**Written Observations of Japan on the Declaration of Intervention of New Zealand**

1. Japan takes note of the decision by New Zealand to exercise its right of intervention in the case concerning Whaling in the Antarctic (Australia v. Japan) pursuant to Article 63 of the Statute of the Court as well as Articles 82 to 85 of the Rules of Court with the consequence that the construction given by the judgment will be equally binding upon New Zealand. However, my Government feels compelled to draw to the attention of the Court certain serious anomalies that would arise from the admission of New Zealand as an intervenor.

2. These anomalies arise from the context in which the current declaration of intervention was filed by New Zealand. This context is evident from the Joint Media Release dated 15 December 2010, issued in the names of the Hon. Kevin Rudd and the Hon. Murray McCully, respectively the Australian and New Zealand Ministers for Foreign Affairs. A copy of that press release is attached to these written observations.

3. The press release records that "Australia and New Zealand agree on strategy for whaling legal case". This Joint Media Release, issued six months after the Application was filed by Australia, makes clear that the Applicant "(has) kept in close consultation with the Government of New Zealand about how best to progress [their] shared anti-whaling objectives".[1] The statement explains the rationale behind the choice of Article 63 as the basis for New Zealand's intervention as follows:

> "Australia has indicated that they would prefer New Zealand not to file as a party. Because New Zealand has a judge on the ICJ, Sir Kenneth Keith, the joining of the two actions would result in Australia losing its entitlement to appoint a judge for the case."[2]

Mr. McCully stated that: "[f]ollowing the Australian elections New Zealand was keen to hear Australia's view prior to making a decision on [its] participation in the case".[3]

4. Australia's aims seem to have been reached as a result of the steps taken by New Zealand. New Zealand's decision to intervene in the case is stated to derive from "its long-standing participation in the work of the International Whaling Commission, and its views with respect to the interpretation and application of the Convention, including

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[1] Joint Media Release dated 15 December 2010, by the Hon. Kevin Rudd MP, Australian Minister for Foreign Affairs, and the Hon. Murray McCully MP, New Zealand Minister for Foreign Affairs, "Australia and New Zealand agree on strategy for whaling legal case".
[2] *Ibid.*
[3] *Ibid.*

whaling under Special Permit".[4] However, read in conjunction with the statement in the Joint Media Release, that "New Zealand has once again confirmed that it is a strong partner of Australia in the bid to end 'scientific' whaling and improve whale conservation worldwide"[5], New Zealand appears *prima facie* to fully support Australia's case.

5. The equality of the parties will be at serious risk if States are able to embark on "form shopping", as it were, and, by pursuing what may in effect be a joint case under the rubric of an Article 63 intervention, to avoid some of the safeguards of procedural equality under the Statute and Rules of the Court. It is not difficult to interpret the choice of intervention under Article 63 as a strategy designed 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 the existence of such interests and suggest the taking of carefully orchestrated procedural steps to advance them.

6. Moreover, Article 31, paragraph 5, of the Statute of the Court and Article 36, paragraph 1, of the Rules of Court exclude the possibility of appointing a Judge *ad hoc* when two or more parties are in the same interest and therefore are to be reckoned as one party only. This is the case in the present dispute.

7. At the time of the Applicant's appointing its Judge *ad hoc*, my Government expressed, in the letter dated 22 March 2011, its intention to reserve the right to return to the matter of that appointment. My Government now wishes to express its serious doubts concerning the equality of the parties in these proceedings before the Court, and its profound discomfort with the situation that results from the manner in which New Zealand's intervention has come about.

8. 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. This need is especially acute in this case, where submissions on jurisdiction and on merits are being made together, and where only one round of written pleadings has been allowed.

9. First, my Government submits that the written observations that New Zealand may present in accordance with Article 86 of the Rules of Court should not be left without a

[4] Declaration of New Zealand pursuant to Article 63 of the Statute of the Court by the Government of New Zealand, 20 November 2012, para.8.
[5] Joint Media Release, *op.cit.*

written response from the original parties. In circumstances where there is collusion between the Applicant and the State wishing to intervene, the intervenor's observations would amount in essence to a second round of written pleadings by the Applicant, while the Respondent has no opportunity to respond. Therefore, Japan reiterates its wish to have the opportunity to express its views in writing on the submission by New Zealand on the substance of the intervention, within an appropriate time.

10. Second, my Government considers that, in the event that the intervention by New Zealand is admitted, the intervening State should have only one opportunity to make oral submissions, and that this should take place after the first round of the oral pleadings by Australia and before that of Japan. Further, as the scope of the right of intervention under 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",[6] my Government respectfully submits that the time to be allocated for the oral pleading by the intervening State should be significantly less than in the case of intervention under Article 62.

11. Third, my Government submits that, still in the event that the intervention by New Zealand is admitted, the latter's intervention in the proceedings 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. Japan wishes to emphasise the need for adequate time for preparation before its oral proceedings, both in the first and the second rounds, especially given that there has been only one round of written pleadings in this technically complex case and that the Applicant is yet to respond to the Respondent's objection to jurisdiction.

N. Kanehara

Nobukatsu Kanehara
Agent of Japan

[6] Case concerning Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application by Malta for Permission to Intervene, Judgment, 14 April 1981, para.26, p.15.

The Hon Kevin Rudd MP
# Australian Minister for Foreign Affairs

## Australia and New Zealand agree on strategy for whaling legal case

Joint Media release

- Australian Minister for Foreign Affairs, The Hon Kevin Rudd MP
- New Zealand Minister for Foreign Affairs, The Hon Murray McCully MP

15 December 2010

The New Zealand Government has decided not to file as a party to Australia's legal action in the International Court of Justice against Japanese 'scientific' whaling in the Southern Ocean, but will instead 'intervene' formally in the case, a move welcomed by the Australian Government.

Foreign Ministers Kevin Rudd and Murray McCully say that both countries have agreed to work together towards the elimination of whaling in the Southern Ocean through complementary strategies.

Mr Rudd welcomed the New Zealand decision to intervene in the case as pragmatic, and reflecting Australia's preference.

"New Zealand has once again confirmed that it is a strong partner of Australia in the bid to end 'scientific' whaling and improve whale conservation worldwide," Mr Rudd said.

"By intervening in the case, New Zealand will be able to make both written and oral submissions to the Court that Japanese whaling in the Southern Ocean is contrary to its obligations under applicable international conventions to which Australia and New Zealand are also Parties.

"We have kept in close consultation with the Government of New Zealand about how best to progress our shared anti-whaling objectives. We are very pleased with the valuable support New Zealand will lend to this vital case."

Mr McCully said that the Cabinet had this week agreed to his recommendation to intervene in the case but not to file as a party.

"Following the Australian elections I indicated to Mr Rudd that New Zealand was keen to hear Australia's view prior to making a decision on our participation in the case," Mr McCully said.

"Australia has indicated that they would prefer New Zealand not to file as a party. Because New Zealand has a judge on the ICJ, Sir Kenneth Keith, the joining of the two actions would result in Australia losing its entitlement to appoint a judge for the case. New Zealand's decision to intervene will allow the case to proceed without delay.

"With this decision made, we have begun to focus on new diplomatic and communications strategies to try to persuade Japan to end whaling in the Southern Ocean. With this in mind, I have spoken to Japan's Foreign Minister Seiji Maehara to explore the room for further diplomatic initiatives," Mr McCully said.

### Media inquiries

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