NJG/JAC/29008 13 July 2001

CIRCULAR COMMUNICATION TO COMMISSIONERS
AND CONTRACTING GOVERNMENTS
IWC.CCG.188

Letters from Australia, New Zealand and the UK regarding Iceland's adherence to the Convention

Please find attached letters from Australia, New Zealand and the UK that I have been asked to circulate to Commissioners, Contracting Governments and then subsequently to Observers.

Bo Fernholm, IWC Chairman, intends to raise the matter of Iceland's adherence to the Convention with a reservation with respect to paragraph 10 (e) of the Schedule at the private Commissioners' meeting on Sunday 22 July.

The private Commissioners' meeting will be held at the Novotel, Hammersmith and will start at 14.00 on 22 July. Commissioners should call into the Secretariat office in time to register and receive your security pass before the start of the Commissioners' meeting.

Dr. Nicky Grandy
Secretary to the Commission

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Australia refers to the Circular Communication to Commissioners and Contracting Governments of 26 June 2001 (IWC.CCG.181) concerning the deposit on 8 June 2001 by Iceland of an instrument of adherence to both the International Convention for the Regulation of Whaling and the Protocol to the Convention. Australia notes that the instrument contains a reservation with respect to paragraph 10(e) of the Schedule attached to the Convention. Iceland maintains that the reservation forms an integral part of its instrument.

As the Convention is the constituent instrument of an international organisation, the relevant principles of international law require that the reservation contained in Iceland's instrument must be accepted by the International Whaling Commission for it to have effect.

Until such time as the Commission has taken a decision on the reservation, it is Australia's position that Iceland may not be regarded as a member of the Commission.

Australia would be grateful if this communication could be circulated to Commissioners, Contracting Governments and Observers.

Yours sincerely

Howard Bamsey
Australian Commissioner
to the International Whaling Commission

3 July 2001

INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING: ADVICE ON ICELAND'S RESERVATION

International law on reservations

The international law on reservations remained unsettled for much of last century, with various principles having competed for acceptance. The principle observed in the practice of the League of Nations (and for a time by the UN Secretary-General) was that of 'unanimity', which required a reservation to be accepted (either expressly or tacitly) by all the parties to a treaty before the reserving State could become a party. The practice of Latin American States in relation to regional multilateral conventions was to permit States to make reservations, while allowing parties to a treaty to object to the reservation and to regard the treaty as not being in force between them and the reserving State. The Soviet Union and its allies were of the view that the right of a State to make a reservation could not be restricted in any way.

2. In 1951 the International Court of Justice (ICJ) gave an advisory opinion on whether reservations could be made to the Genocide Convention, which does not contain a provision on reservations.[1] In the opinion of the majority[2], a reservation could be made, provided it was compatible with the object and purpose of the Convention. If another State Party objected to the reservation as being incompatible with the object and purpose of the Convention, that State Party could consider the reserving State not to be a Party to the Convention. If the reservation was not objected to by some Parties and was compatible with the object and purpose of the Convention, the reserving State could be regarded as being a Party to the Convention.

3. Although the advisory opinion was strictly limited to the Genocide Convention, it came to be seen as supporting the Latin American approach. In broad terms, the International Law Commission (ILC) adopted the ICJ approach in the draft articles on reservations it prepared for the consideration of States as part of its preparatory work in the early to mid-1960s for the negotiation of the Vienna Convention on the Law of Treaties (VCLT).

Vienna Convention on the Law of Treaties

4. The VCLT entered into force on 27 January 1980. Article 4 provides that:

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

5. The application of article 4 means that the VCLT cannot be applied directly to the International Convention for the Regulation of Whaling (ICRW), as it was concluded prior to the entry into force of the VCLT. That said, provisions of the VCLT may be applied to the ICRW if they represent customary international law. This may occur through one of the two following means.

6. The first means is identified by the 'without prejudice' clause contained in article 4. This clause makes clear that existing principles of customary international law codified in the VCLT continue to apply to treaties such as the ICRW.

7. The second means is through VCLT provisions, which represented progressive development of the law at the time of the negotiation of the VCLT, subsequently developing into principles of customary law through their general application by States that are not Parties to the VCLT.[3]

Articles 19 to 23 of the VCLT

8. The subject of reservations is addressed in articles 19 to 23 of the VCLT.

9. Sinclair, in his standard work on the VCLT, warns that:

it would be a bold jurist who would assert, with any degree of confidence, that the Convention regime [on reservations] represents in its entirety codification rather than rules of progressive development.[4]

Article 19

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[1] I.C.J Reports 1951; 1951 International Law Reports ('ILR') 364.

[2] 1951 ILR at p. 365.

[3] *North Sea Continental Shelf Cases*, I.C.J. Reports 1969.

[4] Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed., p. 14.

10. Article 19 permits a State to formulate a reservation unless:

- the reservation is prohibited by the treaty;
- the treaty allows only specified reservations, which do not include the reservation in question; or
- in any other case, the reservation is incompatible with the object and purpose of the treaty.

