of whales”*<sup>8</sup>.

New Zealand claims that States Parties to the Convention have a collective interest in scientific research and information, so as to enable the International Whaling Commission (IWC)—the authority to adopt binding regulations “with respect to the conservation and utilization of whale resources”—to perform its function properly under the Convention<sup>9</sup>.

8. New Zealand also claims that, according to regulations adopted by the IWC, Parties to the Convention are prohibited from engaging in commercial whaling, by way of the imposition by the IWC of a zero catch limit. It adds that the killing, taking or treating of whales (other than minke whales) by factory ships is also prohibited and that all commercial whaling is prohibited in the Indian and Southern Oceans. It further submits that such regulations are binding on all Parties to the Convention unless they objected to them pursuant to the procedures provided for under Article V(3) of the Convention.<sup>10</sup>

9. New Zealand argues that Parties to the Convention may engage in “Special Permit” whaling only in accordance with Article VIII, and explains that the killing of whales under Special Permit is permitted only for the limited purposes of “scientific research”. Thus, the issue of Special Permits is subject to distinct procedural requirements for notification, prior review and comment, and the reporting of results through the IWC and Scientific Committee. New Zealand contends that “whaling under a Special Permit issued without meeting the requirements of Article VIII is subject to the other provisions of the Convention and Schedule, including the prohibitions on commercial whaling”<sup>11</sup>.

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<sup>4</sup>It refers in this regard to Australia’s *Application Instituting Proceedings*, paras. 29 and 35-37; it also refers to the website of the International Whaling Commission, “Recent Special Permits: Japan”.

<sup>5</sup>ICJ, *Declaration of Intervention*, pp. 4-5, paras. 14-17.

<sup>6</sup>It bases its interpretation of the Convention on Articles 31-32 of the 1969 Vienna Convention on the Law of Treaties.

<sup>7</sup>In this regard, New Zealand claims that, by becoming Parties to the Convention, “Contracting Governments have agreed not to permit their nationals to carry out any whaling activity except in accordance with the provisions of the Convention and its Schedule”; cf. ICJ, *Declaration of Intervention*, pp. 5-7, paras. 18-23.

<sup>8</sup>*Ibid.*, p. 6, para. 21 [emphasis added].

<sup>9</sup>*Ibid.*, pp. 5-7, paras. 18-23.

<sup>10</sup>*Ibid.*, p. 7, para. 24.

<sup>11</sup>*Ibid.*, pp. 7-8, paras. 25-26.

10. New Zealand then reviews the requirements of a Special Permit under Article VIII, and states that whaling for purposes other than scientific research is not permitted under Article VIII, even if it involves the collection of scientific data. It adds that the requirement that whaling be for scientific research is an essential element of Article VIII, and that the purpose of scientific research of the whaling programme in question must be established on the basis of an objective assessment. It further contends that, according to Article VIII, the State Party concerned must attach “restrictions as to number” and “other conditions” to any Special Permit issued, and, in setting those restrictions, it must show that it has limited the number of whales caught under Special Permit to the minimum which is both necessary for, and proportionate to, the objectives of the research, and which will have no adverse effect on the conservation of the stock. New Zealand claims that paragraph 30 of the Schedule of the Convention mandates States Parties to submit proposed Special Permits to the Scientific Committee and that such obligation gives rise to a duty of meaningful cooperation. New Zealand claims that these requirements are reflected in the practice of the IWC and its Committees since the adoption of the Convention<sup>12</sup>.

11. At the end of its Declaration of Intervention, New Zealand provides the following summary of its interpretation of Article VIII of the Convention:

“(a) Article VIII forms an integral part of the system of collective regulation established by the Convention.

(b) Parties to the Convention may engage in whaling by Special Permit only in accordance with Article VIII.

(c) Article VIII permits the killing of whales under Special Permit only if:

i. an objective assessment of the methodology, design and characteristics of the programme demonstrates that the killing is only “for purposes of scientific research”; and

ii. the killing is necessary for, and proportionate to, the objectives of that research and will have no adverse effect on the conservation of stocks; and

iii. the Contracting Government issuing the Special Permit has discharged its duty of meaningful cooperation with the Scientific Committee and the IWC.

(d) Whaling under Special Permit that does not meet these requirements of Article VIII, and not otherwise permitted under the Convention, is prohibited<sup>13</sup>.

### **III. WRITTEN OBSERVATIONS OF AUSTRALIA AND JAPAN ON NEW ZEALAND’S DECLARATION OF INTERVENTION**

12. In its Written Observations of 18.12.2012, Australia sustains that New Zealand’s Declaration meets “all of the requirements” under Article 63 of the Statute (para. 5). There is no reason, in its view, why a third State (in this case New Zealand) cannot intervene over the construction of Article VIII of the International Convention for the Regulation of Whaling, to which New Zealand is a party (para. 7). Furthermore, New Zealand does not seek to be a party to the proceedings (para. 8). New Zealand’s Declaration of Intervention, — Australia adds, — is specifically focused on a point of interpretation, without extending to “general intervention” in the

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<sup>12</sup>*Ibid.*, pp. 8-9, paras. 27-32.

<sup>13</sup>*Ibid.*, pp. 9-10, para. 33. New Zealand submits documents in support of its Declaration of Intervention; cf. *ibid.*, p. 10, para. 34.

case, nor to other aspects of the dispute between Australia and Japan. Given such limited reach of an intervention under Article 63, the intervening State cannot be considered a party (para. 9), — Australia concludes, in its support, in this understanding, of New Zealand’s intervention.

13. For its part, on 21.12.2012 Japan filed its Written Observations on New Zealand’s Declaration of Intervention of 20.11.2012<sup>14</sup>, wherein it argues that “certain serious anomalies would arise from the admission of New Zealand as an intervenor” considering the context in which the declaration of intervention was filed. Japan refers in this regard to the Joint Media Release, issued on 15.12.2010 in the names of the Australian and New Zealand Ministers for Foreign Affairs, announcing that “Australia and New Zealand agree on strategy for whaling legal case”. According to Japan, such a statement explains the rationale behind the choice of Article 63 as the basis for New Zealand’s intervention, as it indicates that “New Zealand appears *prima facie* to fully support Australia’s case”<sup>15</sup>.

14. Japan then contends that the equality of the parties will be at serious risk if States can pursue a joint case under the rubric of an intervention under Article 63, to curtail some of the safeguards of procedural equality under the Statute and the Rules of Court. Japan further argues that the choice of intervention under Article 63 can be interpreted as a strategy to avoid having to prove an “interest of a legal nature that may be affected by the decision in the case”, as required under Article 62, where the circumstances point to such interests and “suggest the taking of carefully orchestrated procedural steps to advance them”<sup>16</sup>.

15. Japan expresses “serious doubts” on the equality of the parties in these proceedings before the Court and its “profound discomfort” resulting from the manner in which New Zealand’s intervention has arisen. Thus “Japan respectfully submits in these circumstances that particular care needs to be taken when the Court decides on the further procedural steps in this case, in order to ensure the equality of the parties to the dispute”; Japan further claims that this is particularly important in the present case, where submissions on jurisdiction and on the merits are made together, and only one round of written pleadings has been allowed<sup>17</sup>.