11. The first two points are not relevant in the present case, as the ICRW is silent on reservations.

12. The third point would be applicable to a treaty, which is concluded after the VCLT, that is silent on the question of reservations. If this point codifies a principle of customary international law, the 'without prejudice' clause in article 4 would support its application to the ICRW.

13. In the *Genocide Convention Case*, the ICJ accepted that a reservation could be made to the Genocide Convention, provided it was compatible with the object and purpose of the Convention. As noted above, the ILC, in broad terms, adopted the ICJ approach in its draft articles on reservations.

14. In light of developments following the *Genocide Convention Case*, it can be argued that article 19(c) of the VCLT reflects a codification of existing customary international law. As such, the 'without prejudice' clause in article 4 of the VCLT supports its application to the ICRW.

15. If the contrary view was taken instead that article 19(c) reflected progressive development of the law, the ILC Special Rapporteur on Reservations to Treaties, Pellet, advances a strong argument that 'even if the Vienna Convention was an exercise in progressive development with regard to reservations, the rules established by…articles 19 to 23 have now acquired customary force'.[5] Accordingly, article 19(c) could be applied to the ICRW on this basis.

16. Article 19 cannot be read in isolation from the other articles in the VCLT dealing with reservations.

Article 20

17. While article 19 governs the formulation of reservations by States, article 20 deals with the acceptance of, or objection to, those reservations by other States.

18. There are two provisions in article 20 which, in the alternative, may be applicable to the present case. The first is article 20(2) which provides:

When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

19. The second is article 20(3) which provides:

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

Article 20(2)

20. Although article 20(2) can be said to reflect customary international law, there is a strong argument against it being applicable in the present case.

21. Sinclair categorises treaties falling within the scope of article 20(2) as 'restricted multilateral treaties'.[6] He argues that these types of treaties establish 'very close co-operation between a limited number of States', giving the following examples:

treaties of economic integration, treaties between riparian States relating to the development of a river basin or treaties relating to the building of a hydro-electric dam, scientific installations or the like.[7]

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[5] Alain Pellet, First Report on the Law and Practice Relating to Reservations to Treaties, A/CN.4/470 of 30 May 1995, para. 157.

[6] Sinclair, op. cit., p. 33.

[7] Ibid, p. 34.

22. He points to the treaties providing for the establishment and enlargement of the European Communities as the 'most notable illustration' of this type of treaty.[8]

23. Clearly, the ICRW cannot be classed as a 'restricted multilateral treaty'.

Article 20(3)

24. Again, the threshold question to be addressed in relation to the application of article 20(3) is whether it represents customary international law.

25. The ILC draft provision on the constituent instruments of international organisations (article 16(3)) was adopted without substantive amendment in the negotiation of the VCLT, becoming article 20(3). The ILC commentary on article 16(3) notes that the question of how reservations to the constituent instruments of international organisations should be handled had arisen a number of times.[9] The commentary refers to the lodgement by India of an instrument of acceptance to become a member of the International Maritime Consultative Organisation (IMCO), which contained a reservation. The IMCO Convention was silent on reservations. The UN Secretary-General, in his capacity as depositary, referred the matter to the IMCO Assembly, which requested him to circulate the document to all members.

26. In a statement of the UN Secretary-General's practice as a depositary made in the early 1960s, the matter of reservations to constituent instruments was addressed in the following terms:
When a convention embodies a constitution establishing an international organization, the Secretary-General transmits any reservations accompanying an instrument of ratification or accession to that organization for its consideration and informs the State concerned accordingly. The Secretary-General then makes his actions conform, in respect of such instrument, with the decision of the competent organ of the organization concerned.[10]

27. It can be said that Article 20(3) certainly reflects the practice followed in relation to constituent instruments for which the UN Secretary-General served as depositary. The UN Secretariat views article 20(3) as confirming existing rules of international law.[11] Ruda is also of the view that article 20(3) reflected 'current practice'.[12]

28. However, the US, at least prior to the VCLT, followed the principle of unanimity in relation to certain constituent instruments (the Chicago Convention and the Statute of the International Atomic Energy Agency) for which it was depositary.[13] This entailed communicating instruments of ratification containing reservations to States Parties and seeking advice as to whether they accepted the reservation, rather than referring the matter to a competent organ.

29. There is a strong argument to be made that article 20(3) represents a codification of existing customary international law, despite the practice of the US. However, if the contrary view is taken that it represented progressive development of the law at the time it was negotiated, reliance may be placed on Pellet's argument that articles 19 to 23 now have 'customary force'. In this regard, it should be noted that a senior legal official of the US State Department stated not long after the VCLT entered into force that the US (not a Party) had 'adjusted [its] procedure' to take into account articles 19 to 23 of the VCLT.[14]

30. As article 20(3) represents customary international law, it can be applied to the ICRW, if the two conditions for its application are satisfied.

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[8] Ibid.

[9] *Yearbook of the International Law Commission* (1966, Vol. II), p. 207.

[10] UN document A/5687, reproduced in the *Yearbook of the International Law Commission* (1965, Vol. II), see p. 102.

[11] See Note verbale of 3 July 1969 concerning the IMCO Convention reproduced in the 1969 UN *Juridical Yearbook* at pp. 223-224.