16. In this regard, Japan first submits that New Zealand’s written observations in accordance with Article 86 of the Rules of Court should not be left without a written response from the original Parties, since in the present circumstances, in its view, the intervenor’s observations would essentially amount to a second round of written pleadings by the Applicant. Thus, it reiterates its wish to express its views in writing on New Zealand’s submission on the “substance” of the intervention, within an appropriate time. Secondly, Japan contends that in the event New Zealand’s intervention is admitted, the latter should have only one opportunity to make oral submission, after the oral pleadings of Australia, and before that of Japan. Furthermore, Japan contends that, because intervention pursuant to Article 63 is confined to “the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case”<sup>18</sup>, the

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<sup>14</sup>ICJ, doc. AJ 2012/20, of 21.12.2012.

<sup>15</sup>ICJ, *Written Observations of Japan*, paras. 1-4.

<sup>16</sup>Japan then refers to Articles 31(5) and 36 of the Statute which exclude the possibility of appointing an *ad hoc* Judge when two or more parties are in the same interest and thus should be taken as one party only, which it submits to be the case in the present dispute; *ibid.*, paras. 5-6.

<sup>17</sup>*Ibid.*, paras. 7-8.

<sup>18</sup>Japan refers to the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Application by Malta for Permission to Intervene*, Judgment of 14.04.1981, p. 15, para. 26.



time allocated to New Zealand should be significantly less than in a case of intervention under Article 62.

17. Thirdly, Japan further submits that New Zealand's intervention (if admitted), "in collaboration with the Applicant", should not result in "any shortening of the time allocated to the Respondent for the preparation of response to the pleadings by the Applicant and also by the intervening State"; it stresses the need to have adequate time for preparation before the oral proceedings, especially because there has been only one round of written pleadings<sup>19</sup>. The main point to be here retained is that, although Japan does not appear to raise a formal and express objection to the admission of New Zealand's Declaration of Intervention under Article 63<sup>20</sup>, it manifests concern mainly with the procedural equality of the Parties in the proceedings.

18. On its turn, in its subsequent written observations (original letter of 10.01.2013), Australia refers to what it regards as Japan's "mischaracterization" (of past events), in its view "wholly irrelevant" to the matters flowing from New Zealand's Declaration of Intervention (p. 1). Australia objects to Japan being provided with additional time (at its own expense) to get prepared, in the course of the forthcoming oral hearings (when Japan's jurisdictional objections will be dealt with), as a result of the Court's prior decision not to have a second round of briefs with arguments in the written phase (p. 1). Australia adds that New Zealand, as an intervenor, has "a right to be heard" by the Court, and there is no reason for it to be allowed less time (p. 2).

#### IV. COMMENTS OF NEW ZEALAND ON JAPAN'S WRITTEN OBSERVATIONS

19. Five days ago, New Zealand filed in the Court its letter of 01.02.2013, containing its comments on Japan's Written Observations (*supra*). New Zealand indicates that it "does not accept that its intervention affects the equality of the parties"; as a State Party to the International Convention for the Regulation of Whaling, it is "exercising its right to intervene in order to place its interpretation of the relevant provisions of the Convention before the Court, as the Statute of the Court [Article 63] entitles it to do" (p. 1). New Zealand added that the ICJ should not be invited to speculate as to the implications of its intervention for the proceedings before the Court (pp. 1-2).

20. New Zealand further contended that the equality of the parties to the disputed "cannot be imperilled" when a third State exercises its right to intervene — as a non-party — under Article 63 of the Statute. It recalled that the procedural rights of the parties and the intervening State are set out in Article 86 of the Rules of Court, it being for the ICJ to decide on "the extent of procedural rights" of the intervening State (p. 2.). New Zealand then concluded that the right to intervene, under Article 63 of the Statute, is "an integral part" of the framework of operation of the ICJ, as a forum for the settlement of disputes "under multilateral treaties"; in this context, — it added, — the exercise by New Zealand of such right of intervention "does not affect the equality of the parties to the dispute" (p. 2).

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<sup>19</sup>And, furthermore, and Australia is yet to respond to Japan's objection to jurisdiction; ICJ, doc. *Written Observations of Japan*, paras. 9-11.

<sup>20</sup>Note in this regard that Article 84(2) of the Rules of Court provides that: "If, within the time-limit fixed under Article 83 of these Rules, an objection is filed to an application for permission to intervene, or to the admissibility of a declaration of intervention, the Court shall hear the State seeking to intervene and the parties before deciding."

## V. BEYOND STATE CONSENT

21. Having reviewed all the documents conforming the *dossier* of the present case of relevance for the decision taken today, 06.02.2013, by the Court, I can now move on to the next point of my Separate Opinion. May I, at this stage, observe, as to the consent of the parties in the main case, which is not strictly or formally at issue in the present case, — that such consent does not play a role in the proceedings conducive to the Court’s decision whether or not to grant intervention. In a Joint Declaration appended to a recent Judgment of the Court (in the case of the *Territorial and Maritime Dispute, Nicaragua versus Colombia, Application by Honduras for Permission to Intervene, Judgment of 04.05.2011*), it was pointed out that consent by the parties in the main case<sup>21</sup> is irrelevant, and cannot be perceived as a prerequisite for intervention as a non-party<sup>22</sup>.

22. As master of its own jurisdiction, the Court does not need to keep on searching for State consent in deciding on an application for permission to intervene in international legal proceedings. And the aforementioned Joint Declaration added that

“In effect, third party intervention under the Statute of the Court transcends individual State consent. What matters is the consent originally expressed by States in becoming Parties to the Court’s Statute, or in recognizing the Court’s jurisdiction by other instrumentalities, such as compromissory clauses. (...) There is no need for the Court to keep on searching instinctively for individual State consent *in the course* of the international legal proceedings. After all, the consent of contending States is alien to the institution of intervention (...).”<sup>23</sup>.

23. This is so, — may I add herein, — in respect of interventions under Article 62 as well as Article 63 of the Court’s Statute. In the present case of *Whaling in the Antarctic*, opposing Australia to Japan, there has been, anyway, no *formal* objection to New Zealand’s Application for permission to intervene. Nor was there any *formal* objection to Greece’s recent Application for permission to intervene in the case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy), wherein the ICJ granted Greece permission to intervene as a non-party in the case (Order of 04.07.2011). In my Separate Opinion appended to the Court’s Order on the previous Greece’s intervention in this case, I pondered that

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<sup>21</sup>In that case, the Court was before an application for permission to intervene under Article 62 of its Statute, whilst in the present case the application to that end is under Article 63 of its Statute.

<sup>22</sup>This is generally acknowledged nowadays; cf., *inter alia*, e.g., S. Rosenne, *Intervention in the International Court of Justice*, Dordrecht, Nijhoff, 1993, pp. 79 and 104; J.M. Ruda, “Intervention before the International Court of Justice”, in *Fifty Years of the International Court of Justice — Essays in Honour of R. Jennings* (eds. Vaughan Lowe and M. Fitzmaurice), Cambridge, Cambridge University Press, 1996, p. 495; K. Mbaye, “L’intérêt pour agir devant la Cour Internationale de Justice”, 209 *RCADI* (1988) pp. 340-341. And as to jurisdictional links, cf. also, e.g., J.G. Starke, “*Locus Standi* of a Third State to Intervene in Contentious Proceedings before the International Court of Justice”, 58 *Australian Law Journal* (1984) p. 358.

<sup>23</sup>Joint Declaration of Judges Cançado Trindade and Yusuf, paras. 8, 10 and 13-15. Earlier on, — it may be recalled, — the ICJ Chamber itself rightly pointed out, in the Judgment of 1990 in the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras (Application by Nicaragua for permission to intervene), that the competence of the Court, in the particular matter of intervention, “is not like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case”; ICJ, case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras (Application by Nicaragua for permission to intervene), Judgment of 13.09.1990, para. 96.

“even if there were any such objection, it would have been immaterial for the purpose of the Court’s assessment of the Application at issue for permission to intervene. State consent indeed has its limits; the ICJ is not always restrained by State consent, in relation not only to intervention, but also in respect of other aspects of the procedure before the Court, as I sought to demonstrate in my extensive Dissenting Opinion (paras. 45-118, 136-144 and 156-214) in the Court’s Judgment of 01.04.2011 in case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia versus Russian Federation); the ICJ is not an arbitral tribunal” (para. 7).

## VI. DISCRETIONARY INTERVENTION AND INTERVENTION AS OF RIGHT

24. One and a half years after the permission granted by the Court to Greece’s intervention in the case concerning the *Jurisdictional Immunities of the State* (Germany versus Italy, Order of 04.07.2011), the Court has again granted permission to New Zealand’s intervention in the present case *Whaling in the Antarctic* (Australia versus Japan, Order of 06.02.2013). There is one point of distinction between these two Court’s decisions, with regard to the typology of interventions under the ICJ Statute: the first decision, of one and a half years ago, concerns *discretionary intervention*, whilst the decision taken today concerns *intervention as of right*.

### 1. Historical Origins

25. It is known that, in its origins, the historical antecedents of the institute of intervention in legal proceedings can be found in the old practice of international arbitrations, in the chapter of peaceful settlement of international disputes. Although there were endeavours for the enlargement and enhancement of its domain (*infra*), and even to render the basis of arbitration permanent, those antecedents of arbitral practice show that arbitration notwithstanding kept its essentially bilateralized outlook, and maintained its focus on the consent of the contending parties. It was necessary to wait for the systematization of the whole chapter of peaceful settlement of international disputes, encompassing the *judicial solution* as well (as distinguished from the arbitral solution), for the express provision on intervention to come to the fore and to see the light of the day.

26. That systematization took place in the course of the two Hague Peace Conferences, in 1899 and 1907, respectively<sup>24</sup>. One of the significant outcomes of the I Hague Peace Conference was the 1899 Convention for the Pacific Settlement of International Disputes, Article 56 of which provided that:

“The award is binding only on the Parties who concluded the *compromis*. When there is a question as to the interpretation of a convention to which Powers other than those in dispute are Parties, the latter notify to the former the *compromis* they have concluded. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them”.

27. The draftsmen of this provision had in mind intervention as of right, of the kind of the one which, some years later, found its place in Article 63 of the Statute of the Permanent Court of International Justice (PCIJ) (*infra*). The Conference *Report* (III Commission) on this

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<sup>24</sup>Earlier on, in 1875, the *Institut de Droit International* had adopted a code for arbitral procedure, one of its first achievements after its establishment in 1873. Later on, in 1877, the *Institut de Droit International* adopted a resolution strongly recommending the insertion of compromissory clauses in future treaties.

1899 Convention states that Article 56 derived from a proposal presented by the Delegate of the Netherlands (T.M.C. Asser)<sup>25</sup>. The matter was retaken, and further worked upon, at the II Hague Peace Conference of 1907, which, after its revision, adopted the 1907 Convention for the Pacific Settlement of International Disputes, containing a similar provision in the (new) Article 84. The Conference *Report* (I Commission) on this 1907 Convention comments that former Article 56 “was not modified essentially; it was only slightly changed in matters of form”<sup>26</sup>. In fact, Article 84 of the 1907 Convention provided that:

“The award is binding only on the Parties in dispute. When there is a question as to the interpretation of a convention to which Powers other than those in dispute are Parties, the latter inform all the signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them”.

28. Once again, the draftsmen of this new and slightly modified provision had in mind intervention as of right, of the kind of the one which later on was enshrined into Article 63 of the PCIJ Statute. By the end of the two Hague Peace Conferences, — which set up the basic pattern for forthcoming multilateral conferences, the universal juridical conscience seemed to have captured the idea that international law had to conform a true international *system*, endowed with obligatory arbitration (even though the Permanent Court of Arbitration had already come into existence on 19.09.1900).

29. After all, State voluntarism remained an obstacle to respect for international law and an undue limitation of the rule of law in international litigation<sup>27</sup>. The hope of creation of a Court of Arbitral Justice (before the days of a true international tribunal, the PCIJ) was largely prompted by the fears that, in the absence of international justice, States would keep on doing whatever they wished, and the increase in armaments (naval and military) would keep on going on<sup>28</sup>. There was a premonitory reaction, on the part of the lucid jurists of those threatening times, against that state of affairs, and against State voluntarism.

30. In fact, the discussions, throughout the work of the two Hague Peace Conferences (of 1899 and 1907), on the future creation of international courts, engaging renowned jurists of those days (such as, e.g., T.M.C. Asser, Ruy Barbosa, L. Bourgeois, J.H. Choate, F. de Martens, C.E. Descamps, F. Hagerup, F.W. Holls, among others), contained, already at that time, references to: a) the juridical conscience of peoples; b) the need of obligatory arbitration; c) the needed establishment or constitution of permanent tribunals; d) the determination of fundamental rules of procedure; e) the access of individuals to international justice; f) the development of an international jurisprudence; and g) the progressive development of international law<sup>29</sup>. This, — as

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<sup>25</sup>Permanent Court of Arbitration (PCA), *The Hague Peace Conferences of 1899 and 1907 and International Arbitration — Reports and Documents* (org. S. Rosenne), The Hague, T.M.C. Asser Press, 2001, p. 74.

<sup>26</sup>*Ibid.*, p. 265.

<sup>27</sup>J. Allain, *A Century of International Adjudication: The Rule of Law and Its Limits*, The Hague, T.M.C. Asser Press, 2000, pp. 2 and 7, and cf. pp. 15 and 18.

<sup>28</sup>Cf. PCA, *The Hague Peace Conferences of 1899 and 1907 and International Arbitration ...*, *op. cit. supra* n. (25), pp. XVII-XIX, 9 and 179.

<sup>29</sup>W.I. Hull, *The Two Hague Conferences and Their Contributions to International Law*, Boston, International School of Peace / Ginn & Co., 1908, pp. 370-448.

I can perceive it, — showed the awareness, of the importance of such issues, already present in the minds of jurists of that time.

31. At the II Hague Peace Conference, the topic of compulsory arbitration was extensively discussed, on the basis of five propositions (tabled by Brazil, Portugal, Serbia, Sweden and the United States, respectively); the very fact that the II Hague Peace Conference took place marked an epoch in the development of international law<sup>30</sup>. As aptly remarked by James Brown Scott in those days, the holding of that Conference demonstrated “the oneness of mankind”, having “brought nations together as never before”; yet, it left unfinished the task of the establishment of “an international and permanent judiciary”<sup>31</sup>.

32. The projected III Hague Peace Conference was never convened, and the disaster of the following years left scars that were not healed for generations, as stressed by some of the greatest thinkers and writers of the XXth century (which is not my intention herein to recall, within the confines of this Separate Opinion). But the lessons left mainly by the II Hague Peace Conference<sup>32</sup> were duly captured by the draftsmen of the Statute of the PCIJ (and later of the ICJ). Some of the participants of the II Hague Peace Conference had the intuition of the need of international tribunals, to relieve the world that it would enter an “orderly process”, given the fact that “the development of international law only proceeds step by step very gradually”<sup>33</sup>.

33. Before turning to the work undertaken by the Advisory Committee of Jurists, entrusted by the League of Nations with the task of drafting (in 1920) the Statute of the PCIJ, may I just point out that the work of the two Hague Peace Conferences was lately reassessed in the centennial commemorations of the two of them<sup>34</sup>. The centennial work on the second of them contains two contributions on the endeavours towards the universalization of international law by means of securing the presence, in a multilateral conference such as the II Hague Peace Conference, not only of great powers, but also of other participating States of the whole of Latin America and of Asia<sup>35</sup>. They provide an overview of the historical context within which the discussions on the matter at issue were conducted.