[12] Ruda, 'Reservations to Treaties', 146 *Hague Academy of International Law, Collected Courses* 95, p. 187.

[13] Mendelson, 'Reservations to the Constitutions of International Organizations', (1971) 45 *British Year Book of International Law* 137, pp. 158-160.

[14] Dalton, 'The Vienna Convention on the Law of Treaties: Consequences for the US', 1984 *Proceedings of the American Society of International Law* 276, p. 278.

Application of article 20(3) to the ICRW

31. The first condition for the application of article 20(3) is that the ICRW be the constituent instrument of an international organisation. This condition is expressed in general terms without limitation as to the types of constituent instruments and international organisations that are covered. Accordingly, as the ICRW establishes and governs the operation of an international organisation, the International Whaling Commission (IWC), it can be said to satisfy the first condition. In this regard, it is worth noting that article III(6) of the ICRW contemplated that the IWC could be 'brought within the framework of a specialized agency related to the United Nations'.

32. The fact that not all the provisions of the ICRW deal with the operation of the IWC (eg. article IX) does not present a difficulty. Article 20(3) does not impose a requirement that the constituent instrument be concerned only with the organisation and operation of the international organisation. Nor does it differentiate between different types of provisions that may be found in such an instrument. Accordingly, it would apply not only to reservations made to the organisational provisions of an instrument, but also to other provisions, such as those that regulate the actions of States.

33. The second condition for the application of article 20(3) is that the constituent instrument does not establish another mechanism for dealing with reservations. The ICRW does not address any matter relating to reservations. Accordingly, the second condition is satisfied.

34. With these conditions satisfied, the second part of article 20(3) may be addressed.

Consideration of Iceland's reservation by the IWC

35. Given that the issue concerns membership of the IWC, the competent organ for the purposes of article 20(3) would be the IWC meeting in plenary.

36. Article III(2) of the ICRW provides that, with the exception of action related to article V, decisions of the IWC shall be taken by a majority of members voting. As the matter of Iceland's instrument of adherence is not linked to action under article V, it would appear that the acceptance of the instrument with its reservation would require a decision to be taken by a majority of members voting.

37. The question arises as to the grounds upon which such a decision should be taken.

38. As argued above, article 19(c) of the VCLT represents customary international law and can be applied to the ICRW. In the case where a treaty is silent on reservations, article 19(c) permits a State to formulate a reservation unless it is incompatible with the object and purpose of a treaty. Accordingly, the compatibility of Iceland's reservation with the object and purpose of the ICRW is the legal test to be applied by IWC members in deciding upon the acceptance of the reservation.

39. The corollary of the IWC deciding upon the acceptance of the reservation is that individual members are precluded from taking unilateral action in relation to the reservation. In fact, at the Diplomatic Conference negotiating the VCLT, the US proposed that the words 'but such acceptance [by the competent organ] shall not preclude any contracting State from objecting to the reservation' be included in the text of article 20(3).[15] As can be seen from that text, this proposal was not accepted.

40. If the decision is taken to reject the reservation, the further question arises as to the status of Iceland's instrument of adherence. Given the consensual nature of treaty relations, it should be a matter for Iceland to determine whether it wished to maintain the instrument of adherence if the reservation is not accepted. However, Iceland's instrument of adherence states that the reservation is an 'integral part' of it.[16] In effect, this means that the Commission's decision on the reservation will decide whether Iceland is a Party to the ICRW or not. It follows that Iceland should not participate in the work of the Commission as a member unless and until the Commission votes to accept the reservation.

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[15] Mendelson, op. cit., p. 150.

[16] IWC Circular Communication to Commissioners and Contracting Governments (IWC.CCG.181) of 26 June 2001.

Reservations by Peru, Chile and Ecuador

41. Reservations were made by Peru, Chile and Ecuador upon becoming party to the ICRW. These were not subject to acceptance by the IWC. This does not diminish the argument that Iceland's reservation ought to be dealt with through this process. Article 20(3) of the VCLT represents customary international law and governs action to be taken in relation to Iceland's reservation.

Dear Dr Grandy

New Zealand wishes to refer to Circular Communication IWC.CCG.181 informing Commissioners and Contracting Governments of the deposit by Iceland of its instrument of adherence to the International Convention for the Regulation of Whaling and the Protocol to the Convention. New Zealand notes the instrument's statement that Iceland adheres to the Convention and Protocol with a reservation with respect to paragraph 10 (e) of the Schedule attached to the Convention. Iceland maintains that the reservation forms an integral part of the instrument.

As the Convention is the constituent instrument of an international organisation, the relevant principles of international law require that the reservation contained in Iceland's instrument of adherence must be accepted by the International Whaling Commission for it to have effect.

Until such time as the Commission has taken a decision on the reservation, and given that Iceland maintains that its reservation is an "integral" part of its adherence, it is New Zealand's position that Iceland may not be regarded as a party to the Convention nor a member of the Commission.

New Zealand would be grateful if this communication could be circulated to Commissioners, Contracting Governments and Observers.

Regards

Jim McLay
New Zealand Commissioner to the International Whaling Commission