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<sup>30</sup>J. Brown Scott, *The Hague Peace Conferences of 1899 and 1907*, vol. I, Baltimore, Johns Hopkins Press, 1909, pp. 335 and 738.

<sup>31</sup>*Ibid.*, pp. 739 and 751. By the end of the II Hague Peace Conference, the foundations seemed to have been established for further development of international law, striving for compulsory arbitration, the establishment of the judicial settlement of international disputes, and the limitation or reduction of armaments; R. Ferreira de Mello (org.), *Textos de Direito Internacional e de História Diplomática de 1815 a 1949*, Rio de Janeiro, Edit. A. Coelho Branco, 1950, pp. 65, 115 and 117.

<sup>32</sup>Unlike the I Hague Peace Conference (with 26 participating States, mainly European), the II Hague Peace Conference counted on participating States from distinct continents and parts of the world (a total of 44), having been the first of the kind in world diplomatic history.

<sup>33</sup>J.H. Choate, *The Two Hague Conferences*, Princeton/London/Oxford, Princeton University Press/H. Frowde/Oxford University Press, 1913, pp. 58 and 87, and cf. pp. 6-7, 10, 19, 32-33, 42, 51, 57, 61 and 91.

<sup>34</sup>Cf. [Various Authors,] *The Centennial of the I International Peace Conference — Reports and Conclusions* [1999] (ed. F. Kalshoven), The Hague, UNITAR/Kluwer, 2000, pp. 1-515; [Various Authors,] *Actualité de la Conférence de La Haye de 1907, II Conférence de la Paix / Topicality of the 1907 Hague Conference, the II Peace Conference* [2007] (ed. Y. Daudet), The Hague/Leiden, Hague Academy of International Law/Nijhoff, 2008, pp. 1-490.

<sup>35</sup>Cf. A.A. Cançado Trindade, “The Presence and Participation of Latin America at the II Hague Peace Conference of 1907”, in *Actualité de la Conférence de La Haye de 1907, II Conférence de la Paix...*, *op. cit supra* n. (34), pp. 51-84; S. Murase, “The Presence of Asia at the 1907 Hague Conference”, in *ibid.*, pp. 85-101.

34. The following moment to address, in the identification of the historical origins and shaping of the concept of intervention in legal proceedings, is that of the work, in mid-1920, of the Advisory Committee of Jurists, appointed by the League of Nations to draft the Statute of the old PCIJ. By then, not only was the way paved for further thinking on compulsory jurisdiction<sup>36</sup>, but also, significantly, with the advent of the *judicial* settlement of disputes at world level<sup>37</sup>, the concept of intervention fully bloomed. With the advent of the PCIJ (followed over two decades later by the ICJ), two kinds of intervention were envisaged (cf. *infra*), and enshrined into Articles 62 and 63 of the Hague Court's Statute, respectively. Intervention, under the two provisions, was to seek to overcome the bilateralization of the controversy at stake, thus widening dispute-settlement<sup>38</sup>, when it could be of direct interest or concern to other States.

## 2. Discretionary Intervention (Article 62 of the Court's Statute)

35. The Advisory Committee of Jurists nominated by the League of Nations, which drafted the Statute of the PCIJ, at the end of its work (which lasted from 16 June to 24 July 1920), deemed it fit to include therein two provisions, Articles 62 and 63, on two kinds of intervention in legal proceedings. Article 62 of the Statute of the ICJ (derived from that of the PCIJ), as adopted by that Committee, set forth that:

“1. Should a State consider that it has an interest of a legal nature, which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2. It will be for the Court to decide upon this request”<sup>39</sup>.

36. This was discretionary intervention, distinct from the aforementioned antecedents (*supra*). It was a formula proposed by the Committee's President (Baron E. Descamps). On the occasion, it was decided that it “would be a separate article”, and that it “would be inserted before the original Article 23”<sup>40</sup>, which provided for intervention as of right (*infra*). Article 62 of the Statute of the PCIJ/ICJ requires a legal standard for intervention which is distinct from that of Article 63: according to Article 62, the State seeking to intervene must consider that “it has an interest of a legal nature which may be affected by the decision in the case”, and the Court has the discretion to decide upon this request. We are, thus, here before *discretionary* intervention.

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<sup>36</sup>Cf., e.g., *inter alia*, B.C.J. Loder, “The Permanent Court of International Justice and Compulsory Jurisdiction”, 2 *British Year Book of International Law* (1921-1922) pp. 6-26; M.O. Hudson, *The Permanent Court of International Justice — 1920-1942*, N.Y., MacMillan Co., 1943, pp. 189-193; E. Hambro, “Some Observations on the Compulsory Jurisdiction of the International Court of Justice”, 25 *British Year Book of International Law* (1948) pp. 133-157; and cf., later on, e.g., *inter alia*, C.W. Jenks, *The Prospects of International Adjudication*, London/N.Y., Stevens/Oceana, 1964, pp. 101, 110, 113-117, 757, 760-762 and 770; R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, Nijhoff, 1993, pp. 31-32, 48, 83, 86, 90 and 94-95.

<sup>37</sup>It may be here recalled that the first modern international tribunal, in operation for one decade (1907-1917) in Latin America, was the Central American Court of Justice, which historically preceded the PCIJ.

<sup>38</sup>Cf., e.g., G. Morelli, “Note sull'Intervento nel Processo Internazionale”, 65 *Rivista di Diritto Internazionale* (1982) pp. 805-806, 808, 811 and 814.

<sup>39</sup>League of Nations/PCIJ — Advisory Committee of Jurists, *Procès-Verbaux des séances du Comité avec Annexes / Procès-verbaux of the Proceedings of the Committee with Annexes* (16.06-24.07.1920), The Hague, Van Langenhuisen Brothers, 1920, p. 594.

<sup>40</sup>*Ibid.*, p. 594.

37. Requests for permission to intervene lodged with this Court in distinct cases in recent years, unlike the *cas d'espèce*, have been formulated on the basis of Article 62 of the Statute. Article 62 is not the formula drawn from the two Conventions for the Pacific Settlement of International Disputes (of 1899 and 1907), adopted by the I and II Hague Peace Conferences, respectively<sup>41</sup>. The scope of Article 62 is stricter than that of Article 63, in that the permission for intervention will depend on the exercise by the Court of its discretion, its decision being taken in the light of the particular circumstances of each case. This kind of discretionary intervention is drawn from that provided for in the domestic legal system of several States<sup>42</sup>, i.e., in comparative domestic law.

### 3. Intervention as of Right (Article 63 of the Court's Statute)

38. In the present case, however, New Zealand's Declaration of Intervention is grounded on Article 63 of the Statute of the ICJ, which provides, for its part, that a State Party to a Convention which the Court is requested to interpret has a "right to intervene in the proceedings". We are no longer before discretionary intervention (*supra*), but rather before intervention as of right. The Court has clarified that this "right" concerns intervention on "the point of interpretation which is in issue in the proceedings". We are here before intervention *as of right*. Article 63 of the Statute of the ICJ (derived from that of the PCIJ, as originally adopted by the Advisory Committee of Jurists in 1920)<sup>43</sup>, 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”.

39. It is relevant to keep this distinction in mind, for the purposes of the consideration of the present Declaration of Intervention. It is to be noted that New Zealand does not seek to be a Party in the proceedings of the *cas d'espèce*, and that, in accordance with Article 63(2) of the Court's Statute, by availing itself of its right to intervene, it accepts that the construction to be given by the forthcoming Judgment [as to the merits] in the present case will be binding upon itself. Furthermore, it seems that New Zealand's intention to intervene pertains to issues of interpretation of the Convention at issue, which appears to be in line with the text of Article 63(2) of the Statute. I shall turn to this issue later on, in this Separate Opinion.

40. At this stage, may I observe that, throughout the years, the point has been made, in expert writing, that the use of intervention under Article 63 of the Statute has been rather infrequent, but this does not mean that it would or should remain so, as all States Parties to multilateral treaties are

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<sup>41</sup>Shigeru Oda, "Intervention in the International Court of Justice – Articles 62 and 63 of the Statute", in *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte — Festschrift für H. Mosler* (eds. R. Bernhard *et alii*), Berlin/Heidelberg, 1983, p. 644.

<sup>42</sup>*Ibid.*, pp. 640-641 and 647.

<sup>43</sup>Cf. League of Nations/PCIJ — Advisory Committee of Jurists, *Procès-Verbaux des séances du Comité avec Annexes...*, *op. cit. supra* n. (39), p. 594.

committed to contribute to their proper interpretation<sup>44</sup>. If such interventions increased, uncertainties could diminish, as the ICJ could have more occasions to clarify the application and scope of Article 63<sup>45</sup>. In one of the earlier studies on the subject, Edvard Hambro wrote sympathetically in favour of “an extensive use of Article 63”, acknowledging the needed “teleological interpretation” of certain multilateral treaties, to enable the Parties to defend the rights that such treaties purported to protect. In any case, — he added, — Article 63 “has widened the jurisdiction” of the Court, as States which are Parties to the Conventions at issue “must be deemed to have a right to intervene” thereunder, even if the last word as to whether there is room for a possible intervention belongs ultimately to the Court<sup>46</sup>.

#### 4. Precedents in the Court’s History (PCIJ and ICJ)

41. This would be a proper point to turn attention to the precedents on the matter at issue, in the history of the Hague Court (PCIJ and ICJ). The sole legacy of the old PCIJ, on the matter at issue, lies in its Judgment (on Poland’s request for intervention) of 28.06.1923 in the case of the vessel *S.S. “Wimbledon”*, wherein the PCIJ accepted Poland’s intervention under Article 63 of its Statute. The Court at first compared the two distinct kinds of intervention, i.e., intervention under Article 62 of the Statute, based on the existence of an interest of a legal nature on the part of the intervening party, and the right to intervene under Article 63, pertaining to the interpretation of an international (multilateral) convention. The PCIJ then recalled the object of the Application Instituting Proceedings in the case at issue, and its task decide whether German authorities were within their rights in refusing to the vessel *S.S. “Wimbledon”* free access to the Kiel Canal and, if necessary, to determine the damages due for the prejudice caused to that vessel.

42. The PCIJ then recalled that Poland had requested, in its Note of 22.05.1923, permission to intervene on the basis of Article 62 of the Statute<sup>47</sup>, and explained that, although Article 63 had not been expressly referred to in Poland’s Note, the latter cited Poland’s participation in the Treaty of Versailles, and, more specifically, the violation of the rights and interests guaranteed to Poland under Article 380 of that Treaty. The PCIJ then noted that, from a further communication by the Agent of Poland, it appeared that Poland would have adopted the right conferred upon it by Article 63, as a party to the Treaty of Versailles.

43. As Poland’s Agent did not insist on its request for intervention under Article 62, and further indicated that it did not intend to ask for compensation from Germany, the PCIJ thus found it unnecessary to consider Poland’s request for intervention under Article 62. The PCIJ added that, as Poland intended to avail itself of the right to intervene under Article 63, the case at issue thus involved the interpretation of certain clauses of the Treaty of Versailles, to which Poland was one of the States Parties; the PCIJ, accordingly, accepted the request for intervention by Poland.

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<sup>44</sup>E. Hambro, *op. cit. infra* n. (46), pp. 389 and 400; C. Chinkin, “Article 63”, in *The Statute of the International Court of Justice — A Commentary* (eds. A. Zimmermann *et alii*), 2<sup>nd</sup> ed., Oxford, Oxford University Press, 2012, pp. 1595 and 1597.

<sup>45</sup>C. Chinkin, *op. cit. supra* n. (44), p. 1582.

<sup>46</sup>E. Hambro, “Intervention under Article 63 of the Statute of the International Court of Justice”, in *Il Processo Internazionale — Studi in Onore di G. Morelli*, 14 *Comunicazioni e Studi* (1975) pp. 400, 391, 397 and 399.

<sup>47</sup>On the side of the four applicant States in the main case, namely, United Kingdom, France, Italy and Japan. The PCIJ’s Judgment as to the merits of the case at issue was delivered on 17.08.1923.



44. As for the ICJ, the first case it dealt with a Declaration of Intervention under Article 63 of its Statute was a Latin American case. In its Judgment of 13.06.1951 in the case of *Haya de la Torre*<sup>48</sup> (Colombia *versus* Peru), pertaining to the admissibility of Cuba's intervention under Article 63 of the Statute and questions on the merits of the case, the ICJ started by recalling that Cuba, in availing itself of the right which the Statute confers on States Parties to a convention, the interpretation of which is in issue, filed a declaration of intervention under Article 63 of the Statute concerning the construction of the Havana Convention on Asylum of 20.02.1928, and its general attitude regarding asylum. The Court also recalled that, while Colombia did not object to the intervention, Peru requested the Court to decide that the intervention was inadmissible, as it was, in its view, an attempt by a third State to appeal against the previous Judgment of the ICJ of 20.11.1950 in the *cas d'espèce*<sup>49</sup>.

45. Against this background, the Court first observed that every intervention is incidental to the proceedings in a given case and thus a declaration filed as an intervention only acquires that character in the event that it actually relates to the subject-matter of the pending proceedings. The Court stated that the subject-matter of the case at issue was different from that of the case terminated by the Judgment of 20.11.1950, as it concerned the surrender of Haya de la Torre to the Peruvian authorities, a question which was outside the submission of the Parties in the previous case, and was thus not decided in the previous Judgment.

46. The Court was thus of the view that, under these circumstances, the question before itself was whether the object of Cuba's intervention was indeed the interpretation of the Havana Convention in connection with the question whether Colombia is under an obligation to surrender the individual concerned to Peru. The Court noted that, during the public hearing, Cuba explained that its intervention was based on the fact that the Court had to interpret a new aspect of the Havana Convention, which had not been considered in the previous Judgment of 20.11.1950. This being so, the Court decided, on 16.05.1951, that, within these limits, Cuba's purported intervention was in conformity with the conditions of Article 63 of the Statute, and thus admitted the intervention on this basis<sup>50</sup>.

47. In this Latin American case, the *célèbre Asylum* case (1951), Cuba's request for intervention (under Article 63) was successful, in the terms of the Court's decision. The two subsequent cases of interventions under Article 63 of the ICJ Statute did not have the same outcome; in both of them the requests for intervention were dismissed as inadmissible. Such precedents (before the recent *Germany versus Italy* case (2012) and the present case opposing Australia to Japan) were the case of *Nicaragua versus United States* (1984) and the *Nuclear Tests* case (New Zealand *versus* France, 1995).

48. In the case of *Nicaragua versus United States* (Order of 04.10.1984), El Salvador filed a Declaration of Intervention under Article 63 of the Statute, citing various multilateral conventions to which it was a party and on the basis of which Nicaragua's jurisdictional and substantive claims were based; El Salvador argued that its intervention had the "sole and limited purpose" of claiming that the Court did not have jurisdiction to hear Nicaragua's application (pp. 1-2). The Court decided that the Declaration of intervention of El Salvador was inadmissible "inasmuch as it relates to the current phase of the proceedings" (p. 216). The decision was surrounded by much discussion among the Judges, as can be inferred from the various individual Opinions they filed; there was no

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<sup>48</sup>ICJ, case of *Haya de la Torre Case* (Judgment of 13.06.1951), *I.C.J. Reports* (1951) p. 71.

<sup>49</sup>*Ibid.*, pp. 74-76.

<sup>50</sup>*Ibid.*, pp. 76-77.

doubt, however, that it is for the Court to decide in each case whether the conditions for intervention are fulfilled.

49. In the other precedent, that of the *Nuclear Tests* case (New Zealand *versus* France), the Court dealt with the “Request for an Examination of the Situation” in accordance with paragraph 63 of the Court’s prior Judgment of 20.12.1974 in the Nuclear Tests case, opposing New Zealand to France. In its Order of 22.09.1995, the Court decided that such “Request for an Examination of the Situation” did not fall within the provisions of the said paragraph 63 and must thus be dismissed. Consequently, as to the Applications for permission to intervene (Article 62) of Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia, as well as the Declarations of Intervention (Article 63) made by the latter four States, since they were all proceedings incidental to New Zealand’s main Request, they had likewise to be dismissed.

50. This Order of the Court was likewise surrounded by much discussion, as can be inferred from the various individual (Separate and Dissenting) Opinions filed by some of the Judges. There were, in that case, Applications for permission to intervene under Article 62, and Declarations of Intervention under Article 63 of the Statute; pursuant to a rather formalistic outlook, the Court’s majority dismissed them, despite the importance and seriousness of the matter at issue, concerning the protection of the environment against the danger of radioactive contamination in the South Pacific region, to the benefit of the Polynesian, Melanesian and Micronesian peoples.

51. There is, thus, in my perception, a case for a more proactive attitude of the ICJ towards intervention, on the distinct grounds of Article 63 as well as Article 62 of its Statute. One and a half years ago the ICJ rightly granted intervention to Greece under Article 62, in the case concerning the *Jurisdictional Immunities of the State* (cf. *supra*), and now it has rightly granted it to New Zealand under Article 63, in the present case of the *Whaling in the Antarctic*. In another recent case wherein it was likewise requested (under Article 62), but not granted, concern was expressed, within the Court, as to the need to keep such proactive attitude as to the institute of intervention in international judicial proceedings<sup>51</sup>.

52. In my Separate Opinion appended to the Court’s Order of 04.07.2011, in the case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy), whereby it granted intervention to Greece (under Article 62 of its Statute), I deemed it fit to observe that

“Twice before, permission to intervene was granted by the ICJ: by its Chamber, in the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras (Application by Nicaragua for permission to intervene, Judgment of 13.09.1990), and by the full Court itself, in the case concerning the *Land and Maritime Boundary* between Cameroon and Nigeria, wherein, by its Order of 21.10.1999, it authorized Equatorial Guinea to intervene. Both cases concerned land and maritime boundaries. This time, with the Order it adopts today, 04 July 2011, the ICJ grants to Greece permission to intervene in the case concerning the *Jurisdictional Immunities of the State*, a domain of great importance in and for the development of contemporary international law. The Court has so decided at the height of its responsibilities as the principal judicial organ of the United Nations (Article 92 of the U.N. Charter).

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<sup>51</sup>ICJ, case of the *Territorial and Maritime Dispute* (Nicaragua *versus* Colombia, Application by Costa Rica for Permission to Intervene, Judgment of 04.05.2011), Joint Dissenting Opinion by Judges Cançado Trindade and Yusuf, paras. 1-29.

Unlike land and maritime delimitation cases, or other cases concerning predominantly bilateralized issues, the present case is of interest to third States, such as Greece, other than the two contending Parties before the Court. The subject-matter is closely related to the evolution of international law itself in our times, being of relevance, ultimately, to all States, to the international community as a whole, and, in my perception, pointing towards an evolution into a true *universal* international law.

(...) By granting to Greece (...) permission to intervene, the present Order of the Court gives, in my view, a proper expression to the principle of the sound administration of justice (*la bonne administration de la justice*) in the context of the *cas d'espèce*" (paras. 57-59 - and cf. *infra*).

## VII. Collective Interest and Collective Guarantee

53. This leads me to my next point of consideration in the present Separate Opinion. As I have already pointed out, consent of the parties in the main case does not play a role in proceedings conducive to the Court's decision (under Article 63 or else under Article 62 of its Statute) whether or not to grant intervention; the Court is master of its own jurisdiction, and one is here beyond State consent (part V, *supra*). I have furthermore pondered, earlier on, that States Parties to multilateral treaties are committed to contribute to their proper interpretation (para. 27, *supra*). This is, in my perception, even more compelling when such treaties embody matters of *collective interest*, and are endowed with *collective guarantee* of the observance of the obligations contracted by the States Parties.

54. In any case, in my understanding, the *nature* of the treaty at issue is to be kept in mind. Furthermore, one is also to keep in mind the elements which compose the general rule of interpretation of treaties, formulated in Article 31 of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986), — namely, good faith, text, context, and object and purpose of the treaty; they are the ones that most often mark presence in treaty interpretation<sup>52</sup>. Underlying the general rule set forth in Article 31(1) of the two aforementioned Vienna Conventions lies the principle *ut res magis valeat quam pereat*, widely supported in case-law, and which corresponds to the so-called *effet utile* (at times referred to as principle of effectiveness), whereby one is to secure to the conventional provisions their *proper effects*<sup>53</sup>.

55. The evolution of international law itself can have an effect upon the interpretation of the treaty at issue. The object and purpose of a treaty can be given precision, and be developed, by the parties themselves (as in classic treaties) under the effect of certain precepts of law, or else by organs of international supervision established by the treaties themselves (in distinct domains of protection). When it comes to *protection* (of the human person, of the environment, or of matters of general interest), the principle of *effet utile* assumes particular importance in the determination of the (enlarged) scope of the conventional obligations of protection.

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<sup>52</sup>Cf., generally, e.g., Maarten Bos, "Theory and Practice of Treaty Interpretation", 27 *Netherlands International Law Review* (1980) pp. 3-38 and 135-170; W. Lang, "Les règles d'interprétation codifiées par la Convention de Vienne sur le Droit des Traités et les divers types de traités", 24 *Österreichische Zeitschrift für öffentliches Recht* (1973) pp. 113-173; Ch. De Visscher, *Problèmes d'interprétation judiciaire en Droit international public*, Paris, Pédone, 1963, pp. 9-264; among others.

<sup>53</sup>Cf., e.g., M.K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités", 151 *Recueil des Cours de l'Académie de Droit International de La Haye* (1976) p. 74; G.E. do Nascimento e Silva, *Conferência de Viena sobre o Direito dos Tratados*, Rio de Janeiro, MRE, 1971, pp. 34-35 and 73-74; I.M. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester, University Press/Oceana, 1973, pp. 73-75; F. Capotorti, "Il Diritto dei Trattati Secondo la Convenzione di Vienna", in *Convenzione di Vienna sul Diritto dei Trattati*, Padova, Cedam, 1984, pp. 35-39; among others.

56. The corresponding obligations of the States Parties assume an essentially *objective character*: they are implemented collectively, singling out the predominance of considerations of general interest (or even *ordre public*), transcending the individual interests of States Parties. The nature of treaties addressing matters of general or common interest and counting on *collective guarantee* (by States Parties) for their implementation has an incidence on their process of interpretation. And it could not be otherwise.

57. There is no space, under treaties of the kind, for unilateral State action, or even for bilateral reciprocal concessions: States Parties to such treaties are bound by the contracted obligations to seek jointly the realization or fulfilment of the object and purpose of the treaties at issue. State Parties are bound by *positive obligations* enshrined therein. The preambles themselves of treaties of the kind contain important elements for their interpretation, to be necessarily taken into account.

58. As to the 1946 International Convention for the Regulation of Whaling (ICRW), and in particular its “objectives and purposes”<sup>54</sup>, namely, the proper conservation of the whale stocks and the orderly development of the whaling industry, it is clear that the former stands higher, as without the proper *conservation* of whale stocks there can be no *orderly* development of the whaling industry. The basic foundation of the ICRW is thus the *conservation* of all whale species at issue. The principle of *effet utile* points in this direction, discarding the mere profitability of the whaling industry.

59. There is a concern for *orderly* development in the ICRW, which uses the expression “common interest”<sup>55</sup>, and, moreover, identifies its beneficiaries, in expressly recognizing

“the interest of the nations of the world in safeguarding for *future generations* the great natural resources represented by the whale stocks”<sup>56</sup>.

The regulatory scheme is set out in detail in the *Schedule*. It should not pass unnoticed that the notion of public or good order had already found expression in the international community at the time of the adoption of the ICRW.

60. The general policy objectives under the ICRW were thus — and remain — the protection of all whale species from overfishing, to the benefit of *future generations in all nations*, and the orderly development of whaling industry was to abide by that. Conflicts or disputes were thus to be avoided on that basis, and that (orderly) industrial development was not to undermine the public or good order of the oceans. The objectives of the ICRW disclose the *nature* of the treaty, to be implemented well beyond the scope of bilateral relations between States Parties. The *nature* of the ICRW is, in my understanding, to be kept in mind, in the present decision of the Court concerning intervention for the purposes of interpretation of Article VIII of the Convention.

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<sup>54</sup>Expression utilized in Articles V(2) and VI of the Convention.

<sup>55</sup>Fourth preambular paragraph.

<sup>56</sup>First preambular paragraph [emphasis added].

## VIII. THE PREVENTIVE DIMENSION

61. A proactive posture of the ICJ as to the institute of intervention in international judicial proceedings, under Article 63 of its Statute, appears in principle justified, in cases like the present one, concerning the interpretation or construction of a provision of a multilateral treaty like the ICRW, aiming above all at the *conservation* of all whales species, to the benefit of future generations in all nations. The notion of inter-generational equity is present herein. I have devoted much attention to the long-term temporal dimension and the notion of inter-generational equity in my Separate Opinion (part IX, paras. 114-131) in the case concerning *Pulp Mills on the River Uruguay* (Argentina *versus* Uruguay, Judgment of 20.04.2010), and I here limit myself to refer to my reflections developed therein. In the present case, the ICRW's *preventive* dimension should not pass unnoticed. States Parties are here to act with due care, under the ICRW, so as to avoid a harm which may project itself in time.

62. The uncertainties still surrounding the institute of intervention in legal proceedings are proper to the persisting and new challenges faced by international justice in our times<sup>57</sup>, in the enlargement of its scope both *ratione materiae* and *ratione personae*. International tribunals are to face such uncertainties, approaching the institute of intervention with due attention to the contemporary evolution of international legal procedure at conceptual level, and to the nature of the multilateral treaties at stake.

63. Article 63 of the Court's Statute provides for intervention *as of right* (*supra*), — as the ICJ itself has pointed out, when the State seeking to intervene confines its intervention to “the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case”<sup>58</sup>. On the basis of its Declaration of Intervention, it does not seem that New Zealand is seeking a “general intervention” in the present case. It purports to inform the Court of its view, focused on a specific point of interpretation or construction of Article VIII of the 1946 Convention for the Regulation of Whaling. New Zealand's submission is thus duly circumscribed, and the Court is right in holding it admissible.

## IX. THE *RESURRECTIO* OF INTERVENTION IN CONTEMPORARY JUDICIAL PROCEEDINGS BEFORE THE ICJ

64. The ICJ's decision contained in the present Order in the case concerning *Whaling in the Antarctic* is significant: looking back in time, we may well be witnessing lately the *resurrectio* of intervention in contemporary judicial proceedings before the ICJ. I have made this point in my Separate Opinion in the Court's previous Order of 04.07.2011 permitting Greece's intervention in the case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy). In a rather short lapse of time, the Court has taken its position on granting intervention, on the basis of both Article 62 (in 2011) and Article 63 (the present Order) of its Statute.

65. I have deemed it fit to dwell further upon this issue, in the present Order of the Court, declaring admissible New Zealand's intervention in the case *Whaling in the Antarctic* (Australia *versus* Japan). Twice before, in two cases concerning land and maritime boundaries in the nineties, the ICJ also authorized two other applications to intervene, namely, in the case concerning the

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<sup>57</sup>E. Jouannet, “Quelques perspectives théoriques: incertitudes sur le tiers et désordres de la justice internationale”, in *Le tiers à l'instance devant les juridictions internationales* (eds. H. Ruiz Fabri and J.-M. Sorel), Paris, Pédone, 2005, pp. 260-263.

<sup>58</sup>ICJ, case of the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Application to Intervene*, I.C.J. Reports (1981) p. 15, para. 26.

*Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras (Application by Nicaragua for permission to intervene, Court's Chamber Judgment of 13.09.1990), and in the case concerning the *Land and Maritime Boundary* between Cameroon and Nigeria (Application by Equatorial Guinea for permission to intervene, Court's Order of 21.10.1999).

66. On the two more recent occasions, namely, in the case concerning the *Jurisdictional Immunities of the State* and in the present case of *Whaling in the Antarctic*, the Court has adopted two Orders granting the requested interventions in two domains of great importance in and for the development of contemporary international law, namely, that of the tension between the right of access to justice and the invocation of State immunities, and that of marine life and resources and international protection of the environment. In the ambit of the circumstances surrounding these two more recent cases, in domains of concern to the international community as a whole, intervention has at last seen the light of the day.

67. Although intervention, throughout the history of the ICJ, laid dormant in the Peace Palace for most of the Court's history until recently, it has never died, and it appears now to have resurrected, in a revitalized way. In deciding as it has done, granting intervention in the aforementioned last two cases, in such relevant contexts, the ICJ has so decided at the height of its responsibilities as the main judicial organ of the United Nations (Article 92 of the U.N. Charter). Unlike land and maritime delimitation cases, or other cases concerning predominantly bilateralized issues, these last two cases concern third States as well, other than the respective contending parties before the Court.

68. The subject-matters at issue in those two cases (*supra*) are, in my perception, closely and decisively related to the evolution of contemporary international law as a truly *universal* international law, being thus of relevance ultimately to all States. The *resurgere* of intervention is thus most welcome, propitiating the sound administration of justice (*la bonne administration de la justice*), attentive to the needs not only of all States concerned but of the international community as a whole, in the conceptual universe of the *jus gentium* of our times.

## X. CONCLUDING OBSERVATIONS

69. In the present case, in my view, a proper expression to the principle of the sound administration of justice (*la bonne administration de la justice*) can be found precisely in the declaration of admissibility by the Court of the Declaration of Intervention by New Zealand in the *cas d'espèce*. I have made precisely this point, one and a half years ago, in my Separate Opinion (para. 59) appended to the Court's Order of 04.07.2011, in the case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy). This is a point which, in my view, should not pass unnoticed herein.

70. It so happens that, in the present Order, the Court considered the principle of the sound administration of justice (*la bonne administration de la justice*) in relation to other arguments put to it (paras. 17-19 of the Order), which are rather tangential to the institute of intervention (under Article 63) itself, and do not have a direct bearing on its essence. It is true, as the Court states (para. 18), that intervention, in the terms of Article 63 of the Statute, cannot — does not — affect the procedural equality of the contending parties. The Court rightly acknowledges (para. 19) that New Zealand's Declaration of Intervention falls within the provisions of Article 63 of the Statute and the requirements of Article 82 of the Rules of Court, and is thus admissible. It is so, — I would add, — irrespective of whether the contending parties object or not to it.

71. In circumstances like those of the *cas d'espèce*, it is necessary to surmount the old bilateralist bias that permeates dispute-settlement under the procedure before this Court. It so happens that such bias has for a long time impregnated expert writing on the subject<sup>59</sup> as well. It is about time to overcome such dogmatism of the past, with their characteristic immobilization, remnant of the old arbitral practice. The present case concerning *Whaling in the Antarctic*, unlike land and maritime delimitation cases, or other cases concerning predominantly bilateralized issues, concerns third States as well, Parties to the 1946 Convention for the International Regulation of Whaling, other than the respective contending parties before the Court. The Convention concerns a matter of general or common interest, and is to be implemented collectively by States Parties, thus contributing to the public order of the oceans.

72. In the present Order, the Court has limited itself to address the points raised by the three States concerned, in the terms in which they were raised. Under the self-imposed pressure of time, it has abstained from dwelling upon the substantive aspects concerning the essence of intervention under Article 63 of its Statute. For my part, I have struggled against the constraints of time, in order to take care of dwelling upon them in the present Separate Opinion. Throughout the years the hope has been expressed, in expert writing, that further clarification is given as to the meaning and scope of intervention under Article 63 of the Statute of the ICJ.

73. This is what I have been attempting to do in this Separate Opinion, to the extent possible. The insufficient clarification provided so far has been attributed to the rather infrequent use of intervention as of right under Article 63. But even in the cases wherein intervention under Article 63 has been put to the Court, like the present one, this latter has not provided sufficient or entirely satisfactory clarification, though it has fortunately reached the right decision in today's Order.

74. It may well occur that, in the future, whichever clarification is provided, it comes to appear, after all, not entirely satisfactory. One point seems, however, clear. The rhythm of progressive development of international law, whichever path is taken, is particularly slow; so slow that any advance achieved seems to be due to a constructive reasoning in a rare moment, or glimpse, of lucidity. In any case, and to be fair to jurists (my colleagues), it so happens that Law is not an "exact science", and perhaps fortunately so. After all, what is thought of as "exact" today, with the passing of time comes to appear as not being so "exact" as one thought or assumed it to be earlier on. In the domain of Law, we are faced with *Sollen / devoir être* (so necessary to human beings), and dissatisfaction seems often to be ineluctable herein.

75. After all, *Sollen / devoir être* (or at least the tension between *Sein* and *Sollen*) requires thinking, rather than applying mechanically pre-existing norms. As for mechanical application, nowadays computers would do it just as well. Thinking (which requires much greater effort) cannot always be presumed; this is why one ought to be satisfied when a certain advance is achieved, moved by thinking with an awareness of the imperatives of justice. Today, 06.02.2013, is one such occasion, with the Court's Order of admissibility of New Zealand's Declaration of Intervention under Article 63 of its Statute, just as one and a half years ago (Order of 04.07.2011)

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<sup>59</sup>To quote one example: — "International law in its historical evolution has shown a general reticence towards third-party interference in the judicial (or arbitral) settlement of bilateral disputes. Indeed, such third-party intervention has always been presented as an exception to the general principle of *res judicata inter alios acta*, and there is nothing in modern international judicial experience or practice to warrant any far-reaching departure from that approach". S. Rosenne, *Intervention in the International Court of Justice*, *op. cit. supra* n. (22), p. 190.

there was another such occasion, with the Court's permission of Greece's intervention under Article 62 of its Statute, in the case concerning the *Jurisdictional Immunities of the State*.

76. So, we do not — fortunately — work always surrounded by dissatisfaction. After all, there are, in its course, moments or glimpses of enlightenment as well, which should satisfy those engaged into the progressive development of international law and the realization of justice at international level. The aforementioned last two grants of intervention by this Court, under Articles 62 and 63 of its Statute (Orders of 04.07.2011 and 06.02.2013, respectively), are good examples in this direction. The gradual *resurrectio* of intervention in contemporary judicial proceedings before the World Court can, in my perception, render a valuable service towards a more cohesive international legal order in our days. After all, intervention in legal proceedings, by providing additional elements to the Court for its consideration and reasoning, can contribute to the progressive development of international law itself, especially when matters of collective or common interest and collective guarantee are at stake.

(Signed) Antônio Augusto CANÇADO TRINDADE  
Judge

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## DECLARATION OF JUDGE GAJA

It may be regretted that the Court, facing for the first time in several decades a declaration of intervention under Article 63 of the Statute, has not seized the opportunity for clarifying certain aspects of the procedure relating to this type of intervention.

While one may understand that the Court does not wish to address questions that are not immediately relevant for the purpose of deciding whether New Zealand's intervention is admissible, it is less understandable that the conditions for the admissibility of an intervention are only the object of a general reference to Article 63 of the Statute and of an analysis of the formal requirements set forth by Article 82 of the Rules (para. 8).

One of the conditions which should have been spelled out and ascertained by the Court relates to the relevance of the suggested construction of the convention for the decision of the case. In the *Haya de la Torre (Colombia/Peru)* Judgment the Court had noted that "every intervention is incidental to the proceedings in a case" and that "a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings" (*I.C.J. Reports 1951*, p. 76). On that basis, the Court found that Cuba's intervention was admissible only in part (*ibid.*, p. 77). The Court made this assessment in the Judgment that decided the case on the merits. When confronted with the same issue at an earlier stage, as in the present case, the Court should not go further than a *prima facie* analysis of the relevance of the suggested construction for the decision of the case. The Court could have outlined this criterion and assessed New Zealand's declaration accordingly. No doubt, the Court would have reached the conclusion that in this regard the intervention is admissible, given the extensive references in New Zealand's declaration to the construction of Article VIII of the International Convention for the Regulation of Whaling which is at the core of the present case.

While the Court fails to analyse specifically the conditions for admissibility of New Zealand's intervention, it includes in its Order some remarks that do not concern that admissibility. This concerns in particular the assertion that New Zealand as an intervener will be bound, according to paragraph 2 of Article 63 of the Statute, by the construction to be given by the Court. This statement may be taken as a simple reminder of the relevant paragraph in the Statute on the legal effects of an intervention. However, the provision in the Statute actually says that "the construction . . . will be equally binding upon" the intervener. This cannot mean that only the intervener will be bound. The provision would be unbalanced, and unduly penalize the intervener. By saying that the intervener will be "equally" bound, paragraph 2 of Article 62 points to the conclusion that, with regard to the construction of the convention, the intervener will be bound towards the parties and that the parties will also be bound towards the intervener.

Should the question of the effects of the construction arise, the Court may well reach the same conclusion. However, by focusing only on the future obligations of the intervener, the Court may regrettably suggest that it holds a different view.

(Signed) Giorgio GAJA.

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